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Via Electronic Mail

Ms. Lori Udall
Office of the ICIM
IDB Headquarters
1300 New York Avenue, NW
Washington, D.C. 20577
Tel. 202.623.3952
Fax 202.312.4057
E-mail: mecanismo@iadb.org

Re: Comments on the Current Policy of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank

Dear Ms. Udall:

We, the undersigned, are writing in response to the invitation to submit comments on the current Policy of the Independent Consultation and Investigation Mechanism (“ICIM”) of the Inter-American Development Bank (“IDB”). We represent organizations from around the world that work with people and communities impacted by IDB projects. Many of us were involved in the creation of the ICIM, have been closely following the ICIM since it went into effect in September 2010, and have assisted communities in submitting requests to the ICIM. We therefore have insight into the workings of this accountability mechanism, and we commend the IDB for providing this opportunity for the public to comment on the current ICIM Policy. We submit these comments with the expectation that they will be taken into account by the Board and used to make real improvements to the ICIM.

Overall, we believe that the ICIM has great potential to “increase the transparency, accountability and effectiveness of the Bank’s performance.”¹ Accountability mechanisms such as the ICIM often serve as the primary or only available complaint system for people harmed by an institution’s activities. The ICIM also provides the IDB with an independent channel for bringing policy non-compliance to light, as well as illuminating solutions for issues that risk harming the institution’s reputation or undermining its mandate. Finally, the ICIM also provides the IDB with an opportunity to learn from the implementation of past projects and increase the Bank’s overall effectiveness.

Although the ICIM undeniably needs improvement, it has already proven its relevance in promoting positive development outcomes. For instance, the Pando-Monte Lirio Hydroelectric Project Compliance Review Report was widely praised by the Board, which endorsed all

¹ Agreement regarding the Eighth General Increase in the Resources of the Bank, AB 1704, ¶ 2.97, INTER. AM. DEV. BANK (Aug. 1994).

findings of non-compliance.² As a result, Bank Management created and is implementing an Action Plan that has increased the potential that the Pando-Monte Lirio Project, and similar projects in the future, will properly assess, manage and mitigate impacts, leading to possible positive development impacts.

Moreover, the 20 cases that the ICIM has registered since coming into existence contribute to greater oversight of IDB projects. The large number of cases received and processed by the ICIM from 2010 to 2012 is an indicator of the mechanism's external credibility.³ Conversely, the fact that no complaints have been registered in 2013 points to a possible chilling effect caused by the Office of Evaluation and Oversight's ("OVE") December 2012 evaluation, which labeled the ICIM as irreparably ineffective and dysfunctional, recommending that the office be suspended.⁴ Such a sudden drop off in the number of cases is troubling and suggests that the ICIM urgently needs institutional support and stability to avoid any further loss of credibility and effectiveness.

We urge the IDB to demonstrate its full support for an effective ICIM by making revisions to the Policy, as well as the structure of the office, that will increase accessibility, transparency and efficiency. Such changes should be made in a manner that allows the mechanism to rebuild its external credibility, which hinges in large part on the ICIM's ability to operate independently from Bank Management and the Board.

We take this opportunity to make recommendations for the ICIM's improvement based on our observations of the ICIM over the past three years, as well as our extensive experience regarding the design, implementation and use of similar accountability mechanisms. Specifically, our comments address: I. Clarity of Mandate; II. Accessibility, Transparency and Efficiency; and III. Independence and Effectiveness.

I. Clarity of Mandate

We agree with OVE that the ICIM's current Policy and structure "reflects a degree of ambivalence about whether the Bank wants or needs an effective [ICIM]."⁵ Ensuring that the ICIM has a more precise mandate going forward will increase effectiveness by ensuring that ICIM staff anchor their decisions in a clear understanding of the overarching intent of the mechanism.⁶ Additionally, having a clearly articulated mandate may assist in building both internal and external credibility, as well as avoiding a situation in which the Board or Bank

² See Final Decision of the Board of Executive Directors regarding the Compliance Review Report for case PN-MICI001-2010, INTER. AM. DEV. BANK (Dec. 12, 2012).

³ By way of comparison, from 2010 to through the end of 2012, the number of complaints registered by the ICIM was similar to or significantly higher than the number registered by its sister mechanisms at other regional development banks. Specifically, from 2010 to 2012, the accountability mechanism at the African Development Bank registered four complaints; the accountability mechanism at the European Bank for Reconstruction and Development registered eleven complaints; and the Asian Development Bank's accountability mechanism registered sixteen complaints (excluding those complaints dismissed prior to a formal eligibility assessment).

⁴ See Evaluation of the Independent Consultation and Investigation Mechanism, ii-iii, Office of Evaluation & Oversight, INTER AM. DEV. BANK (Dec. 2012) [hereinafter OVE Evaluation].

⁵ *Id.* at ¶ 4.3.

⁶ See *id.* at ¶ 4.7.

Management seek to use the ICIM to reduce, rather than enhance, institutional accountability.⁷ Finally, creating a clear mandate for the ICIM will help the Bank better implement its commitments to transparency and to increased consideration of project-affected people.

A. Access to Effective Remedy Should be at the Heart of the ICIM’s Mandate

The Board created the ICIM in 2010 “to provide a forum and process to address complaints from parties that allege that they are or might be adversely affected by IDB operations.”⁸ Although the Policy makes no explicit reference to remedy, one can readily imply from this statement that the ICIM was meant to provide at least a forum for provision of remedy to those harmed by IDB projects. We believe that a focus on remedy for harmed communities is key to the ICIM’s external credibility, and we therefore strongly disagree with OVE’s suggestion that the ICIM’s mandate be reframed *exclusively* in terms of “improve[ing] the development effectiveness of Bank operations by identifying gaps in compliance with policy and recommending remedial actions as appropriate.”⁹ Such a formulation fails to fully address the ICIM’s vital role as a forum for providing effective remedy.

IDB member countries have an international obligation under the UN Guiding Principles on Business and Human Rights (“Guiding Principles”) to ensure that access to effective remedy is at the heart of the ICIM’s mandate. In the intervening years since the Board created the ICIM, the UN Human Rights Council unanimously adopted the Guiding Principles, which clearly delineate states’ obligation to provide access to effective remedy for business-related human rights abuses.¹⁰ This obligation extends to situations in which states “participate in [international financial] institutions.”¹¹ Therefore, given that a significant number of the adverse impacts of IDB projects fall under the rubric of “business-related human rights abuses,” IDB member countries must ensure that the ICIM’s mandate focus on provision of effective remedy for such abuses.¹²

Effective remedy may take many forms,¹³ but in the context of the ICIM should encompass at least the following elements: (1) transparency about and public acknowledgment of responsibility for harm done or foreseeable harm; (2) provision of appropriate redress to

⁷ See, e.g., *id.* at ¶ 4.5 (“According to reports OVE received in interviews, some Board members and Bank Management told [ICIM] principals that they expected the consultation phase to serve as a ‘gatekeeper’ to limit – and, if possible prevent – cases going to compliance review.”).

⁸ Policy Establishing the Independent Consultation and Investigation Mechanism at 1, INTER-AM. DEV. BANK (Feb. 17, 2010) [hereinafter ICIM Policy].

⁹ *Id.* at ¶ 8.6.

¹⁰ See Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework,” ¶ 25, UN HUMAN RIGHTS COUNCIL A/HRC/17/31 (2011) [hereinafter Guiding Principles] (“As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”).

¹¹ *Id.* at ¶ 10 Commentary.

¹² See *id.* at ¶ 27 (“States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.”).

¹³ See *id.* at ¶ 25 Commentary.

complainants; (3) implementation of measures to prevent further harm; and (4) meaningful institutional learning and change to prevent the same situation from happening in the future. The ICIM should retain both its Consultation and Compliance Review functions, which together can provide a forum for each of these elements of effective remedy.

We encourage the Board to strengthen and clarify the ICIM's mandate by clearly defining the ICIM's role in providing a forum for provision of remedy to those harmed or possibly harmed by IDB projects and by guaranteeing that the mechanism has the authority, resources and support necessary to be effective in that role.

B. The Structure of the ICIM and the Roles of its Principals Should Be Revised and Clearly Defined to Ensure that the Mechanism Can Fulfill Its Mandate

In its evaluation of the ICIM, OVE identified “[t]he striking inconsistency between the policy and the executive secretary’s TOR,” as well as the ICIM Policy’s failure to define how the three principals should interact with each other, as major contributing factors to the ICIM’s inefficiency.¹⁴ Additionally, the non-transparent decision by the principals to have the Executive Secretary check several of the exclusion and eligibility criteria prior to registration of requests has led to inconsistencies and the ICIM’s failure to disclose roughly half of the requests received.¹⁵

Given these problems, we recommend that the Board consider restructuring the ICIM and more clearly defining the roles and responsibilities for each of the principals. In doing so, the Board should focus on building a structure and defining roles in a way that helps ensure that the ICIM is able to be a forum to effectively address complaints from project-affected people and provide remedy to those harmed by IDB projects. Building a strong ICIM capable of providing effective remedy will ensure that the IDB has a forum to properly address complaints from project-affected people.

C. The ICIM Should Establish an Advisory Group

The Board should also consider establishing an Advisory Group that would meet with the ICIM to provide strategic advice and assistance in achieving its mandate. This independent group would bring a set of different perspectives to issues that the ICIM is facing. The Compliance Advisor/Ombudsman’s Strategic Advisors Group, comprised of professionals from academia, civil society, private industry and other sectors in the field of conflict resolution, could serve as a model.¹⁶ Such a group of independent experts must be composed in such a way that it can assist the ICIM in better understanding and implementing its mandate.

¹⁴ See OVE Evaluation at ¶¶ 4.8-4.10.

¹⁵ See *id.* at ¶¶ 5.4-5.8 and Annex 3.

¹⁶ See Strategic Advisors Group, Compliance Advisor/Ombudsman at <http://www.cao-ombudsman.org/about/strategicadvisors/>.

II. Accessibility, Transparency and Efficiency

We commend the Board for adopting some provisions in the current ICIM Policy that help increase accessibility for potential users. For example, under the current Policy, the ICIM accepts requests from individuals, groups or representatives,¹⁷ written in a variety of languages¹⁸ and submitted in a variety of manners.¹⁹ The current ICIM Policy also allows requesters to “complete or correct a Request” prior to a determination of ineligibility.²⁰ These provisions enhance accessibility by ensuring that legitimate complaints are not turned away because of a failure to understand technical requirements. Additionally, we commend the ICIM staff for giving advice to complainants about how to frame requests to fit within the ICIM’s mandate and complicated eligibility rules. Such advice makes the mechanism more accessible and transparent, and may also increase efficiency, as it avoids having the same request filed and rejected multiple times.

Despite these positive steps, however, the current ICIM Policy and practice has many unnecessary barriers to accessibility and suffers from issues regarding lack of transparency and efficiency. The following points suggest ways in which accessibility, transparency and efficiency could be improved.

A. The IDB and the ICIM Should Engage in Additional Outreach Efforts

According to OVE, the ICIM’s primary outreach activities consist in attending large gatherings such as the IDB’s annual meetings.²¹ While this type of outreach, particularly attendance at the annual meetings with civil society, is an important way for the ICIM to reach interested members of civil society, as well as increase its visibility within the Bank, such efforts are not sufficient. Attendance by civil society at such meetings is limited to approximately 20 organizations and almost none of them represent or are members of communities harmed or potentially harmed by the IDB projects. The Board should provide the ICIM with sufficient resources to continue these activities, as well as additional funding to improve outreach directly to project-affected people. In doing so, the ICIM may wish to consider conducting joint outreach efforts with the World Bank’s accountability offices, the Compliance Advisor/Ombudsman and the Inspection Panel.

The IDB and the ICIM should make efforts to improve the information available to local communities that could be affected by IDB projects. The Bank should broadly distribute

¹⁷ See ICIM Policy at ¶ 30 (A requester may be “one or more persons, groups, associations, entities or organizations...residing in the country(ies) where the Bank-Financed Operation is or will be implemented. A Request may be presented through a representative located in the project host country or elsewhere...”).

¹⁸ See *id.* at ¶ 32(b) (“The official languages of the IDB are Spanish, English, Portuguese and French. Requests will be processed if received in other languages, although additional time for processing and translations may be necessary.”).

¹⁹ See *id.* at ¶¶ 31, 32(a) (Stating that requests do not need to follow a particular format and may be received “in writing, via electronic or regular mail, fax, or text message to the ICIM Office phone number” and that “[o]ral Requests will be accepted, subject to subsequent receipt of a signed communication.”).

²⁰ *Id.* at ¶¶ 41, 57.

²¹ OVE Evaluation at ¶ 7.5.

information about its policies and procedures, as well as information about the ICIM, in a timely and effective manner 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 IDB actively distribute simple, pictorial-based, local-language, user-friendly descriptions of the mechanism, and simplified copies of the IDB operating policies and procedures to all communities that could be impacted by IDB projects. Such materials should also be made available on the ICIM’s website, and the IDB’s homepage should include a link to the ICIM. In addition the IDB and the ICIM should implement common efforts to distribute information and build capacity inside the Bank about the existence and role of the ICIM.

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

B. Translation Practices Must Be Improved

As noted above, we commend the ICIM for processing requests received in languages other than the official languages of the IDB. The Policy, however, does not address what language the ICIM will use in communicating with requesters. In practice, the ICIM has at times communicated with requesters in a language they did not understand, even when they filled the complaint and can communicate in one of the official languages of the IDB.²² This can have a substantive impact on whether the ICIM is accessible, transparent and fair to requesters.

We recommend that the Policy be revised to clarify that communications and drafts to which requestors must respond will be translated into appropriate languages and that translation delays will not penalize requestors by decreasing the amount of time in which they have to respond. Moreover, translation of documents into Spanish and Portuguese, the two most common languages spoken in the ICIM’s region and official IDB languages, should be done efficiently and should not cause delays in the ICIM’s operations.

C. All Requests Should Be Immediately Registered Prior to an Eligibility Determination

The current practice of failing to register roughly half of the requests received is non-transparent and has no basis in the current ICIM Policy.²³ The ICIM Policy specifies that “[t]he Executive Secretary *shall forward all Requests* to the Project Ombudsperson no later than five

²² For example, in the Pando-Monte Lirio case, the Executive Secretary at times communicated with the requesters in English, although they were Spanish speakers. Additionally, the requesters initially received a draft Compliance Report in English only, which they were unable to read. They waited nearly a month for a translation to become available before they could comment on it. After lodging a complaint about the delay, they were eventually given an extended comment period, but the extension did not provide them with the 45-day comment period specified in the Policy. *See* ICIM Policy at ¶ 68.

²³ *See* OVE Evaluation at ¶¶ 5.6-5.7.

business days following receipt,” at which point the Ombudsperson makes an eligibility determination.²⁴ Yet, the ICIM has instead created an intake stage, during which time the Executive Secretary determines whether to register requests based on “certain of the exclusion and eligibility criteria.”²⁵

The 2012 Annual Report indicates that the Executive Secretary did not register 90% of the requests received that year.²⁶ Thus, while the ICIM Policy appears to envision only two types of complaints – eligible and ineligible – all of which would eventually be disclosed via the Registry, in practice, the ICIM has three types of complaints: (1) unregistered; (2) registered, but ineligible; and (3) registered and eligible. Of these, until very recently, only the second two were disclosed via the Registry.

Additionally, the criteria used by the Executive Secretary in making the registration determination are unclear, nor is it apparent how the intake stage differs from the eligibility determination conducted by the Ombudsperson. Moreover, the OVE evaluation indicates that even internally, the procedures for this stage of the complaint process are not standardized.²⁷ This situation raises serious concerns regarding both transparency and efficiency, and creates confusion for requesters regarding the registration and eligibility process.

To ensure greater accessibility, transparency and efficiency, the Policy should be amended to require that *all* requests be registered immediately upon receipt. The eligibility determination should then be made by the proper party after registration,²⁸ who should report the reasons for rejecting any cases that are found ineligible.

D. Vague and Unnecessary Eligibility Requirements Restrict Access to the Mechanism and Create Inefficiencies

The exclusions and eligibility criteria in the current ICIM Policy are a barrier to the mechanism’s accessibility and effectiveness. The eligibility requirements are “numerous and heterogeneous, and they require more subjective judgment than those of most other [similar mechanisms].”²⁹ As the Policy currently stands, there are seventeen separate exclusions and eligibility criteria, which place a heavy burden on affected communities trying to access the mechanism, both by making the complaint process more complicated and by screening out valid

²⁴ *Id.* at ¶ 39.

²⁵ See OVE Evaluation at ¶ 5.4.

²⁶ See ICIM 2012 Annual Report, p. 5, INTER-AM. DEV. BANK. In 2011, 44% of requests were not registered. ICIM 2011 Annual Report, p. 8, INTER-AM. DEV. BANK.

²⁷ See OVE Evaluation at ¶¶ 5.4-5.5, 5.8 and Annex 3.

²⁸ Who the proper party should be will depend on the new structure of the ICIM. In any event, if the ICIM maintains the role of the Executive Secretary, that role needs to be clarified.

²⁹ OVE Evaluation at ¶ 5.2. For example, the Compliance Advisor/Ombudsperson (“CAO”) only has three criteria for a complaint to qualify for an assessment: (1) that the complaint relate to an International Finance Corporation (“IFC”) or Multilateral Investment Guarantee Agency (“MIGA”) project; (2) that the complaint be about a social and/or environmental issue related to that project; and (3) that the complainants believe they are or may be affected by the issue(s) raised. CAO Operational Guidelines, §2.2.1, CAO (2013), available at: http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf.

complaints that the ICIM may be well-positioned to handle. Additionally, some of the ICIM's eligibility requirements and exclusions are particularly problematic and should be revised.

The Board should therefore consider reducing the overall number of eligibility and exclusion criteria, as well as revising them along the lines described below.

1. The ICIM Should Not Preclude All Requests that Raise Issues Under Arbitral or Judicial Review

The provision requiring a request to be rejected if it “raise(s) issues under arbitral or judicial review by national, supranational or similar bodies”³⁰ unnecessarily restricts access to the mechanism, limiting the ICIM's ability to positively impact development outcomes. As currently written, the provision is extremely broad and “could be used to rule out virtually any case.”³¹ Therefore, the ICIM may reject requests under this provision even when only very tenuous connections exist between the request and another proceeding, and even when there is no reason to believe that the other proceeding would impact the ICIM process or vice versa. In addition, this provision ignores the fact that the ICIM's nature and objectives are different from those of other mechanisms that requesters might be using.

Moreover, verifying whether a request should be excluded under this provision is virtually impossible, can lead to excessive delays at the eligibility stage, and necessitates conducting a second eligibility determination when a request moves from the Consultation Phase to the Compliance Phase, to determine whether the legal situation has changed.³² These time consuming and duplicative determinations are not an efficient way to address the concerns of some Board members that the ICIM process might interfere with or influence an ongoing court case.³³

Additionally, the parallel proceedings rule may bar valid requests from seeking remedies only available through the ICIM. For example, there is no other mechanism, judicial or non-judicial, that can directly address the IDB's violations of its social and environmental policies. As such, the ICIM's Compliance Review Phase is the only opportunity for requesters to hold the IDB accountable to its own policies. Moreover, the compliance reports issued by the ICIM offer the IDB an opportunity to improve development outcomes by correcting detrimental policy violations during the course of a project. No other forum would provide the institution with the same type of feedback.

³⁰ ICIM Policy at ¶ 37(i).

³¹ OVE Evaluation at ¶ 5.16.

³² *Id.* OVE also points out that the provision obliges a requester to choose between legal recourse and the ICIM's assistance and incentivizes the initiation of legal proceedings by other parties who wish to prevent or derail an ICIM case. *Id.*

³³ *See id.* at 5.15.

The ICIM Policy should therefore eliminate the parallel proceedings rule.³⁴ Alternatively, the rule should be amended to exclude consideration of parallel proceedings for Compliance Review and to allow consideration of these proceedings in the Consultation Phase only when the same parties raising exactly the same issues are seeking identical remedies in another forum where all parties are actively addressing the issues.

2. The ICIM Should Consider Harm for which the IDB Is Not Directly Responsible

The current ICIM Policy only allows requesters to bring complaints related to harm directly caused by the IDB.³⁵ In some cases, however, it may be important for the ICIM to accept requests where an IDB-financed operation has caused harm, even if the IDB may not be the directly responsible party. If, for example, the harm has created a problem that puts the IDB's investment at risk, allowing the ICIM to accept a request may serve the institution, as well as communities in which the IDB operates, because it could lead to a mutually satisfactory agreement or an Action Plan that allows the project to go forward without causing harm. It could also allow for institutional learning to prevent similar risk to projects in the future. The exclusions should be amended to allow the ICIM to play a role in such cases.³⁶

3. The Cut-Off Date for Filing a Request Should Be Extended

The current ICIM Policy requires requests to be filed within two years of the last disbursement.³⁷ Some projects, however, create long-term adverse impacts that only become apparent many years after a project is completed. The delayed onset of harm should not foreclose a request. Additionally, it may take time, or even outside assistance, for affected people to learn that the IDB is involved in a project that is harming them and that they can file a complaint with the ICIM. In such cases, having a cut-off date of only two years after the last disbursement is inappropriate. In order to account for long-term health and environmental impacts, and for the difficulty some project-affected people may have in learning that the IDB is involved in a project and has an accountability mechanism to receive complaints, the ICIM should be permitted to consider requests filed within ten years of the last disbursement.³⁸

³⁴ Some high-functioning accountability mechanisms never exclude requests due to parallel proceedings. For example, the CAO's Policy does not bar requests because of parallel proceedings, and the mechanism has never excluded a request on those grounds.

³⁵ See ICIM Policy at ¶ 37(a).

³⁶ The Board should consider using the CAO as a model in this regard. See CAO Operational Guidelines at § 2.2.1 ("Complaints may relate to any aspect of the planning, implementation, or impact of an IFC/MIGA project...").

³⁷ ICIM Policy at ¶ 37(f).

³⁸ Some mechanisms do not have set cut-off dates. For instance, the CAO will accept complaints about any project the IFC or MIGA is participating in or actively considering, without defining any set cut-off date. See CAO Operational Guidelines at § 2.2.1.

4. The ICIM Should Be Made More Accessible for Requesters Fearing Retaliation or Intimidation

Under the current ICIM Policy, the provisions excluding anonymous complaints³⁹ and requiring requesters to “take[] steps to bring the issue to the attention of Management”⁴⁰ are not adequately protective of requesters who may have a reasonable fear of retaliation or intimidation. Requiring requesters to identify themselves and to bring issues to the attention of management may require them to decide between their safety and the potential remedy filing a request may offer, thus potentially limiting their access to the mechanism.

Requesters who reasonably fear reprisals against them if they have to comply with these provisions should be permitted to have a representative file a request on their behalf without clearly identifying them and should be permitted to waive the requirement that they contact Bank Management.⁴¹

5. Requesters Should Not be Required to Explicitly Reference Policy Violations in the Request

Although the current ICIM Policy could be read to require requesters to cite specific policy violations in their request,⁴² we commend the ICIM for not interpreting the Policy in this way.⁴³ Requiring requesters to cite to specific policy violations creates an unnecessary bar for communities who may not fully understand or have access to these policies. Therefore, the Policy should be amended to explicitly allow requesters to bring complaints to the ICIM without alleging a specific policy breach.⁴⁴ Doing so would bring the Policy in line with current ICIM practice and would increase accessibility for requesters who may have hesitated to file complaints because they did not fully understand the IDB’s policies.

³⁹ ICIM Policy at ¶ 33; *see also id.* at ¶ 30 (“A Request may be presented through a representative located in the project host country or elsewhere, but any such Request must identify the person(s) on whose behalf the representative is acting...”).

⁴⁰ *Id.* at ¶¶ 40(h), 56(h).

⁴¹ Other institutions make similar exceptions. For example, the Project Compliance Mechanism of the European Bank for Reconstruction and Development requires complainants to “describe the good faith efforts the Complainant has taken to address the issues in the Complaint, including with the Bank and/or the Client, and a description of the result of those efforts, *or an explanation of why such efforts were not possible.*” Project Complaint Mechanism: Rules of Procedure at ¶18(d) (May 2009), *available at*: http://www.ebrd.com/downloads/integrity/pcm_rules.pdf.

⁴² *See id.* at ¶¶ 40(f), 56(f).

⁴³ *See* ICIM 2012 Annual Report at 9 (“It is important to highlight that the ICIM does not require requesters to cite the specific operational policy (or policies) that they believe has (have) not been followed by the Bank and therefore may have caused them harm. Nor does the ICIM expect requesters to have full knowledge of the operational policies of the Bank.”).

⁴⁴ The Board should consider using the CAO as a model in this regard. *See* CAO, Operational Guidelines at § 2.1 (“There is no requirement for a complainant to specify particular policies, guidelines, or procedures.”).

6. The Ombudsperson and Panel Chair Should be Permitted to Conduct Site Visits During Eligibility Determinations

Under current ICIM Policy, eligibility determinations are made using only the information contained in the request and in IDB records.⁴⁵ This provision limits the ICIM's ability to assess the harm being caused and makes the ICIM less accessible, particularly for communities who may struggle to convey their concerns in a written request. Site visits would also allow the ICIM to determine early on how it might have a positive development impact in a given case. Finally, site visits may allow the ICIM to more easily and efficiently determine that some complaints are not eligible. Therefore, the ICIM staff should be permitted to conduct site visits during eligibility determinations for those cases in which on-site information is required to make an informed determination.⁴⁶

III. Independence and Effectiveness

The current ICIM Policy has several provisions that enhance the mechanism's independence and effectiveness. In particular, we believe that the provisions establishing the Project Ombudsperson's and Panel's independence and ability to act on their own initiatives are vital to the ICIM's external credibility and ultimate effectiveness, both of which hinge in large part on the mechanism's real and perceived independence from Bank Management.⁴⁷ We are concerned that this independence has been compromised due to structural changes established by the Board following the OVE evaluation. We therefore urge the Board to provide strong support for an independent ICIM going forward.

Any changes that are made to the structure of the ICIM should be done in a way that preserves and improves the mechanism's independence and overall effectiveness.

A. The ICIM Should Have More Independence with Regard to Compliance Review and Site Visits

1. Board Approval Should Not Be Required for Compliance Review Investigations and Monitoring

The current ICIM Policy requires the Board to approve the Panel's Recommendation and Terms of Reference for an investigation before a request may proceed to a Compliance Review investigation.⁴⁸ This provision risks interference with the Panel's independence and effectiveness.⁴⁹ The ICIM Policy should be amended to give the ICIM full and independent authority to determine whether to conduct a Compliance Review investigation.

⁴⁵ See ICIM Policy at ¶¶ 40, 56.

⁴⁶ The Inspection Panel, for example, allows Panel members to make site visits as part of a preliminary review if more factual information "is required to make an informed recommendation to the Executive Directors." Inspection Panel Operating Procedure at ¶ 36.

⁴⁷ See ICIM Policy at ¶¶ 74, 77.

⁴⁸ See *id.* at ¶ 59.

⁴⁹ For example, the Board's involvement may have interfered with the first Mario Covas Rodoanel Project – Northern Section case, which has experienced significant delays at this stage of the process.

Additionally, under the current Policy, the Panel can only monitor agreements reached following Compliance Review if requested to do so by the Board.⁵⁰ Yet, the Panel, as the body that made non-compliance findings in the first place, is ideally suited to determine whether such monitoring is needed. Moreover, monitoring ongoing compliance and implementation of remedial actions agreed upon as a result of the Compliance Review process will help make the ICIM more effective at contributing to positive development outcomes.⁵¹ The ICIM Policy should therefore be revised to give the Panel authority to independently determine whether and how to conduct monitoring after the Board endorses findings of non-compliance.⁵²

2. Site Visits Should Not Be Left to the Agreement of the Country Concerned

The Policy currently requires that the ICIM obtain the written non-objection of a country where a site visit is to be made.⁵³ This undermines the independence and effectiveness of the ICIM by allowing a country to impede the mechanism's ability to make a full assessment or investigation of the request. In order for both the Consultation Phase and the Compliance Review Phase to be effective, there must be an opportunity for all requesters to be heard and for the ICIM to visit the site in person. To the extent the country concerned has agreed to IDB financing for a project, they should be deemed to have consented to site visits by the ICIM.⁵⁴

3. Post-Employment Ban for Panel Members Should be Permanent

While the ICIM Policy requiring a five-year post-employment ban for members of the Panel is to be commended,⁵⁵ there should be a permanent post-employment ban.⁵⁶ This will ensure that Panel members remain independent.

⁵⁰ ICIM Policy at ¶ 72.

⁵¹ The Pando-Monte Lirio case provides an example of a missed opportunity in this regard. While the ICIM was well positioned to undertake monitoring, the Board did not request that the ICIM monitor implementation of the Action Plan created to address non-compliance, and the case was formally closed. Requesters, who are concerned that the Plan is not being implemented effectively, wanted ongoing involvement by the ICIM.

⁵² Given the importance of ongoing monitoring, the Board may wish to consider making such monitoring mandatory. The CAO could serve as an example. *See* CAO Operational Guidelines at § 4.4.6 (“In cases where IFC/MIGA is/are found to be out of compliance, CAO will keep the compliance investigation open and monitor the situation, until actions taken by IFC/MIGA assure the CAO that IFC/MIGA is/are addressing the noncompliance.”).

⁵³ *See* ICIM Policy at ¶¶ 49, 63..

⁵⁴ Alternatively, the ICIM could adopt a policy similar to that of the Asian Development Bank, in which a country may decline a site visit, but a Compliance Review is still undertaken and the Compliance Review Panel “may give added weight to the complainants’ views.” *Operations Manual Bank Policies: Accountability Mechanism*, ¶ 94, ASIAN DEV. BANK, ACCOUNTABILITY MECHANISM (2012), available at: <http://www.adb.org/sites/default/files/OML1.pdf>.

⁵⁵ ICIM Policy at ¶ 80.

⁵⁶ Other mechanisms have permanent post-employment bans for some mechanism staff. For example, the CAO’s Vice President is restricted for life from obtaining employment within the World Bank Group. *See* CAO Operational Guidelines at § 1.3. Similarly, Experts at the European Bank for Reconstruction and Development’s mechanism have a permanent post-employment ban, which prohibits them from working at the Bank in any capacity. *See* Project Complaint Mechanism: Rules of Procedure at ¶ 48.

B. After a Request Has Been Found Eligible, the ICIM Should Be Permitted to Recommend that Disbursements to a Project be Halted

We commend the current ICIM Policy for allowing the Project Ombudsperson or the Panel to recommend that disbursements be halted pending Consultation or Compliance Review.⁵⁷ However, the Policy unnecessarily restricts the circumstances under which such recommendations can be made and does not provide any indication of the likelihood that such recommendations will be followed. Allowing projects to proceed despite their alleged violations of Bank Policy and harm to communities undermines the ICIM's effectiveness and ability to provide effective remedy to communities. The Policy should therefore be changed to allow the Ombudsperson or the Panel to recommend a halt to project disbursements about which credible allegations of serious and imminent harm have been made. Further, we urge the IDB to adopt such recommendations on a no-objection basis.

C. The ICIM and Requesters Should Be Permitted to Comment on Action Plans Created to Address Findings of Non-Compliance

As currently written, the ICIM Policy cuts the ICIM and requesters out of the process once the Board endorses the Panel's findings of non-compliance.⁵⁸ Both requesters and the Panel should have the opportunity to comment in writing on any proposed Action Plan, and Management should be required to consider the comments and amend the Action Plan accordingly. Allowing both the Panel and the requesters to express their opinions about Management's proposed Action Plan will provide important information on the sufficiency and feasibility of the Plan, leading to improved development outcomes.

D. Delays Prevent the ICIM from Achieving Maximum Effectiveness

Because many of the requests submitted to the ICIM concern projects in progress, every delay has the potential to cause further and potentially irreparable harm to communities. Moreover, when requests are submitted about projects in the pre-approval phase, delays can lead to projects being approved before the ICIM process has had any impact. The following specific changes to ICIM Policy and practice would help avoid such delays.

We note, however, that the significant delays in the ICIM's processing of cases may be related to other serious issues discussed in these comments, including underfunding, understaffing, interference by the Board, the non-transparent intake procedure and/or complicated and duplicative eligibility determinations. Therefore, the Board may also be able to alleviate delays by providing more robust funding, taking measures to ensure the ICIM's independence, and clarifying and simplifying the registration and eligibility process.

⁵⁷ See *id.* at ¶¶ 48, 66.

⁵⁸ See *id.* at ¶ 71.

1. All Key Stages of the ICIM Process Should Have Specific Timelines for Completion and Clear Rules Regarding Extensions

The current ICIM Policy lacks specific timelines for certain key stages of the ICIM process, such as the time between declaring a request eligible for Compliance Review and submitting the Recommendation and Terms of Reference for the investigation to the Board, or the time between receiving comments on a draft Compliance Review Report and distributing the final Report to the Board. In some cases, there have been substantial delays at these stages.⁵⁹ The revised ICIM Policy should include reasonable timelines for all key stages of the process.

Additionally, the current ICIM Policy allows the Ombudsperson and Panel Chairperson to extend any time period in the Policy,⁶⁰ which makes the timelines that do exist appear unimportant. The ICIM Policy should therefore explicitly limit the extension of deadlines and require that specific reasons be publicly given when time periods are extended.

2. Eligibility Should Only Be Assessed Once

The ICIM Policy requires requests to proceed through two separate eligibility determinations, one for Consultation and one for Compliance Review, despite the use of nearly identical criteria for each phase.⁶¹ Additionally, the Executive Secretary's intake process covers at least some of the criteria that are then assessed again by both the Project Ombudsperson and the Panel Chair.⁶² These duplicative eligibility determinations create unnecessary additional steps and delays.⁶³ Moreover, the potential for the Ombudsperson and the Panel Chairman to arrive at different eligibility determinations in the same case using the same criteria also threatens the ICIM's credibility and makes the mechanism less predictable for potential users. The Policy should therefore be revised to provide for only one eligibility determination, which would cover both the Consultation and Compliance Review phases.

3. Sequencing Should be More Flexible

As the ICIM Policy currently stands, a request may only proceed to Compliance Review if "(a) the Consultation Phase has been terminated or concluded for any reason, or (b) the Request was deemed ineligible under the Consultation Phase."⁶⁴ To prevent one ICIM role from

⁵⁹ For example, in the Serra do Mar case, the requester received the Terms of Reference from the Panel in January 2011 and responded with comments after two days. The Panel finally issued a revised draft Recommendation for a Compliance Review with the Terms of Reference two years later, and the Panel is only just now preparing a final revised Recommendation for a Compliance Review, more than three years after the request was originally filed. Similarly, in the Pando-Monte Lirio case there was a delay of more than four months between the time that the requesters submitted comments on the draft Compliance Review Report and the distribution of the final Report to the Board.

⁶⁰ *Id.* at ¶ 91.

⁶¹ See ICIM Policy at ¶¶ 40, 54, 55 and 56.

⁶² See OVE Evaluation at ¶¶ 5.4-5.5.

⁶³ For example, although the Policy indicates that the Executive Secretary should acknowledge receipt of a request and transfer it to the Ombudsperson within five business days, OVE found that it took the Executive Secretary an average of 66 calendar days to complete this step (or 36 calendar days excluding legacy cases). *Id.* at Table 5.1.

⁶⁴ ICIM Policy at ¶ 54.

restricting access to another, and to honor community self-determination, the ICIM Policy should be revised to allow requesters to choose the process they seek to initiate. When communities feel that Compliance Review is the most appropriate way to address a complaint, this amendment would remove the delay caused by a prerequisite Consultation process.⁶⁵

We also recommend that greater flexibility be built into the system to allow requesters to determine not only which phase they wish to initiate, but also their order. Sequencing should be determined on a case-by-case basis to enhance the effectiveness of the Compliance Review phase. Such flexibility would allow the Compliance Review phase to begin first when it is more urgently needed but both phases are requested, avoiding the delay caused by first going through a potentially lengthy Consultation process. We further recommend that, consistent with other accountability mechanisms, the ICIM Policy allow for parallel Consultation and Compliance Review processes where appropriate.⁶⁶

E. The ICIM's Current Budget and Staffing Issues Impede the Mechanism's Effectiveness

The ICIM suffers from insufficient funding and a shortage of staff in a variety of areas, which hinders the mechanism's operations and effectiveness. The ICIM, up until this year, had an active caseload, registering twenty cases between 2010 and 2012. Although its caseload was higher than many similar mechanisms,⁶⁷ the ICIM's budget was significantly smaller. For example, the regional mechanism with the most similar caseload, the Accountability Mechanism of the Asian Development Bank, had an average budget of \$3.06 million per year in 2011 and 2012, whereas the ICIM received an average of \$2.15 million for its operations during the same time period.⁶⁸

We are concerned that the ICIM's budget is undermining its effectiveness. For example, budgeting and staffing issues have created difficulties during the Consultation Phase, which requires frequent staff trips throughout Latin America. Similarly, Panel members are only contracted to work a limited number of days per year, which has not been sufficient to meet the demand for Compliance Review.

To resolve these issues and ensure the ICIM's effectiveness, the Board should provide funding at a level at least equal to that of other mechanisms with a similar caseload and should ensure that all key functions of the ICIM are fully staffed. In addition to a higher budget, the

⁶⁵ There have been cases in which requesters clearly indicated that they want Compliance Review only, making the request ineligible for Consultation, but experienced significant delays at the Consultation eligibility stage before being transferred to Compliance Review. *See* OVE Evaluation at ¶ 5.13.

⁶⁶ For example, the Project Compliance Mechanism of the European Bank for Reconstruction and Development and the Complaints Mechanism of the European Investment Bank allow complaints to proceed simultaneously.

⁶⁷ As noted above in footnote three, from 2010 to through the end of 2012, the number of complaints registered by the ICIM was similar to or significantly higher than the number registered by its sister mechanisms at other regional development banks.

⁶⁸ *See* The Independent Consultation and Investigation Mechanism 2011 Annual Report, p. 46, ICIM; *see also* 2012 MICI Annual Report at 43.

ICIM should have a revolving fund from which to draw as needed for site visits, the hiring of experts, and other expenses that are difficult to include in the budget.⁶⁹

We would again like to reiterate that though flawed, the ICIM is a valuable tool. The ICIM's continued presence is essential to providing access to effective remedy for those harmed by IDB projects and ensuring positive development outcomes from IDB projects.

Thank you for your attention to these issues. We appreciate this opportunity to comment on the ICIM, and we look forward to the results of the consultation and consideration of the above, as well as to further engagement. Please do not hesitate to contact us if you have any questions or would like to discuss these matters in further detail.

Sincerely,

Natalie Bridgeman Fields
Executive Director
Accountability Counsel
230 California Street, Suite 304
San Francisco, CA 94111
United States
1.415.412.6704
natalie@accountabilitycounsel.org

Margarita Florez
Asociacion Ambiente Y Sociedad
Bogota
Columbia
57 1 3185895016
margarita.florez@ambienteysociedd.org.co

Astrid Puentes Riaño
Co-Directora
Asociación Interamericana para la Defensa del Ambiente, AIDA
Atlixco 138, Colonia Condesa
México, DF 06140
México
52.55.5212.0141
apuentes@aida-americas.org

⁶⁹ The CAO could serve as a model. It has an agreement with the IFC and MIGA to make additional funds available through a Contingency Fund “in the event of an unexpected volume of complaints, a large-scale mediation effort, or other ombudsman-related activity.” Annual Report 2012, p. 83, CAO.

Vince McElhinny
Senior Policy Advisor
Bank Information Center
1100 H Street NW, Suite 650
Washington, DC 20005
United States
1.202.737.7752
vmcelhinny@bicusa.org

Mariana Castillo
Centro Mexicano de Derecho Ambiental (CEMDA)
Atlixco 138, Col. Condesa. Del. Cuauhtemoc, C.P. 06140
Mexico
52 (55) 52863323
mcastillo@cemda.org.mx

Tania Arosemena
Environmental Advocacy Center - Panama (CIAM Panama)
Panama City, Bethania, De los Periodistas Avenue, House G-14
Panama
(507) 236-0866 / 0868
tarosemena@ciampanama.org

Antonio Gambini
Chargé de recherche & plaidoyer Financement du développement
Centre national de coopération au développement, CNCD-11.11.11
9 Quai du Commerce
1000 Bruxelles
Belgium
32.(0).2.613.30.31
Antonio.gambini@cncd.be

David Pérez-Rulfo
Corporativa de Fundaciones
2139 Lopez Cotilla, Arcos Vallarta 44130
Guadalajara, Jalisco
Mexico
52(33)3615-0437
david@vivirparacompartir.org

Alcides Faria
Ecoa
Rua 14 de Julho 3169, Campo Grande, MS.
Brasil
55 673 324 3230
alcidesf@riosvivos.org.br

Jonathan G. Kaufman
EarthRights International
Washington DC
USA
1 202 466 5188 x113
jonathan@earthrights.org

Gabriela Burdiles
Fiscalía del Medio Ambiente (FIMA)
Portugal 120, oficina 1-A
Santiago
Chile
56-2-22221670
fima@fima.cl

Joji Carino
Director
Forest Peoples Programme
1c Fosseyway Business Centre, Stratford Road
Moreton-in-Marsh, GL56 9NQ
England
44.(0).1608.652894
joji@forestpeoples.org

Jorge Carpio
Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (FOCO)
Castillo 460 (CP 1414)
Ciudad de Buenos Aires
Argentina
54 11 47728922
jcarpio@inpade.org.ar

María Marta Di Paola
Economista Ambiental de Cambio Global
Fundación Ambiente y Recursos Naturales (FARN)
Tucumán 255 6A (1049)
Buenos Aires
Argentina
0054.11.4312.0788
economiaambiental@farn.org.ar

Mariana González Armijo
Investigadora del área de Transparencia y rendición de cuentas
Fundar, Centro de Análisis e Investigación, A.C.
Cda. Alberto Zamora 21
Coyoacán, 04000 Distrito Federal
México
52.55.5554.3001
mgonzalez@fundar.org.mx

Maurice Ouma Odhiambo
Jamaa Resource Initiatives
P.O Box 4393 Nakuru, 20100
Kenya
254-723-466-975
oumaodhiambo@gmail.com

María Antonieta Valera de la Torre
Mujeres y Punto AC
San Borja 407 dep. 4 Col Del Valle Deleg
Benito Juárez CP 03100
Mexico
52 (656) 55 75 15 38
mujeresy@yahoo.com.mx

J. Eli Makagon
Natural Justice, Lawyers for Communities and the Environment
63 Hout Street, Mercantile Building
Cape Town, 8000
South Africa
27 21 426 1633
eli@naturaljustice.org

Benjamin Cokelet
Executive Director
Project on Organizing, Development, Education, and Research (PODER)
New York, NY
USA
info@projectpoder.org

Joseph Wilde-Ramsing
Centre for Research on Multinational Organizations (SOMO)
Sarphatistraat 30
1018 GL Amsterdam
Netherlands
31 206391291
j.wilde@somo.nl

Derek MacCuish
The Social Justice Committee of Montreal
1857 boul. de Maisonneuve ouest,
Montreal QC H3H 1J9
Canada
1 514 933 6797
dmaccuish@sjc-cjs.org