



31 March 2020

Dear ARP III Team,

Thank you for the opportunity to comment on the ARP III consultation draft. The draft is an important step towards a universal understanding of how to effectuate the core elements of non-State-based grievance mechanisms.

In short, Accountability Counsel recommends that the report include two additional elements: (1) the tenet of independence throughout the effectiveness criteria; and (2) the need for a remedy fund.

### *Introduction*

[Accountability Counsel](#) amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, we employ community driven and policy level strategies to access justice. We represent communities who appeal to Independent Accountability Mechanisms at international financial institutions, a type of non-State-based grievance mechanism, for remedy for harms caused by institution-financed projects. We have represented communities engaging with Independent Accountability Mechanisms at the [World Bank Group](#), [Inter-American Development Bank](#), and the [United Nations Development Programme](#), among others. Accountability Counsel has contributed to the creation of new Independent Accountability Mechanisms at financial institutions as well - such as at the United State International Development Finance Corporation, Asian Infrastructure Investment Bank, and Green Climate Fund - and contributed to the periodic reviews of nearly all of the policies and procedures of the multilateral development banks' Mechanisms. Based on our decade of experience representing communities and advocating to financial institutions, we make the below recommendations.

### *Recommendations*

#### **Effectiveness Criteria and the Core Element of Independence**

We agree that grievance mechanisms must adhere, at a minimum,<sup>1</sup> to the effectiveness criteria in Article 31 of the Guiding Principles on Business and Human Rights and therefore concur that

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<sup>1</sup> For additional criteria for assessing grievance mechanisms, see David Hunter, Natalie Bridgeman-Fields, "Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism," *The Georgetown Int'l Env'tl. Law Review* (2008), available at [https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1066&context=facsch\\_lawrev](https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1066&context=facsch_lawrev).

Policy Objectives 6 (effectiveness criteria), 7 (legitimate), 8 (accessible), 9 (predictable), 10 (equitable), 11 (transparent), 12 (rights-compatible), and 13 (source of continuous learning) are critical.

Grievance mechanisms must also be *independent* from the management of the companies, multi-stakeholder initiatives, and development finance institutions (collectively, “business enterprises”) whose conduct they are evaluating. This is currently included in paragraph 7(d): “provide the mechanism with an appropriate degree of independence from the business enterprise(s) against which allegations of harm have been made.” Accountability Counsel agrees with 7(d) and also maintains that the need for independence is related to all of the effectiveness criteria and thus should be explicitly included throughout.

A lack of independence risks accessibility, predictability, equitability, and transparency.

- *Accessibility* (Policy Objective 8) → The elements of accessibility - including raising awareness (para. 8.1); the application of clear and minimal eligibility criteria (para. 8.2); the existence of procedures for receiving grievances that respect communities’ needs (para. 8.3); confidentiality protections (para. 8.9); and reprisal protections (para. 8.10) - are all jeopardized if the management of a business enterprise can place undue influence on the grievance mechanism.
- *Predictability* (Policy Objective 9) → The elements of accessibility - including “well-defined, reasonable and suitably flexible timeframes” for processes (para. 9.1); prior consent and confidentiality safeguards (paras. 9.2, 9.3); and publication of accurate and realistic information (paras. 9.5, 9.6) - are all jeopardized if a grievance mechanism cannot act independently from management at its corresponding business enterprise.
- *Equitability* (Policy Objective 10) → The elements of equitability - including raising awareness about the role of the mechanism and available advice and assistance (para. 10.1); procedures ensuring adequate information, access to evidence, access to reports of investigations, and adequate opportunities to comment (para. 10.2); adequate information provided at a conclusion of a process (para. 10.3); provision of support to remedy seekers (para. 10.4); and training of mechanism staff (para. 10.5) - are all at risk if a business enterprise can ensure its interests are favored over a remedy seeker’s interests.
- *Transparency* (Policy Objective 11) → The elements of transparency - including publication of information related to complaints received and the mechanism’s performance (paras. 11.2, 11.3); and publication of the mechanism’s “policies, procedures and practices” (para. 11.4) - are all jeopardized if management at a business enterprise can limit what information a mechanism shares with parties to a grievance and the public.
- *Rights-compatible approach* (Policy Objective 12) → The elements of a rights-compatible approach - including “draw[ing] appropriately from all recognized categories of full and effective remedy” and providing remedy seekers choice of outcomes (paras.

12.1, 12.2); safeguards to ensure that the human rights implications of remedial outcomes are considered and that “the grievance process is an empowering experience for the remedy seekers” (para. 12.3); existence of “arrangements to address non-implementation of, or non-compliance with the terms of, remedial outcomes” (para. 12.4); and protection of confidentiality and assessment of risks when engaging with State agencies (para. 12.5) - are all jeopardized if management at business enterprises are able to limit unduly the operations of a grievance mechanism.

The policies of international accountability mechanisms for multilateral development banks all contain language that safeguards their independence. A few examples include:

- The World Bank Group’s Inspection Panel has the power to “determine the eligibility of a request for inspection independently of any views that may be expressed by Management.” ([1999 Clarification of the Board's Second Review of the Inspection Panel](#), para. 6.) Further, Panel members are prohibited from serving the Bank in any capacity for the two years preceding their selection and from subsequently working for the Bank again. ([Inspection Panel Operating Procedures](#), para. 7.)
- The International Finance Corporation’s and Multilateral Investment Guarantee Agency’s accountability office, called the Compliance Advisor Ombudsman, “is an independent office that reports directly to the President of the World Bank Group (the President).” ([CAO Operational Guidelines](#), para. 1.1.) Further, the “CAO is not identified with or beholden to any sector or interest. Independence from the line management of IFC and MIGA enables CAO to deliver on its mandate. [...] CAO staff are recruited by the CAO Vice President. Contracts for CAO staff restrict specialists and staff above that level from obtaining employment with IFC or MIGA for a period of two years after they end their engagement with CAO. The CAO Vice President is restricted for life from obtaining employment with the World Bank Group. The CAO office is physically located in a secure area, and only CAO staff have direct access. The CAO Vice President and staff exercise caution in becoming involved in internal processes within IFC/MIGA, which might compromise the neutrality of the Office. To avoid any conflicts of interest, CAO maintains its independence and impartiality by not giving project-specific advice to IFC/MIGA.” ([CAO Operational Guidelines](#), para. 1.3.)
- The Inter-American Development Bank’s Independent Consultation and Investigation Mechanism (MICI) has as one of its guiding principles to “[b]e functionally independent from Management.” ([MICI Policy](#), para. 6.) “The MICI Director, the Consultation Phase Coordinator, and the Compliance Review Phase Coordinator will be independent from Management and in general will be chosen from outside the IIC and the Bank.” ([MICI Policy](#), para. 52(a).)
- The African Development Bank’s Independent Review Mechanism’s “Director shall be selected by a panel composed of a Board member, a representative of Management, and an independent external advisor and shall be appointed by the President with the

concurrence of the Boards of Directors (the ‘Boards’) for a five year term renewable once. The Director shall not have worked for the Bank in any capacity for five (5) years prior to his/her appointment, and shall not work for the Bank in any capacity after the expiry of his/her term(s) of office.” ([Resolution establishing the IRM](#), para. 3.)

Therefore, **we recommend** that Policy Objectives 7-12 all include a statement that “The mechanism has policies and procedures in place to ensure its independence from the business enterprise with which it is associated. This requires, at a minimum, transparent hiring processes and appropriate reporting lines, control over a predictable budget, the mandate to decide its own policies and procedures, the ability to accept and handle complaints without approval from the business enterprise’s management, and disclosure requirements for conflicts of interest.”

### **The Need for a Remedy Fund at Non-State-based Grievance Mechanisms**

As the Guiding Principles on Business and Human Rights acknowledge, the responsibility to respect human rights requires financial institutions to have in place “[p]rocesses to enable the remediation of any adverse human rights impacts they cause or to which they contribute.”<sup>2</sup> Far too often, however, current remedial processes are undermined by the lack of readily available resources. Without dedicated funds for resourcing remedy, non-State-based grievance mechanisms will struggle to facilitate the delivery of meaningful remedy, thereby falling short of the objective set out in paragraph 12.1.

Even when a compliance review investigation confirms local communities’ claims of harm and a bank responds by developing a remedial action plan, positive change on the ground for communities is frequently impeded by a lack of follow-through on providing the resources necessary for implementation. In 2016, for instance, the Office of the Compliance Advisor Ombudsman (CAO), the accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency, released an investigation report in response to a [complaint regarding IFC-financed tea plantations in the Indian state of Assam](#). The report found a raft of substandard living and working conditions on the plantations imperiling worker health and safety. In response to the CAO’s report, the IFC drafted an action plan detailing a number of remedial measures to be taken, with both the IFC and the client to play implementing roles. However, four years later, most of those remedial actions remain unimplemented. As a 2019 CAO monitoring report notes, the IFC’s client sought financial support from the IFC and other shareholders for implementing remedy, but support has yet to meaningfully materialize.

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<sup>2</sup> See Office of the High Commissioner for Human Rights, United Nations, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, Principle 15(c), p. 16, *available at* [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

Consistent with the effectiveness criteria for a grievance mechanism, a Remedy Fund must be principle-based. While a fund can be structured in a variety of ways, it must be geared first and foremost towards delivering effective remedy for communities. No matter how it is structured, the operation of the fund must adhere to the following principles:

- **Remedy-focused:** A remedy fund would bolster an accountability framework in a myriad of ways, from enhancing project outcomes to promoting continuous institutional learning and improvement. However, the fund’s primary purpose must be to deliver remedy for those communities that have heretofore found harm unaddressed or remedy unimplemented.
- **Community-driven:** The fund must empower affected communities to shape remedy (as recognized in paragraph 12.2). Local communities are best positioned to know what will constitute truly effective remedy. While the financial institutions will have important technical expertise to offer regarding the creation of a remedy fund, community needs, as voiced by communities themselves, should be put front and center. Without this, the fund will fail to mitigate the risk of further unintended harm or ineffective remedy.

Communities must have ample and routine opportunities to participate in the deliberative process of designing and delivering remedy, throughout a grievance mechanism’s process, including through remedy implementation. All other parties involved must meaningfully incorporate community input. Other communities not originally affected by a financed activity but potentially affected by remedial measures must also be extended meaningful opportunities for input.

- **Accountability:** Actors that cause or contribute to harm must contribute to remedy.<sup>3</sup> Harm is often not attributable to only the business enterprise or only its client. Rather, it is common for there to be shared responsibility for harm caused. The operation of the fund should ensure that actors with responsibility for harm contribute to resourcing remedial measures.
- **Predictability:** A remedy fund should operate according to well-defined procedures that make the fund’s operation predictable for affected communities seeking remedy and equally effective from case to case. The fund should also operate according to reliable timelines that should be geared towards delivering timely remedy.
- **Impartiality:** Operation of the fund should entail a process for objectively determining the resources necessary to implement effective remedy, free from commercial

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<sup>3</sup> *Id.*, Principle 13, p. 14; Principle 15(c), p. 16; Commentary to Principle 19, p. 21; Principle 22, p. 24.

considerations or undue influence from business enterprises or their clients.

- **Transparency:** In order to ensure it is effective in executing its mandate to deliver remedy, the fund must operate transparently. Information about the remedial actions identified and the resources allocated for their implementation; the rationales for those determinations; assessments by the grievance mechanism and communities about the remedial actions' adequacy; and monitoring reports of remedy implementation should be disclosed publicly.

Therefore, **the report should include** the importance of a remedy fund under Policy Objective 12 (rights-compatibility). Proposed language is as follows: "A mechanism should be able to access a remedy fund that is remedy-focused, community-driven, in support of accountability, predictable, impartial, and transparent."

### *Conclusion*

Accountability Counsel recommends that the report include the tenet of independence throughout the effectiveness criteria. This means including the element of independence for grievance mechanisms in Policy Objectives 7-12. Further, the report should include the importance of a remedy fund to ensure adequate remedy for communities harmed by business enterprises' actions in Policy Objective 12.

Thank you sincerely for the opportunity to contribute to this process.

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