October 28, 2009

Via Electronic Mail

Compliance Review and Mediation Unit
African Development Bank
Email: crmuinfo@afdb.org

Re: Comments on the African Development Bank IRM Draft Review Report

Dear CRMU and Mr. Hansungule:

We, the undersigned, are pleased to submit the following comments on the Draft Review Report on the African Development Bank's IRM ("Draft Review Report"), dated September 26, 2009, for your consideration. We base our comments on our cumulative experience with investments by international financial institutions (IFIs) in Africa and our specific background regarding the design, implementation and practice of IFI accountability mechanisms.

We commend the AfDB for offering the opportunity to comment on the Draft Review Report. As you acknowledge, 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 institution's leadership, where instances of policy non-compliance may be brought to the bank's attention. The following comments are based on the assumption that the AfDB's IRM 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 proposed revised rules in future stages of the review. The following comments focus primarily on responding to the issues raised in the Draft Review Report.

I. General Comments

As a first general comment, we are pleased that the Draft Review Report includes a number of key issues that require attention during the IRM Review; namely, issues of independence of the CRMU, the need for greater outreach regarding the IRM, and the need for easier access to the mechanism. However, we are concerned with the questions raised about the post-employment ban on the Director of the CRMU (a feature we view as critical to the mechanism's independence), the suggestion that there should be more than three Experts, and the perceived "stagnation" that could result from the employment bans on IRM staff. Furthermore, we request that a number of additional issues be considered. Among those are the need for requester choice in which IRM function they wish to employ, and change to the IRM policy to allow for potentially affected people to file a complaint regardless of whether they have already suffered an "adverse affect."

It is noteworthy that many of these issues – those included and omitted from this Draft Review Report – were raised and fully evaluated in the recently-concluded review of the European Bank for Reconstruction and Development's Independent Resource Mechanism (EBRD IRM).[1] Because it appears that the output of the EBRD IRM Review was not considered as part of the background research the AfDB IRM Review Report,[2] we recommend that this process be fully evaluated in light of close parallels between the AfDB and EBRD accountability mechanisms.

As a last general point, the scope of the Draft Review Report is unclear. A number of recommendations appear to be aimed at changes or additions to AfDB policies or approaches generally, beyond the scope of the AfDB IRM Operating Rules and Procedures and the AfDB IRM Enabling Resolution. For example, the recommendation that the "Boards should come up with a strategy to instill a sense of ownership of Bank-financed projects in the minds of local communities in project areas"[3] appears unrelated to changes that might be needed to either IRM document and raises a process question: which documents are under review? Given that the

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[1] One of the undersigned, attorney Natalie Bridgeman, Director of Accountability Counsel, served as the Consultant to the EBRD for the IRM Review from 2008-2009. As a result, a number of these comments are based on very recent experience with detailed benchmarking of the AfDB IRM's policies and practices against other IFI accountability mechanisms. Materials that would be useful to this review from the EBRD IRM Review include the EBRD IRM Benchmarking Report and Appendix (Nov. 3, 2008) and the PCM Report on the Invitation to the Public to Comment and Bank Responses.

[2] We also note with curiosity that nearly all background materials used for the AfDB Draft Review Report are from 2001 or *well before* in some cases. Because there has been exponential development in IFI accountability mechanism practice, design and literature since 2001, this Review might benefit from review of additional source materials, which as of last year included:

One World Trust 2007 Global Accountability Report, http://www.oneworldtrust.org/documents/OWT_GAR_07_colour_lo-res.pdf (visited July 23, 2008); Caroline Rees, *"Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps"*, Corporate Social Responsibility Initiative, Working Paper No. 40 (Jan. 2008), http://www.reports-and-materials.org/Rees-Existinggrievance-mechanisms-Jan-2008.pdf (visited July 23, 2008); Caroline Rees & David Vermijs *"Mapping Grievance Mechanisms in the Business and Human Rights Arena",* Corporate Social Responsibility Initiative, Working Paper No. 28 (Jan. 2008), http://www.reports-and-materials.org/Rees-Vermijs-Mapping-grievance-mechanisms-Jan-2008.pdf (last visited July 23, 2008); Natalie Bridgeman & David Hunter, "*Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism*", 2 GEO. INT'L ENV'TL. L. REV. 187 (2008), http://www.accountabilitycounsel.org/Accountability_Counsel/FIAM.html; Daniel Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INTL. L 403 (2005); Daniel Bradlow, *Study on An Inspection Function for the African Development Bank Group* (African Development Bank Group 2003); ADB Review Of The Inspection Function: Establishment of a New ADB Accountability Mechanism (May 2003), http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf (visited July 23, 2008).

[3] Draft Review Report at 5.

mandate of the review is to "provide recommendations on how [the CRMU] could improve the effectiveness of the Bank's IRM"[4], are we to look at the Draft Review Report as addressing only potential changes to the Operating Rules and Procedures and the Enabling Resolution, both of those documents, just one of these documents, or all Bank policies and procedures? We assume for purposes of these comments that the AfDB IRM Operating Rules and Procedures and the AfDB IRM Enabling Resolution are both under review, but not AfDB policy more generally.[5]

II. Specific Comments

The following comments relate to specific recommendations of the Draft Review Report. We address the Main Findings on page 5 in the order in which they are addressed in the text of the document.

Access to the AfDB IRM

We agree with the assessment on page 7 that the current AfDB IRM does not encourage access. However, we disagree with the caution on page 8 of the need to balance greater access with the worry of flows of complaints creating an inefficient system. The most widely accessible mechanisms at present is the IFC/MIGA Compliance Advisor/Ombudsman (CAO), which has jurisdiction over complaints from every continent, not just Africa; even then they have had only 67 eligible complaints in nine years.[6] We agree nonetheless with the conclusion on page 9 that more should be done to facilitate requests to the AfDB IRM.

Regarding the comment about "adversely affected" on page 9, we would recommend that this term not apply to all requests. If there is a threat or likelihood of harm due to an AfDB-supported project, this should be sufficient to initiate a complaint – actual harm should not be required.

Regarding the first recommendation on page 10, instead of redefining terms in the Enabling Resolution, we recommend that the AfDB continue the practice of providing user-friendly visual aids to communities and promote the IRM to local and regional NGOs through a user-guide. Changes to the Resolution should be reserved for substantive differences in the AfDB IRM process, not simplification of language.

We agree that there should be greater resources allocated for outreach as recommended and that the rules should be provided in a more user-friendly format. We also agree that the Bank's policies and procedures should be distributed (in full and summary form) and publicized in local languages where possible.

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[4] *See* http://www.afdb.org/en/news-events/article/review-of-the-independent-review-mechanism-irm-of-the-afdb-5148/.

[5] This assumption is based on the fact that other AfDB policies, if under review, would require a wholly different/ additional set of consultations, etc.

[6] *See* http://www.cao-ombudsman.org/publications/documents/CAO2008-9AnnualReportEnglish_low.pdf.

Requirements for Submission of Complaints

We agree with the recommendation that the process for submission of complaints should be more straight-forward. On page 11, we support the finding that a requirement of written submission of complaints is not practical and the conclusion that the "CRMU [should be able] to entertain complaints which are other than in writing." Specifically, we agree with the recommendations on page 15 that the CRMU should be able to receive complaints orally, and by telephone, fax, email or other means.

Regarding confidentiality, we agree that the CRMU should guarantee confidentiality once requested. We would maintain the current provision that if for some reason the CRMU believes the circumstances of a case make it impossible for confidentiality of the requester to be maintained, the CRMU should inform the requesters of the risk and give an opportunity for a complaint to be withdrawn. We note that in cases where the CRMU does guarantee confidentiality, the CRMU's guarantee may not offer potential requestors the level of assurance required in sensitive circumstances. An explicit statement of the consequences for an internal breach of confidentiality could strengthen the guarantee and allow requestors to make a more informed decision as to whether to submit a request and would provide requestors a greater sense of protection under the confidentiality policy when a confidential request is submitted. However, in no way should a determination of whether confidentiality is "warranted" be left to the discretion of the Director, as is the case now.

Regarding standing to submit a request, we agree that any person should be able to file a request to the CRMU. Please note that the EBRD IRM's requirement of two or more people to file a complaint was changed in the recent review and the PCM now allows the complaint to be filed by "one or more individual(s)".[7]

Regarding the location of the requesters and the issue of standing, discussed on pages 12-13, we agree with the recommendation on page 15, with slight modification, that the "CRMU should be empowered to receive complaints submitted by any [individual or] organization international or local whether based in the project area or not. However, it is essential that representatives whether local or international secure prior consent of the affected parties or communities where this is practical and provided in the case of the latter they submit proof that it is not practical." We also agree with the page 16 recommendations that Bank Directors and local governments should have standing to submit complaints.

Regarding demonstration of non-compliance with AfDB policy, we agree that citation to a policy with which there has been alleged non-compliance is not a realistic expectation and should not be required. However, because the current version of the IRM policy states that "[w]here possible," the complaint should explain how Bank policies were violated and how an act or omission by the Bank led or may have led to the policy violation, we do not see a need for

[7] EBRD Project Complaint Mechanism Rules of Procedure, paras. 1 and 2.

a change in the rule. Rather, we suggest that the guidance given to staff and communities emphasize that this information is not required, but may be useful.[8]

Regarding the requirement to demonstrate that the complaint has been brought to the attention of Bank management prior to filing a compliant with the CRMU, we agree that this should not be a requirement. The burden to show prior contact should be on Bank management – if it exists at all. If this requirement that Bank management must be contacted remains, there should be a waiver of the requirement if the requesters claim that such contact would be futile or harmful to the requester.[9]

As to the subject of complaints, we agree with the fifth recommendation on page 15 and suggest that the CRMU accept complaints regarding all AfDB-supported operations.

We note that requesters should be empowered to determine which function(s) of the IRM they require – problem-solving, compliance review, or both. Currently, this determination is made at an early stage by the Director.[10]

IRM Outreach

We agree that the CRMU should continue an active outreach program and should be provided sufficient resources to increase the amount of outreach conducted, particularly in the next few years where there is still the need to create a baseline of awareness about the mechanism.

We recommend that the AfDB actively distribute simple, pictorial-based, local-language, user-friendly descriptions of the mechanism, simplified copies of the CRMU Operating Procedures, and simplified copies of the AfDB policies and procedures to all communities likely to be impacted by AfDB projects. The Operating Procedures and AfDB policies should also be readily available in their original format in areas where the AfDB operates. Consistent with recommendation three on page 30, outreach must also include a direct link to the CRMU on the AfDB homepage.

We agree that efforts should be made to train AfDB staff about the CRMU and agree that a staff guide is an essential tool for such a program.

All outreach materials should make clear that requesters can discuss the case informally with the CRMU per paragraph 17 of the current IRM policy.

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[8] This feature too has been adopted in the new EBRD PCM where citation to EBRD policy is not required, but is requested where possible for the compliance review feature only. EBRD Project Complaint Mechanism Rules of Procedure, para. 10(e).

[9] *Accord* EBRD Project Complaint Mechanism Rules of Procedure, para. 22.

[10] *See* AfDB IRM RP, ¶¶ 20, 34. The EBRD recently changed this similarity to the AfDB to allow requester choice in the process and to enable a determination of eligibility for whichever function the requester has chosen. See EBRD Project Complaint Mechanism Rules of Procedure, para. 12.

AfDB Policy Issues and Enforcement

We agree with the pages 24 and 32 recommendations and that there is a need for the AfDB to develop policies on indigenous peoples, human rights, and for all private sector lending. As noted above, however, the AfDB should work toward preparation of these policies separately, using a transparent and consultative process.

However, a separate issue is the jurisdiction of the IRM. Paragraph 5(ix) of the Resolution creating the IRM restricts its jurisdiction in private sector projects to a defined set of AfDB policies. The CRMU cannot accept a request regarding a private sector project if the alleged breach is of the Involuntary Resettlement Policy, Integrated Environmental and Social Impact Assessment Guidelines, or the Information Disclosure Policy. It is unclear why, if these policies apply to private sector policies, the IRM cannot review requests alleging their violation. Instead, the IRM's jurisdiction should allow it to review all policies that are applicable to AfDB projects.

We note with support the comment on page 23 that compliance with AfDB policy should be included in loan agreements.

Clarification Need re Conduct of a PSI

In the case of a recommended problem-solving initiative, and within twenty-one days of the registration, current IRM policy states that the CRMU may request clarification of the issues from management, provide relevant portions of management's response for comment (presumably to the requesters), ask that requesters respond to the management's clarification, and must then "undertake and conclude the problem-solving exercise and/or make its recommendation to the Boards or the President" (emphasis added).[11] This provision is, at least, unclear and, at most, the literal plain language requires the entire problem-solving process to take place within the same period as is required just for management's response to the initial complaint. This paragraph requires clarification.

Actions Taken In Response to IRM Reports

We agree with the assessment on page 25 that there should be a deadline by which management must respond to IRM reports. This issue was recently addressed in the EBRD review where Management was given a reasonable 30-day deadline for responding to complaints. Three months, as recommended on page 25, seems excessively long.

Authority to Continue with a Compliance Review

We strongly agree with the suggestion on page 26 that the CRMU have sole authority to determine whether to continue with a compliance review. This is critical to the CRMU's independence and credibility. The EBRD recently changed its IRM policy to allow a compliance

[11] AfDB IRM RP, ¶ 33.

review to begin immediately upon a finding of eligibility, thus increasing the independence and effectiveness of the process.[12]

CRMU Staffing Issues

Regarding the role of the Director of the CRMU, we note the need for a provision that the Director could be removed by the Boards "for cause."

The recommendation on page 27 requires close consideration. We agree that the Director should be appointed by the Boards, not the President, but disagree that the Director's post-employment ban should be changed. This is an essential hallmark of the independence of the mechanism and change of this rule would undermine the credibility of the mechanism. Any member of the CRMU or IRM Experts that have a role in determining eligibility, problem-solving or compliance review must have a post-employment ban. Therefore, we disagree with recommendation one on page 30.

The point on page 28 regarding stagnation of IRM staff due to their pre-employment ban is not clear to us. We are also unclear about what alternative is being put forward.

We are also confused about the page 28 recommendation that it "is important to have a Francophone speaker at the level of Compliance Officer or above who should be a man for the purposes of gender balance." (emphasis added). What is the context of this comment?

We agree that the CRMU should have access to contingent funds to be able to carry out its functions, consistent with the comment on page 29.

We disagree that the term "for cause" is vague on page 29. Contrary to compromising independence, "for cause" ensures that Experts who are dismissed are not fired arbitrarily and without justification.

Regarding the page 29 discussion of the number of experts, we recommend that the number remain at three in order to ensure that experts have the opportunity to work on a case during their tenure, thus assisting with recruiting experts. A smaller number of experts also concentrates responsibility and accountability for the success of the mechanism in a more easily identifiable set of people.

Consultations

Although we agree with the need for consultations at project conception (page 32), we are unclear how this relates to the review of the IRM. Discussion of the consultation issue, although extremely important, is better placed in the context of review of AfDB operational policies and procedures. We find the second recommendation on page 32 to be confusing.

[12] *See* EBRD Project Complaint Mechanism Rules of Procedure, para. 35.

African Traditional Problem-solving Techniques

We are unclear on what the page 34 recommendations regarding African problem-solving techniques would mean to the IRM rules. We look forward to learning more about this recommendation.

We appreciate the opportunity to comment on the AfDB's Draft Review Report. We look forward to remaining informed and continuing engagement with the AfDB on this important endeavor.

Sincerely,

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