

MEMO TO IDB PRESIDENT LUIS A. MORENO
CCRM Shortcomings -- March 27, 2006

The Inter-American Development Bank (IDB) has embarked on a wholesale reform of its compliance mechanism, guided by the Board of Governor's desire to increase the transparency, accountability and effectiveness of the Bank's performance. The reform of the IDB mechanism is long overdue, but the proposal suffers from grave deficiencies that compromise the independence and effectiveness of the proposed mechanism (CCRM).

The standard for consultations on the CCRM has also been deficient. Despite the fact that the CCRM is probably the most important policy—given that it covers all other policies—consultations were far lower in quality and accessibility when compared to those surrounding the environmental policy, for example. Thus, hopefully these comments will be taken into account.

This memo outlines some of the key concerns regarding the current draft mechanism (CCRM). In particular, these concerns relate to:

- the potential politicization of the Panel's function;
- the lack of adequate transparency of the proceedings;
- obstacles posed to affected communities to access the mechanism;
- the absence of clear outcomes of the process;
- the conflicts of interests associated with the Executive Secretary;
- the lack of monitoring mechanisms for preventive or corrective measures;
- the limited scope of the CCRM;
- the Executive Directors' authority to activate the mechanism; and
- the lack of specific procedures for disclosure policy grievances.

Any accountability mechanism should serve two inter-related objectives. *Firstly*, the CCRM should ensure that the Bank complies with its own internal policies and that consequences result from non-compliance. *Secondly*, the CCRM should ensure that persons harmed by IDB-financed projects obtain effective remedies for their loss. These two objectives – 1) compliance and 2) redress—are critical to ensuring that the Bank meets its development mandate by securing results on the ground. The draft CCRM fails to achieve either objective; it provides a flawed approach to compliance, and it only addresses the damage caused to project-affected persons as a criterion for screening access to the mechanism, without providing for any redress.

(1) **Potential politicization of the Panel's function:** The proposed CCRM unnecessarily politicizes the Panel and thus undermines its independence and credibility.

First, the Board becomes involved in the investigation process too early, including with respect to reviewing eligibility requirements. The decision on whether to conduct an investigation should rest with the Panel; and the Board should be involved only when adequate findings of fact are available to it. This would depoliticize the Mechanism, speed the process, and limit the controversy that attends panel claims. For example, the World Bank Board effectively removed itself from review of eligibility of Inspection Panel claims, and this has made the Panel process less political and confrontational and more efficient and effective.

Second, the CCRM requires that the borrower/recipient country have consented before any site visit by the Panel. Such consent is both unnecessary and counterproductive. The Panel should have the ability to interview complainants and other affected persons who can furnish relevant information for the investigation, without the need for the Host-Country's consent. The problem of country consent can be easily resolved by explicitly incorporating the borrower's consent to any potential investigation in project documents. Moreover, allowing for project-by-project decisions on site visits unnecessarily introduces one more flash-point for controversy, both inside the borrower and at the IDB Board.

- (2) **Lack of adequate transparency of the proceedings:** The Public Registry envisaged by the draft CCRM is a significant improvement over the current situation, but does not ensure the public timely access to key documents of the proceedings. Besides recording procedural actions, the Public Registry should also post the documents that provide the basis for such procedural actions. Access to documents would enable Requesters to have an active role during all the phases of the Mechanism, including commenting on Management's views and making presentations directly to the Board.
- (3) **Obstacles posed to affected communities to access the mechanism:** The draft CCRM places numerous and unnecessary restrictions on access to the mechanism, thereby compromising its ability to deliver outcomes. Important examples include:
- The Mechanism puts requesters at risk by failing to guarantee that their names will remain anonymous if so requested to protect their physical integrity—an absolutely essential protection that exists at the World Bank and other mechanisms;
 - Access to the mechanism is complex and may be quite costly, yet no resources are dedicated to support access by affected communities;
 - In the consultations phase, the requester “must allege a violation of a Bank Operation Policy” and adduce reasonable evidence. However, no clear and objective guidance exists as to what “reasonable evidence” is, thereby opening the door for arbitrary decisions. Also, most persons affected or potentially affected by projects will not have knowledge of the Bank's Operational Policies, and thus this requirement, to the extent it is maintained in this stage, should focus on the problems on the ground rather than on identification or analysis of legal documents. In addition, operational policies may embody or be complemented by international standards, which would be relevant to an investigation during the compliance review phase.
 - The proposed rules undermine affected persons' ability to freely determine who will represent them. Under the current draft CCRM, the Executive Secretary is required to screen representatives, and if affected communities identify an international representative, the Executive Secretary is required to find out whether a local representative is available. These restrictions unduly introduce a potential point of conflict in the Mechanism, as communities lose control of their claim and can be second-guessed by the Bank on an issue best left to the claimant.
 - The Mechanism excludes from its coverage requests that raise issues pending in “litigation involving the Bank or known to involve other project participants”. In cases involving public-sector projects, this exclusion does not make sense given the immunity of jurisdiction of the Bank. In private-sector projects, this exclusion denies access to the Mechanism to affected communities that pursue their right to judicial protection from acts of private parties. This result violates basic principles of due process and access to justice under human rights law.

- (4) **Absence of clear outcomes of the process:** Investigations conducted under the proposed CCRM do not lead to outcomes that are binding on the Bank. Without clear outcomes that are known to affected communities and the Bank before the inspection process begins, both the credibility and effectiveness of the Mechanism are severely undermined.

In addition, Requesters are required to show actual or potential harm to access the Mechanism, but are then denied reparations should the investigation reveal non-compliance with IDB policies. This disconnect undermines the ability of the Mechanism to ensure that project-affected persons do not suffer as a result of Bank's activities.

- (5) **Conflicts of interests associated with the Executive Secretary:** The real and perceived independence of the CCRM is essential to effectively delivering results. The proposed CCRM draft, however, creates an institutional structure riddled with conflicts of interests. For example, the Executive Secretary reports to management, which is clearly implicated in complaints. Instead, the Executive Secretary should report directly to the Panel's Chairman. In addition, the Executive Secretary coordinates with the Legal Department, which also advises management. Furthermore, nothing in the draft CCRM prohibits the Executive Secretary from being employed by the Bank following her or his service. Moreover, the draft does not establish clear criteria for the selection of the Executive Secretary.

Finally, the Executive Secretary is responsible under the draft for the consultation phase and thus acquires an interest in its successful completion. If the consultation phase fails, however, the Executive Secretary may develop bias toward the party he or she feels is responsible for the failure. Given that the compliance review phase only begins after the consultation phase concludes, and given that the Executive Secretary has administrative duties in the compliance phase, the independence of the mechanism is compromised.

- (6) **Lack of monitoring mechanisms for preventive or corrective measures:** While the Mechanism authorizes the Executive Secretary to monitor implementation with respect to the results of the consultations phase, no similar authority is given to the Panel with respect to the results of the compliance phase. This is a major shortcoming that will reduce the effectiveness of the Mechanism to improve project impacts on the ground. The Panel should be tasked with monitoring and reporting at least annually on any implementation decisions arising from the compliance phase.

- (7) **Limited scope of the CCRM:** In order to effectively secure compliance with internal policies, the mechanism should apply to the project process in its entirety, including the time after disbursement of funds. A comprehensive approach to the CCRM scope would increase the IDB's leverage with respect to the implementation of projects. Further, the CCRM would be designed to ensure that any project-affected community would have a mechanism for redress if policies are violated. Moreover, the disbursement date is arbitrary as a cut-off date for determining the scope of the CCRM, which should be open to project-affected communities regardless of the date when funds were disbursed.

- (8) **Executive Directors should have the authority to initiate investigations:** In order to secure compliance by management with internal policies, members of the Board of Directors should have the authority to initiate investigations. This authority would underscore the fact that the CCRM is an independent mechanism designed to report any instances of non-compliance directly to the Board of Directors.

(9) **Lack of specific procedures for disclosure policy grievances:** As currently proposed, the scope and procedures for the CCRM would not adequately address grievances raised in specific regards to the Bank's Disclosure of Information Policy. An appropriate independent appeals process is needed to interpret quickly and impartially the IDB's presumption of disclosure "in absence of a compelling reason for confidentiality" and provide an independent review of the regime of exceptions. Any individual or interested party, regardless of whether or not they are harmed by IDB's non-disclosure, should be eligible to lodge a disclosure related appeal with the CCRM and receive a final decision within 15-30 days. Disclosure related appeals would not require a determination of acceptance or investigation similar to other safeguard policy complaints. Rather, one CCRM panel member or the panel as a whole would review the information request(s) and make a recommendation on whether or not there is an overwhelming public interest in disclosure.

The deficiencies of the draft CCRM identified above undermine the independence and effectiveness of the Mechanism. Independence of the CCRM is critical to ensure that the Mechanism delivers its expected contribution to accountability, transparency and effectiveness. As currently drafted, however, the limited role of requestors and lack of access to documents, compounded by lack of clear outcomes, potential politicization, and lack of an independent monitoring mechanism do not guarantee the independence of the Panel and otherwise undermine its effectiveness.
