

ACCOUNTABILITY AND EFFECTIVENESS FOR AFFECTED PEOPLE

Input into the Review of the ADB Inspection Function¹ (Updated)

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¹ This document is an addition to Strengthening Public Accountability: Recommendations to the Asian Development Bank (ADB) for Revising Its Inspection Policy March 18, 2002, available electronically at www.bicusa.org/asia/Civil_Society_Recommendations-March_18_2002.pdf. This document incorporates comments on the ADB First Working Draft of May 3, 2002 received from various experts on, and practitioners in, inspection mechanisms as well as civil society groups from southern and northern countries that have been monitoring ADB and MDB inspection mechanisms.

² This document is part of a series of submissions by various NGOs monitoring the ADB Inspection Policy review.

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I. INTRODUCTION

“Enhancing internal governance, accountability, and transparency is crucial to enable the MDBs to strengthen their role in the fight against poverty and retain institutional credibility. ... To this end we [the G-7 Finance Ministers and Central Bank Governors] call upon the MDBs to: ... strengthen or establish inspection mechanisms reporting directly to the Board.”

Excerpt from “Strengthening the International Financial System and the Multilateral Development Banks” Report of G-7 Finance Ministers and Central Bank Governors. July 7, 2001, Rome, Italy.

Civil society groups concerned with the Asian Development Bank’s inspection function could not be more in agreement with the urgent need stated above for the ADB to strengthen its inspection mechanism and enhance internal governance, accountability, citizen participation and transparency.

These comments are intended to contribute to the process of improving the inspection function at the Bank, in the context of the Review Process currently underway. The May 3, 2002 draft Working Paper sets forth four options to be considered for a revised inspection function.

The current function – Option A – is unacceptable. Since its inception, the Inspection Function has investigated only one claim – the Samut Prakarn Wastewater Management Plant Project in Thailand. Several other legitimate claims have been rejected by the Board Inspection Committee. The process to date has generated important lessons that illustrate that the current function is wholly inadequate to address the fundamental purposes for which it was created. Neither Bank accountability regarding compliance with its policies, nor redress of claimant grievances, has resulted from the inspection of Samut Prakarn. Both issues are of critical importance for the institution, its shareholders, and those whom it is trying to serve.

Options B and C, as outlined in the Working Paper, build on the experiences of the World Bank Inspection Panel and the IFC Compliance Advisor/Ombudsman. It is our view that neither of these mechanisms alone will address the dual needs of accountability and problem solving that have been expressed by affected communities, inspection requesters and civil society organizations.

Only Option D, which combines elements of the Inspection Panel and Ombudsman functions, has the basic components of an effective mechanism. We urge the Bank to ensure that the revised mechanism has both accountability and problem solving functions.

While the Bank may develop a mechanism that addresses accountability issues and provides problem solving to affected communities, it is crucial that the new mechanism also reflect the Bank’s (both the Board and the Management) acknowledgement that:

- (a) addressing problems raised in projects and programs funded by the ADB is, in fact, an indication of a modern, accountable institution, which the Bank strives to be. It should not

be seen as a process that results in embarrassment for the Bank. Public acknowledgement and support for the Bank and its remedial actions will depend on how the Bank solves problems and address accountability issues;

- (b) being a multilateral institution that is not subject to any court, the ADB must have its own accountability mechanism. Without such a mechanism, the ADB's credibility is questionable.

There is also a critical need for the Bank to develop a culture of responding to public inquiries and complaints. Such a culture should be part of the Bank's basic values and business practices. If the Management responded promptly and effectively to complaints, many problem projects could be prevented from becoming worse. It is therefore very important for the Bank to take significant measures to change the mindset inside the institution so that policy compliance and responding to citizen complaints become fundamental to the Bank's business practices. This should also be accompanied by an internal redefinition of institutional and staff performance benchmarks, so that being accountable for, and responding to, complaints and problems is seen as a means to improve project quality and development effectiveness, rather than a liability.

II. BASIC PRINCIPLES

We strongly agree with the principles outlined in the Working Paper that state that the inspection function should be, "independent, transparent, fair to all stakeholders, responsive to the concerns of local affected people, and cost-effective and efficient." We also strongly endorse the principle that "any new or revised process should be less adversarial and legalistic than the existing Inspection Function. It should be productive and it should be an asset for the ADB, not a liability."

Below, we elaborate on these and discuss the fundamental principles of accountability and problem solving, which we propose should be adhered to in developing a new mechanism.

A Mechanism for Accountability and Problem Solving

The revised mechanism should be able to address questions of the Bank's accountability to its policies and procedures, as well provide a means by which problems raised by those affected by Bank-funded programs or projects can be resolved.

Accountability: The theory of accountability of international financial institutions is that the public should have a right to expect compliance with the policies and procedures that govern the Bank with regard to loans and projects. Such policies are intended to prevent harm to people and the environment, and protect the rights of citizens to access to information and participation in project design, implementation and evaluation. Compliance with these policies and procedures should improve project quality and development effectiveness and improve the credibility of the ADB.

The Inspection function of the ADB was created in large part to improve compliance and institutional accountability, by giving citizens the right to bring complaints to an independent mechanism within the Bank if they believe that because of policy non-compliance, they have been harmed by a project or loan.

In order to ensure accountability, the Bank's revised mechanism should include the following principles:

- The Complaints should be appraised by a competent body that is independent from the Bank Management. That body should be able to carry out its activities without interference from the Management and the Board. It should derive its authority from the Board, and therefore report to the governing body of the Bank, the Board of Directors.
- The bank should develop a performance evaluation mechanism for staff through which they are rewarded for complying with ADB policies.
- The existence of a complaint mechanism, or inspection function, should help to improve accountability of the institution by providing a means by which Bank staff and management learn from experience how to prevent problems through policy compliance and improve policy development and implementation.

Problem Solving: In addition to accountability, complainants who approach the Bank on the impacts of Bank-funded projects or programs seek solutions to the problems they have or will experience. The revised mechanism should include a process that will provide effective means for solving problems.

It is in the interest of affected people, the Bank, borrowing governments, the private sector, and the general public that the Bank have an effective problem solving mechanism so that potential and/or ongoing adverse impacts can be mitigated or addressed properly. In this way, further damage can be avoided, mitigated, or rehabilitated in a just and timely manner.

Other basic principles³ that need to be taken into account in revising the mechanism are as follows:

Organization and Personnel

- *Independence and reporting:* The new mechanism should be an independent body and should report to the Board. The key persons in charge of the new mechanism should be directly

³ See other recommended principles in Chapter III "Recommendations for Policy Change" in Strengthening Public Accountability: Recommendations to the Asian Development Bank (ADB) for Revising Its Inspection Policy by Bank Information Center (BIC) et. al. March 18, 2002. This document is available electronically at www.bicusa.org/asia/Civil_Society_Recommendations-March_18_2002.pdf

appointed by the Board through a transparent process with input from a multi-stakeholder selection committee.

- *Personnel:* The number of specialists on staff should be dependent on the mechanism's caseload. Initially it may be sufficient to appoint three permanent, senior specialists, each of which would be in charge of one of the following: (1) the Chair of the mechanism, (2) the problem solving arm, and (3) the accountability arm. The terms of reference for establishing the mechanism should allow for appointing additional specialists if required due to an increase in the number of incoming complaints. At all times the roles of the specialists should not overlap between the problem solving arm and the accountability arm of the mechanism.

The specialists should be appointed directly by the Board on a fixed-term, renewable basis. Having a permanent mechanism with specialists, as opposed to a "roster of experts", will allow for institutional learning and continuity through the building of expertise from one case to the next. Its permanence will allow for regular communication with the Board and with the Bank's stakeholders (affected communities, borrowing government officers, executing agencies, etc.), which will increase the mechanism's visibility and enable the mechanism's staff to clarify their mandate. Finally, a permanent mechanism with an independent secretariat will be better equipped to safeguard confidential information, including the anonymity of the claimants when necessary.

- *Criteria of personnel:* In order to ensure that the mechanism's specialists are independent, professional, and competent, the persons selected should meet the following criteria:
 - have substantial prior knowledge of the multi-lateral development banks (MDBs);
 - be able to demonstrate credibility and technical competence, including awareness of the complex environmental and social implications of development projects;
 - have the interpersonal skills and experience required to interact with and meet the different stakeholders involved in the problem solving/compliance process, including bank staff, government representatives and project affected people;
 - be able to deal thoroughly and fairly with complaints brought before them, and have recognized integrity and independence from the Bank Management;
 - have not worked for the Bank for five years prior to their service on the mechanism;
 - be excluded from future employment at the Bank
- *Selection process for mechanism members:* Mechanism members should be selected by the ADB Board in a participatory manner with input from civil society and community-based organizations in an open selection process. A multi-stakeholder selection committee should be formed to make recommendations to the ADB Board of Directors.

The ADB Board may appoint a Board sub-group of three or four members which, based on the recommendations of the multi-stakeholder selection committee, will appoint the mechanism's specialists, appraise the performance of these specialists with input from stakeholders, and renew the contracts if desired.

The Board's involvement in the selection and appraisal of the mechanism's key specialists will build the Board's trust in the mechanism and enhance the mechanism's credibility.

- *Independent means of communication with the public:* It is very important that the mechanism demonstrate its independence from the Bank Management to the public. The mechanism should be able to communicate independently with complainants, governments, and the public in general, and to maintain its own website and information flow separate from the Bank. It should have an independent budget to prepare its own publications, public statements, etc.
- *Outside Consultants:* If necessary, the mechanism should have the option of hiring outside consultants. These consultants should be selected based on their neutrality to the case in question and their technical expertise. The consultants should not have worked on the project/program in question and they should also be excluded from working for the Bank for a certain period after their service to the mechanism. However, the mechanism should have the option of rehiring consultants because knowledge that they acquire through the process can be beneficial to future cases.

The neutrality and independence of the consultants from regular bank contracting and consulting work are important. While in the beginning it may not be easy to find consultants who will meet such criteria, there is a growing demand for consultants specializing in various problem solving and accountability investigation-type work, given that various multilateral and bilateral institutions are establishing and expanding their accountability mechanisms, such as the European Bank for Reconstruction and Development (EBRD), the Inter-American Development Bank (IDB), the African Development Bank (AfDB), and soon the Japan Bank for International Cooperation (JBIC), in addition to the existing World Bank Inspection Panel and the IFC/MIGA CAO. A new market for such services will develop in a very short time, and the ADB should therefore not relax the criteria of neutrality and independence of the consultants to be hired by the new mechanism.

- *Independent Legal Counsel:* The mechanism should have its own legal counsel, instead of taking advice from the Bank's General Counsel, which is under the Bank's Management and therefore is tasked with defending the Bank. This will prevent a conflict of interest and will ensure additional technical assistance for the mechanism's staff. If the mechanism feels the need, it should also be allowed to call on the Bank's General Counsel for assistance.
- *Establishing an Independent Secretariat:* To ensure institutional independence, it is essential that the mechanism have its own secretariat with adequate staff, office space, and required equipment. This secretariat should be responsible for providing logistical and administrative support to the mechanism. The secretariat should also assist complainants in obtaining information about the mechanism and in filing complaints. This is a key requirement for making the mechanism accessible to affected communities. Persons who believe that they are being harmed by ADB projects or programs should be able to turn to this independent secretariat for help in filing a complaint.

Board Inspection Committee

- In the current Inspection Function, the Board Inspection Committee acts as the permanent body to which Inspection Requests are initially addressed. However, their function on the Committee puts Board members in the position of approving loans on the one hand and making decisions regarding policy compliance on the other; this undermines one of the main reasons for establishing the Inspection function: to provide a tool for the Board to have projects reviewed independently. The new permanent mechanism would be able to take up this function, and as a result the process would become more streamlined and far more independent. Therefore, the Board Inspection Committee should be abolished.
- A Board sub-group of three or four members, however, can be established with the task of appointing the mechanism's specialists (based on the recommendations of a multi-stakeholder selection committee), review the performance of these specialists, and renew the contracts if desired.

The Role of the Board of Directors

The role of the Board of Directors in the process should be:

- to establish and select the mechanism's personnel in consultation with civil society;
- to authorize the mechanism's budget;
- to review the performance of the mechanism's specialists and renew the contracts if desired;
- to supervise the mechanism and evaluate ongoing cases implementing problem solving measures, and evaluating compliance issues through periodic reports and annual reports as well as through meetings between the mechanism's staff and the Board;
- to approve the findings and recommendations for each case addressed by the mechanism on a no-objection basis.
- to review the Management's performance in policy compliance and in solving the problems as recommended and facilitated by the mechanism.

Accessibility for Filing Complaints

- Complaints can be made by anyone who feels that he or she will be or has been adversely affected by a project or program funded by the ADB.
- Complaints can be submitted in writing by mail, email, fax, or handed to the mechanism's secretariat.

- In order for the mechanism to be accessible to affected communities, the Bank should accept complaints written in local languages⁴. The mechanism should ensure that its communications with the complainants and documents relative to the Inspection are translated into the appropriate local languages, and allow the complainants to communicate with the Bank in their own language. It is the Bank's responsibility to ensure that it is able to communicate with the affected communities.
- If the Complaint is submitted by a non-affected representative, the Complainants must provide evidence that s/he is representing an affected party. This evidence must include the signature of the affected party. If requested, the affected party/complainants can remain anonymous.
- The ADB President and Board members should also be allowed to request that the mechanism conduct an investigation on compliance issues.
- Complainants should not be required to detail ADB non-compliance with its own policies. This task should be the responsibility of the mechanism's compliance arm.

Scope of the mechanism

- The mechanism can receive all complaints on impacts related to ADB-funded projects and programs. If the complaint involves a corruption allegation or procurement problems related to an ADB-funded project or program, the mechanism will refer the complaint to the ADB Anticorruption Unit⁵. In the event that there is a parallel corruption investigation of a case, the conclusions from that investigation should be considered by the mechanism in their overall assessment of the case.
- The mechanism should develop clear criteria of cases it can or cannot handle.

Informing Stakeholders about the mechanism

- An essential condition for the credibility of the mechanism is that stakeholders be informed of the mechanism, particularly affected communities for whom this mechanism is established. Other stakeholders include borrowing governments, donor governments, the private sector, and Bank staff. The ADB needs to allocate resources and develop strategies to pro-actively educate its stakeholders, particularly those that are likely to be affected by ADB-funded projects and programs, on the revised problem solving and accountability mechanism.

⁴ The World Bank Inspection Panel accepts claims in all languages. The UK and Swedish ombudsman mechanisms accept complaints in at least 10 different languages and provide information on the mechanisms in those languages as well.

⁵ There is an urgent need to review and strengthen the current ADB Anticorruption Policy and the Anticorruption Unit (AU). Experiences with corruption complaints sent to the AU have not shown transparency and effectiveness of the Policy and the AU. Without a strong Anticorruption Policy and Anticorruption Unit, the Bank's credibility and accountability will continue to be at stake.

The ADB should also be innovative about its outreach approach and should consider the use of multimedia tools to educate stakeholders.

- It is not sufficient for the ADB to post information about the mechanism on the website. Information about the mechanism should also be made available in local languages and discussed in community consultations for each and every project or program loan. This requirement should be made part of the revised Policy of this mechanism. In addition, the ADB should make information on individual cases available as soon as a complaint is sent to the ADB. All complaints received should be posted on the mechanism's website and the public should be informed on the different stages throughout the process of dealing with the complaints. All actions taken by the problem solving arms should be summarized and made public on a regular basis. Final reports on problem solving attempts should be made public at the same time that they go to the Board. Findings and reports prepared by the compliance arm should be available to the public at the same time that they go to the Board.
- The revised Policy should require the Bank Management and the mechanism to actively disseminate information in local languages about the Inspection process and mechanism to ADB resident missions, field missions and specific meetings and consultations at the local level. The Policy should state that the mechanism itself has a budget for public outreach.

Inclusion of Policy Compliance in Loan Agreements

- Each loan agreement should include a provision that specifies compliance with all ADB policies. The document should list specifically the policies relevant to the proposed project or program. This is an essential prerequisite to ensure the effectiveness of the revised mechanism because it will clearly define the scope of policies subject to the accountability arm of the mechanism for each individual project/program. All loan agreements must be in the public domain.
- Inclusion of policy compliance language in loan agreements will send a clear message to borrowing countries about the need for accountability and compliance with bank procedural requirements.

Mechanism's Recommendations and Delay of Loan Disbursements

- The mechanism should be allowed to recommend to the Board that they halt loan disbursements if it foresees the potential for irreversible damage and harm, or other urgent matters.

Mechanism's Access to Information and Project Site

- The mechanism should have access to all internal documents pertaining to the project and all Bank staff who are involved in project planning, project negotiation and decision-making. It

should be guaranteed access to project sites at any time, and must be able to meet with complainants in their countries.

Participation of Complainants in the Process

- The process should allow complainants to actively participate throughout the inspection or problem solving process. The complainants should be in agreement with the solutions proposed by the mechanism's specialists regarding any proposed problem solving option(s). They should also be allowed to propose the names of individuals/organizations that the mechanism should interview, as well as to propose project-site visits. The mechanism should regularly communicate with the Complainants regarding the progress of the problem solving option(s). As complainants cannot be expected to travel to Manila, the mechanism should visit the complainants for this purpose. Governments should not be able to block the mechanism from making site visits.

Nature of Management Responses to the Mechanism

- The Management should respond to the mechanism's problem solving arm by providing background information about the complaints, generating options for possible solutions in consultation with complainants, and be responsible for implementing problem solving through the options selected by the mechanism.
- Management should not dispute the findings of the mechanism's compliance arm as indicated in the mechanism's reports. Its response should describe how remedial changes will be implemented.

Inclusion of Private Sector Loans under the mechanism

- The new Policy should include private sector operations in the scope of the mechanism. The mechanism should handle claims regarding ADB private sector operations in addition to public sector claims, and thus create a more comprehensive system of accountability and problem solving for all ADB operations.
- We would also propose that:
 - The Bank make available information on proposed and ongoing projects/programs funded by the ADB at the earliest stage, including Project Profiles and Report and Recommendation of the President documents (RRPs). There should not be different disclosure and transparency guidelines between public and private projects funded by the Bank. The Bank's Information Policy should be revised accordingly.
 - Private sector operations' procedures for environmental and social assessments should be described more clearly than they are now so that they can be more useful for the complaint mechanism. Only by enforcing the same standards applicable to the public

sector will the Bank ensure its role in private sector projects is consistent with its policies and commitment in the public sector. The bank cannot afford to have discrepancies between its public sector and private sector operations.

- Claims from business competitors should be eligible to be filed with the new mechanism.

III. KEY ISSUES IN THE FIRST WORKING DRAFT

What is Inspectable?

All policies approved by the Board should be subject to compliance investigations, regardless of their existence and/or interpretation in the related Operational Manuals (OMs). The OMs are meant to be tools to assist Bank staff in implementing Board policies, but ultimately every policy approved by the Board becomes operative on the date which the Board agrees the policy is to take effect.

Every policy and strategy approved by the Board must be implemented by the Management and should therefore also be subject to inspection/scrutiny by the mechanism. Therefore, the Management should not have the role of deciding which policies or strategies are mandatory, which are recommendatory, or a mix between the two.

There is an urgent need for the Bank to develop a policy on how the Bank determines whether a Board approved statement is a policy, strategy, guideline, etc. It is also important that the Bank have a guide outlining what should be included in policies, strategies, guidelines, etc. Many of the Bank's policies and strategies contain important statements of goodwill, but lack clarity on how these statements are to be translated by the Bank in its projects/programs and what the parameters are to measure success/performance. There is also tremendous confusion on linkages and relevance between policies and strategies.

The Bank should also prepare guidelines for the process of developing and reviewing policies and strategies, particularly in the areas of disclosing information regarding the development/review of policies and strategies, transparency of the process and public availability of documents/drafts relevant to the review, public participation and consultations, incorporation of comments, and Board participation. Only in this way can these reviews be considered credible.

For whom is this mechanism?

The next Working Paper should sufficiently clarify that this mechanism is established to address concerns or complaints raised by communities or groups adversely affected by ADB-funded projects and programs. The First Working Draft continues to use the term 'beneficiaries' -- instead of 'affected people' -- throughout the document. This is a misleading term that should be changed.

It is equally important to create awareness inside the Bank that even if a small number of people are adversely affected by certain Bank-funded projects or programs, they nonetheless have the right to have their concerns addressed by the new mechanism.

Cost Implications

The costs of handling complaints should be an integral part of the project/program costs and should not be seen as a process requiring ‘additional’ costs, therefore justifying avoidance of an inspection altogether. Addressing complaints at the earliest stage is the best way to prevent incurring higher costs.

Staff Morale, Accountability, and the Adversarial Nature of the Accountability Mechanism

Until the Samut Prakarn case, the Bank staff and management had been able to avoid accountability because there was no independent oversight mechanism to ensure compliance with policies. This lack of experience with such an accountability mechanism may explain why Bank staff felt that their morale was undermined during the Samut Prakarn Inspection process.

The Bank needs to educate its staff and Board that there are indeed accountability issues inherent in their jobs, and that being accountable is an asset for the institution, instead of a liability. If Bank staff are aware of and adhere to the value of transparency and accountability, their opinion about an accountability mechanism will not be adversarial as they will recognize that the mechanism is part of the process of institutional checks and balances.

The RSDD’s Compliance Department vs. the Compliance/Problem Solving Mechanism

The Bank has a Compliance Department under the Regional Sustainable Development Division (RSDD). The Compliance Department’s role is ostensibly to ensure that projects or programs being prepared or managed by the regional departments are in compliance with the Bank’s safeguard policies (Information, Environment, Resettlement, and Indigenous Peoples Policies). However, it is a management tool and it works with Bank staff in charge of the projects/programs and therefore cannot scrutinize independently whether certain operations funded by the Bank have or have not complied with Bank policies. It plays a different role from the compliance/problem solving mechanism discussed in this paper. Therefore, the RSDD’s Compliance Unit should not be viewed as a replacement for an independent compliance/problem solving mechanism.