

## **COMPLIANCE REVIEW PANEL: CLARIFICATIONS ON THE APPLICATION OF CERTAIN PROVISIONS OF THE ACCOUNTABILITY MECHANISM POLICY 2012**

### **I. INTRODUCTION**

Throughout the course of the years of implementing the Accountability Mechanism Policy 2012 (AM Policy), there have been various similar or recurring issues that have arisen that would benefit from guidance to ensure a consistent approach when addressing such issues. Set forth below are the identified AM Policy implementation issues and guidance on their resolution for effective implementation of the AM Policy.<sup>1</sup>

### **II. ISSUES AND GUIDANCE**

#### **Issue 1: Clarification of the term “evidence” relating to determining eligibility of a complaint in para. 179 of the AM Policy**

##### **A. Policy Scope of the Issue**

1. The issue is whether the Compliance Review Panel (CRP) should seek to find “evidence” or “prima facie evidence” of noncompliance when determining the eligibility of a complaint. In the past, the CRP eligibility reports have used both “evidence” and “prima facie evidence.” Para. 179 of the AM Policy requires that the CRP find “evidence of noncompliance” to determine that a complaint is eligible.

##### **B. Guidance**

2. “Evidence” means the body of available factors or indications—including facts, data, testimony, records, analyses, reports, and other information—that indicate whether noncompliance occurred, whereas “prima facie evidence” refers to evidence that is sufficient to support the conclusion that noncompliance occurred. Based on these definitions and the use of the term “evidence” in para. 179 of the AM Policy, the application of prima facie evidence as a standard for determining eligibility is erroneous in two respects: (i) it imposes a more onerous condition on eligibility than is intended by the AM Policy; and (ii) when prima facie evidence is found at the eligibility phase, it unfairly, unnecessarily, and inappropriately creates a presumption of noncompliance and makes any following compliance review less objective. For clarity and to distinguish between the two phases, the CRP will use a term similar to “preliminary or initial evidence” sufficient to establish a credible claim that noncompliance may have occurred at the eligibility review stage and “evidence” at the compliance review stage.

#### **Issue 2: Clarification of the scope of the CRP monitoring ADB Management’s Remedial Action Plan**

##### **A. Scope of the Issue**

3. Para. 192 of the AM Policy states the following:

“The CRP will monitor the implementation of any remedial actions approved by the Board. It will report to the Board concerning implementation of Board decisions related to remedial measures, including its determination on the progress in bringing the project into

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<sup>1</sup> The Office of the Compliance Review Panel has developed this guidance in cooperation with the Board Compliance Review Committee and the Office of General Counsel of the Asian Development Bank.

compliance.”

4. Para. 192 does not provide guidance for the case in which the CRP finds that the Remedial Action Plan (RAP) is being implemented, but the CRP also finds that implementation of the RAP will not bring the project into compliance. This circumstance may arise when it is found that changes need to be made in the RAP after it is approved by the Board in order to bring the project into compliance. The AM Policy does not provide a mechanism for updating or changing the Board-approved RAP in the monitoring and reporting process.

## **B. Guidance**

5. A Board-approved RAP represents Management and the CRP’s determination of the requirements to bring the project into compliance. Para. 191 of the AM Policy provides that “The Board will consider Management’s proposed remedial actions ... and make a decision regarding the remedial actions to bring the project into compliance and/or to mitigate any harm, as appropriate.” Para. 192 simply requires the CRP to monitor the implementation of the RAP, as approved, and to report on the progress that the borrower has achieved in implementing the RAP.

6. As a practical matter, if during implementation of the RAP, the CRP’s monitoring reveals issues or shortcomings that, in the CRP’s judgment, require changes to the RAP in order to achieve compliance, then nothing prevents the CRP from raising its concerns in its monitoring reports or with Management. Minor changes to the RAP or its implementation could then be discussed with the relevant operations department, which might then consult the borrower and affected people—all of which might result in changes in implementation and more effective remediation. By virtue of this approach, such minor implementation changes would become part of the RAP and come under the purview of the CRP’s future monitoring.

7. Where the CRP determines that more significant changes to the RAP are required, the CRP might report such views to Management and the Board Compliance Review Committee (BCRC), whereupon Management could propose amendments to the RAP for the Board’s consideration. This situation could arise, for example, where remedial actions contained in the RAP become impossible to implement and some alternative solutions are available that would bring the project into compliance. This approach to considering Board-approved amendments to the RAP is not expressly contemplated by the AM Policy, but it would be consistent with the objective of the AM Policy to remediate issues of noncompliance.

8. In a case where the CRP and the relevant operations department and/or Management do not agree on (i) the need to change the RAP, (ii) the type or nature of the change needed to achieve compliance, or (iii) whether a needed change is minor or more significant, then the BCRC could take a view of such issue, in consultation with ADB’s Office of the General Counsel (OGC).

### **Issue 3: Clarification of the term “through the BCRC”**

#### **A. Scope of the Issue**

9. Para. 134 of the AM Policy comprises part of the BCRC’s terms of reference (TOR) and provides, among other things, that the BCRC will review (i) the CRP’s draft compliance review reports, and (ii) the CRP’s draft reports on monitoring implementation of remedial actions. Para. 182 of the AM Policy states that “the CRP will submit its eligibility report through the BCRC to the Board” (emphasis added). The term “through the BCRC” requires clarification, particularly in light of the CRP’s independence and the role of the BCRC as manager and overseer of the CRP’s work and

the implementation of the AM Policy on behalf of the Board.<sup>2</sup>

## B. Guidance

10. Under the AM Policy, the CRP is independent from Management, which is necessary to achieve a degree of objectivity required to fully and fairly perform the compliance assessment and monitoring functions. But the CRP is not independent from the Board. Instead, the CRP is the fact-finding arm of the Board.<sup>3</sup> The various provisions of the AM Policy covering the functions of the CRP and the BCRC together clearly vest in the BCRC the role of supervisor and overseer of the CRP and its work, and liaison between the CRP and the Board.

11. Accordingly, the term “through the BCRC” in para. 114 (reporting to the Board through BCRC), para. 132(ix) (work program through the BCRC), para. 136(i) (Board oversight through BCRC), para. 182 (submission of eligibility reports through the BCRC), and para. 188 (submission of final reports through BCRC) of the AM Policy all have the cumulative effect of constituting the BCRC as the manager, supervisor, and overseer of the CRP. As such, the BCRC is not meant to serve a mere pass-through conduit function by which the BCRC would simply distribute the CRP’s reports. Instead, the BCRC is to act as a gateway between the CRP and the Board. The BCRC’s role under the AM Policy is to oversee the various components of the compliance review process on behalf of the Board, including reviewing different reports prepared by the CRP for the Board to ensure that they comply with the AM Policy.<sup>4</sup>

12. As described in para. 10 above, the CRP is not functionally independent because its function within the AM Policy depends on a work program, budget, TOR, and reports that are reviewed by the BCRC and the Board. The CRP is a separate organ comprising experts in their fields and should be construed as having professional independence from the BCRC and the Board. Accordingly, the CRP is given a high level of deference as to matters within its professional competence, i.e., determinations of facts found in the compliance review process relating to the design, construction or operation of a project; noncompliance; and harm. As a body of professionals, the CRP’s analyses and conclusions are derived through its independent (professional) judgment, and neither the BCRC nor the Board can require that the CRP change or alter the analyses or conclusions in its reports.

13. Based on the above analysis of its role, the BCRC may (i) accept the findings or recommendation of the CRP and pass the report to the Board for consideration; (ii) disagree with the CRP’s findings or recommendation, or make a different or variant recommendation to the Board for its consideration; or (iii) accept the CRP’s findings, but recommend that the Board take an action different than that recommended by the CRP. In any such case, the CRP’s professional independence is fully retained because the BCRC does not change the CRP’s findings or recommendation but only asserts its own judgment and discretion, leaving the final determination of the relevant matter to the full Board.

### **Issue 4: Clarification of the sequencing and timing of the CRP’s communication to different stakeholders regarding eligibility decisions under para. 181 of the AM Policy**

<sup>2</sup> This clarification is particularly relevant in the context of para. 135 (the BCRC’s function), para. 136 (role of the Board), para. 179 (determining eligibility), para. 181 (the CRP’s advising stakeholders), para. 185 (the CRP’s draft report), and para. 188 (the CRP’s final report) of the AM Policy.

<sup>3</sup> AM Policy para. 114 states that “The CRP will be a fact-finding body that reports to the Board through the BCRC ...”; para. 130 states that “The CRP will be a fact-finding body on behalf of the Board.”

<sup>4</sup> AM Policy para. 135 states that “BCRC’s function in clearing the proposed TOR and reviewing the draft compliance review reports will be to ensure that the CRP operates within the scope of the compliance review function as set out in the Accountability Mechanism policy.”

**A. Scope of the Issue**

14. Para. 181 of the AM Policy requires that “The CRP will inform the complainants, the borrower, the Board member representing the borrowing country, Management, and the operations department concerned of its determination concerning eligibility.” But the sequencing of this notification step in the process is not clearly expressed in the AM Policy.

**B. Guidance**

15. An eligibility report prepared by the CRP involves significant consultations and assessments of information and preparation of drafts, generally in a very short period of time (i.e., within 21 days from the receipt of Management’s response on the complaint). Sometimes, the CRP also fields a fact-finding mission to facilitate the determination of eligibility. New facts and details may surface at any stage of this work. Therefore, it is prudent for the CRP to continue the current practice of informing the stakeholders (i.e., complainants, ADB management, and the borrower, as identified in para. 181 of the AM Policy) after the eligibility report is submitted to the Board and the Board has made a determination pursuant to para. 182 of the AM Policy. The sequence and timing of this approach is not strictly required by the AM Policy, but the AM Policy does not prohibit the current approach taken by the CRP.

**Issue 5: Clarification of the scope of the compliance review****A. Scope of the Issue**

16. Para. 186 of the AM Policy provides that “the CRP compliance review report will focus on the specific complaint.”

17. Concerns have been raised in the past to the effect that, in some cases, focusing strictly and narrowly only on the precise scope of the issues raised in a complaint may be too narrow, and would prohibit the CRP from reviewing other instances of noncompliance in the same project—even where such noncompliance appears to result in direct and material harm. This scenario could arise because complainants might raise only the issues that directly concern them, such as compensation in resettlement policy or visible environmental issues directly affecting them, thereby potentially omitting other important issues that affect them or other project-affected people. The AM Policy therefore appears to strive to limit the scope of compliance reviews, even at the risk that other instances of noncompliance could be unremediated or may form the basis for a subsequent complaint.

**B. Guidance**

18. A CRP compliance review is not a fishing expedition or problem-seeking exercise in which reviewers search for problems or solicit people to complain. The requirement of para. 186 to “focus on the specific complaint” compels the CRP to limit its compliance reviews to the issues specifically raised in the complaint (during the eligibility phase) and in the scope defined in the TOR approved by the BCRC during the compliance review phase. Common sense and experience demonstrate, however, that there might be compliance review cases where, in the course of the review, the CRP discovers obvious and conspicuous problems or likely problems that appear to have arisen from ADB’s noncompliance with its policies and procedures. It would be inconsistent with the overall purpose and objective of the AM Policy and recognized good practice to require the CRP to turn a blind eye towards such clear indications merely because certain affected people were unaware and/or have not complained.

19. A practical course of action for the CRP is to find a balance between the overly broad approach and the overly narrow TOR-only approach, consistent with ADB's responsibility to conduct its operations responsibly in accordance with its operational policies and procedures, and to redress or mitigate direct and material harm arising from its noncompliance.

20. Therefore, when the CRP's review reveals obvious and conspicuous problems or likely problems that appear to have arisen from ADB's noncompliance with its policies and procedures, the CRP is advised to consult with the relevant ADB project team and/or operations department, and the BCRC for them to consider whether CRP's review or TOR should be adjusted, and determine whether

- (i) to add to its eligibility review and/or final compliance review reports a description of the "additional impacts" and/or "additional affected people," together with findings of noncompliance and direct and material harm; or
- (ii) to consult with the BCRC and seek an amendment to expand the TOR as appropriate in cases where the "additional impacts" are sufficiently serious or of sufficient magnitude under relevant operational policies and/or where further significant investigation, time, or resources are required.

**Issue 6: Simplifying the process where additional complaints are filed by different complainants but on the matters already covered by a prior or ongoing complaint**

**A. Scope of the Issue**

21. Clarification is sought on the process to be followed when subsequent complaints are received regarding matters covered in a prior complaint.

**B. Guidance**

22. The objective of the AM Policy is to provide an effective forum for delivering solutions to redress or mitigate direct and material harm caused or likely to be caused by ADB's noncompliance with its operational policies and procedures in an ADB-assisted project. With this objective in mind, (i) para. 142(iii) of the AM Policy provides that complaints should be excluded from the problem solving function if the concerned matters were previously considered by the special project facilitator, and (ii) para. 148(v) of the AM Policy provides for the exclusion from the compliance review function of the matters that have already been considered by the CRP.<sup>5</sup> These provisions clearly establish the principle that both accountability mechanisms (problem solving and compliance review) should focus on the problem and not the complainants. These two paragraphs provide for the following two exceptions: (i) where the complainants have new evidence that was previously not available, and (ii) where the subsequent complaint can be readily consolidated with the earlier complaint.

23. The AM Policy provides guidance under paras. 142 and 148, as provided in Para. 22 above, but does not specify a procedure to be followed in such circumstances because each such case can involve different circumstances that require different approaches. It is important for the CRP to adopt the most practical and efficient approach relevant to the nature of the subsequent complaint. For instance, if it is clear that the grievances in the subsequent complaint have already been either (i)

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<sup>5</sup> Additionally, para. 148 of the AM Policy provides for the exclusion from the compliance review function all types of complaints excluded from the problem solving function except item in para. 142(iii) of the AM Policy, which relates to matters already considered by the special project facilitator.

addressed in an earlier complaint under investigation or (ii) included in the RAP for an earlier complaint, then the subsequent complaint should be declared ineligible without going through the detailed compliance review process. The CRP should also adopt a practical and responsive approach in dealing with new complainants to assure the complainants that their concerns are effectively addressed.<sup>6</sup>

### **Issue 7: The requirements of access to all information by the CRP to be included into relevant sections of the Operations Manual**

#### **A. Scope of the Issue**

24. The AM Policy clearly states that the CRP will have access to all ADB staff and Management, and all ADB records that the CRP deems relevant, except personal information that is typically restricted.

#### **B. Guidance**

25. The AM Policy and Operations Manual (OM) L1 clearly specify that the CRP will have access to all relevant staff, Management, and records. The AM Policy and OM L1 also state that the Management and staff will ensure that the CRP has full access to project-related information in carrying out its functions.<sup>7</sup> To meaningfully implement these provisions, heads of operations departments may issue a memo to their staff pointing out the broad access contemplated to ensure that staff provide complete access to all information and resources (except for personal information), as required. Should any staff have concerns about particularly confidential or sensitive information, those concerns should be raised and discussed by the operations departments with OGC and the Chair of the CRP for handling on a case-to-case basis. The CRP has a responsibility to maintain the confidentiality of any sensitive or confidential information shared with it, and appropriate steps can be taken to share information that minimizes risks of broader disclosure or dissemination.

### **Issue 8: Definition of “harm” and inclusion of “likely harm” throughout the AM Policy**

#### **A. Scope of the Issue**

26. The AM Policy refers to “harm” and “likely harm” in different places for different purposes. Several paragraphs of the AM Policy (paras. 103 and 179) include “harm” and “likely harm.” However, several paragraphs (paras. 186 and 187) refer only to “harm.” This has led to some confusion about whether a finding of likely harm is the objective of a compliance review and subsequent remedial actions or whether the AM Policy limits required remediation only to factors that cause presently existing harm. The current practice of the CRP is to interpret all “harm” as both harm that has materialized at the time of compliance review or harm likely to materialize in the future.

#### **B. Guidance**

27. The use of terms “harm” and “likely harm” under the AM Policy involve various contextual elements, and it is important to understand the meaning of these terms with reference to their context

<sup>6</sup> In past cases, the CRP has declared ineligible subsequent complaints filed by a different distinct set of complainants but covering matters that had already been the subject of previous complaints, and in some cases, such subsequent complaints were consolidated with the earlier complaints.

<sup>7</sup> The relevant paragraphs of the AM Policy are 109, 116, and 137. The relevant paragraphs of OM L1/OP are 2, 7, and 23.

and purpose. The CRP performs its role by

- (i) processing complaints to determine eligibility, including whether there is evidence that an ADB-assisted project has caused or is likely to cause harm to local people;
- (ii) investigating complaints to determine whether ADB failed to comply with its operational policies or procedures and whether ADB's noncompliance with its operational policies or procedures resulted in causing direct and material harm to local people, in an ADB-assisted project;<sup>8</sup> and
- (iii) drawing certain conclusions expressed as findings that will form the basis for Management's RAP.<sup>9</sup>

28. It is important, therefore, to define such terms in the context of the AM Policy.

- (i) The definition of the term "harm" should be understood to have its common meaning (i.e., damage, loss, expense, detriment, ill-consequence, impairment, injury, etc.). ADB's noncompliance with its operational policies and procedures is not, in and of itself, "harm" within the meaning of the AM Policy. It is a necessary factor that must be connected to direct and material harm in order to trigger a requirement for appropriate remediation.
- (ii) The term "direct harm" is a legal conclusion, which connects action to harm without any intervening causes between the act and the resulting harm. For purposes of the AM Policy, a specified harm would be found to have resulted directly from a noncompliance with operational policies and procedures only where such harm arose or occurred in the absence of intervening actions or events connecting the noncompliance and the harm.<sup>10</sup> In addition, where two or more events or circumstances have caused material harm, and ADB's noncompliance was one such event or circumstance, then the CRP should not seek to apportion the responsibility for such harm between multiple contributors, and, in any case, if ADB is one of the contributors, then it is responsible to remedy the noncompliance causing that harm.
- (iii) The term "material harm" is a legal conclusion that is based on a factual determination of the degree of significance or importance of the harm. The AM Policy's purpose is that harm should be found to be "material" to the project affected people where such people are reasonably and objectively understood to have suffered or incurred adverse impacts that are not insignificant, taking into account the nature, magnitude, duration, and other characteristics of the harm.

29. With regard to the final stage of the compliance review when the CRP submits its final report, the AM Policy requires the CRP to "ascertain whether the alleged direct and material harm exists"

<sup>8</sup> Para. 130 of the AM Policy provides that "The CRP will investigate alleged noncompliance by ADB with its operational policies and procedures in any ADB-assisted project in the course of the formulation, processing, or implementation of the project that directly, materially, and adversely affects local people."

<sup>9</sup> Para. 137(iv) of the AM Policy wherein Management will propose remedial actions based on the CRP's findings.

<sup>10</sup> The following is a hypothetical scenario to illustrate the concept of "direct harm." An ADB policy application required the construction of an access road on a project site, and such access road was not constructed. If a third party constructed an alternative roadway adjacent to the site but failed to adequately maintain the roadway, and a car accident resulted, then the third-party construction of the roadway and the failure to maintain it are intervening events and break the direct link between ADB's noncompliance and the harm to the car driver. Accordingly, under the AM Policy, such harm did not occur "directly" from such noncompliance in an ADB project.

(para. 186, emphasis added). “Ascertain” means to make a determination with certainty, and “exists” refers to a current state of reality. Thus, only direct, material and actual existing harm determined with some level of reasonable certainty to be caused by ADB’s noncompliance with its operational policies and procedures is to be appropriately included within the findings and conclusions in the CRP’s final report.

30. In paras. 103 and 106 of the AM Policy, the reference to “likely” harm arises in the context of the allegations, which, by their nature, are claims or assertions that something has occurred, and therefore, require investigation. By the time the compliance review process moves from the allegation phase to the findings phase, the question of suspected “alleged, possible, or likely” harm versus “real and existing” harm must be resolved in order to be included in the CRP’s final report as definitive findings or conclusions that would trigger a required Management response in the plan of remediation.

31. In addition, when a compliance review is undertaken during a design or planning phase prior to construction, where the future construction or operation of the project is likely to cause harm, then “likely harm” would fairly be included in the findings of the CRP’s report. A reasonable level of certainty that the harm will occur is required.

32. Where there are instances in which the CRP has clear evidence that establishes the causation between ADB’s noncompliance with its policies or procedures and a future material harm that has not yet occurred but is clearly “likely” to occur at some future time, then the CRP should take note of such likely material harm. While likely harm is not expressly contemplated by the AM Policy in the context of required remediation, the practical effect is that likely harms that are reasonably certain to occur will be identified by the CRP and will normally be required to be remediated by the Board.

## **Issue 9: Administrative closing of pending complaints filed with the accountability mechanism complaint receiving officer**

### **A. Scope of the Issue**

33. Guidance is required on administrative and housekeeping matters concerning the timeframe (i) within which complainants are required to complete the minimum requirements, as specified in para. 151 of the AM Policy, for filing a complaint; and (ii) for which the complaint receiving officer (CRO) will keep the complaint open due to complainants’ failure to comply with para. 151 of the AM Policy.

### **B. Guidance**

34. Para. 159 read with para. 160 of the AM Policy is the closest analogy in this matter where 60 calendar days’ time is provided to the complainants for clearly indicating their choice of accountability mechanism function if either the complainants did not clearly indicate their choice for problem solving or compliance review in the first place or if any party in ADB objected to the CRO’s decision on where to forward the complaint.<sup>11</sup> Similarly, the CRO should close all complaints pending for more than 60 calendar days due to complainants’ failure to comply with para. 151 of the AM Policy. The 60-calendar day period is to be counted from the date of the CRO’s letter to complainants requesting compliance with the requirements of para. 151. The closure of the complaint will be without prejudice to the same being refiled under the AM Policy.

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<sup>11</sup> Paras. 157–158 of the AM Policy.