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**Comments and Recommendations on
The IDB's *Proposed Independent Consultation and Investigation
Mechanism***

By
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September, 2009

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I. Introduction

The Inter-American Development Bank's (IDB) *Proposed Independent Consultation and Investigation Mechanism* (Apr. 29, 2009) (the *Proposed Mechanism*) is intended to replace the IDB's existing Independent Investigation Mechanism, by which the Bank investigates allegations of its failure to comply with its own operating policies. This paper offers our comments on the *Proposed Mechanism* from the particular point of view of indigenous peoples' human rights concerns, along with our recommendations for improving its independence, accessibility, scope and transparency.

In January of 2009, we published a paper entitled *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights*.¹ The paper is attached as an appendix to this document. In the paper, we explained our position that Multilateral Development Banks, as inter-governmental organizations, are subject to the legal obligations to respect, protect, and promote human rights that apply to states generally. This principle, among others, frames our views on the obligations of the Bank with regard to indigenous peoples and all those potentially affected by Bank-financed projects. Consequently, it also informs our comments on the *Proposed Mechanism*.

According to the principles described in our paper, the IDB, like all Multilateral Development Banks, is legally bound to respect, protect, and promote human rights and should be held accountable for these obligations. We believe such principles are elements of international law that are evolving and crystallizing as binding rules of law through regular state practice and through their growing recognition as legal rules by states.²

While the principles are still in the process of becoming universally accepted, this should neither prevent the positive development of this area of law nor preclude the functioning of a project complaint mechanism within the IDB structure itself. In Principle 7, we outline the responsibility of Banks to receive and respond to complaints by affected communities from a human rights law perspective.

Principle 7. Multilateral development banks shall institute written procedures for the submission and consideration of complaints of human rights violations on behalf of any person or group with respect to any project or activity of the bank. Such procedures shall result in a written report where a human rights violation has occurred and recommendations for corrective action by the bank and by the project as appropriate. Multilateral development banks shall take prompt and effective action to correct any human rights violation identified by such a report and shall take effective measures to prevent future violations.

The internal complaint procedure required by this Principle is critical in order for MDBs to address the human rights concerns that frequently emerge from their projects and/or activities they support. These procedures should be carried out by MDBs in an effective and transparent fashion, and these procedures must allow project-affected people to make complaints of human rights violations concerning a project and/or operation to a MDB body or official. The body or official

¹ Robert T. Coulter, Leonardo Crippa, and Emily Wann, *Principles of International Law for Multilateral Development Banks: The Obligation to Respect Human Rights*, Indian Law Resource Center (2009).

² *Id.* at 5.

should be independent from those who have responsibility for the project or activity in question. Naturally, the normal rules of fairness, openness and record keeping must be observed.³

Even though the *Proposed Mechanism* is not a human rights complaint procedure as described in Principle 7, it must still be improved in four critical areas, namely, independence, accessibility, scope and transparency. These areas are inherently interrelated and together are vital for improving the performance of the Mechanism as a whole. Our comments and recommendations addressing each of these areas are based on the procedural rules governing other Banks' project complaint mechanisms. Consequently, we strongly encourage the IDB to take our comments and recommendations into account in order to improve its own Mechanism.

II. Independence

The Mechanism should have a greater degree of independence from Bank management and leadership in order to carry out its activities in a fair, impartial, and effective manner. While total independence is impossible for an internal Bank mechanism, we have identified several ways to increase the autonomy of the *Proposed Mechanism* and the Panel members.

32. Term

As is the case with the World Bank (WB) Inspection Panel, members should be limited to one term.⁴

The panel members shall be appointed for terms of five (5) years, which may ~~be extended only once~~ **not be extended or renewed**, with the exception of the first Panel, the members of which shall be appointed for staggered terms of two or three years, subject to renewal for one additional term. The first Panel Chair shall be appointed for a term of three (3) years, which may be extended only once.

33. Eligibility for Panel service

After serving on the Panel, members should not be permitted to work for the Bank in any other capacity. A two-year limit is insufficient to ensure the independence of Panel members. The Draft Rules of Procedure proposed in the context of the European Bank for Reconstruction and Development's (EBRD) review of its Project Complaint Mechanism (previously known as the Independent Recourse Mechanism) include such a prohibition.⁵

³ ROBERT T. COULTER, LEONARDO CRIPPA & EMILY WANN, PRINCIPLES OF INTERNATIONAL LAW FOR MULTILATERAL DEVELOPMENT BANKS: THE OBLIGATION TO RESPECT HUMAN RIGHTS, 39, Indian Law Resource Center (2009).

⁴ See IBRD Resolution 93-10 and IDA Resolution 93-6, para. 3 (Sep. 22, 1993), *available at* <http://go.worldbank.org/J19FS7JW50> [hereinafter WB Inspection Panel] ("Each vacancy thereafter shall be filled for a period of five years, provided that *no member may serve for more than one term.*" (emphasis added))

⁵ See EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, PROJECT COMPLAINT MECHANISM DRAFT RULES OF PROCEDURE, para. 48, (2008), *available at* <http://www.ebrd.com/about/integrity/irm/dproc.pdf> [hereinafter EBRD] ("The PCM Expert, *upon completion of his or her term of service, will not be entitled to work for the Bank* (either as a staff member, Bank official, Director, Alternate Director, Director's Adviser or consultant) at any point in the future." (emphasis added))

Executive Directors, Alternate Executive Directors, Counselors, Advisors, or any employee of the Bank or persons holding consultant appointments shall not serve on the Panel until two (2) years have elapsed from the end of their service to the Bank. If a Panel member is called to work for the Mechanism during his or her term, the Panel member shall not be entitled to work for the Bank (either as employee, consultant, Executive Director, Alternate Executive Director, or advisor, assistant or consultant thereto) ~~for a period of two (2) years~~ after the expiry of his or her term.

37. Resignation or removal from Office

As is the case with the WB Inspection Panel⁶ and the EBRD Proposed Project Complaint Mechanism,⁷ members should only be removed *for cause*.

Members of the Panel may resign or be removed by the Board **for cause** at any time without cost or liability to the Bank. In the event a member is removed or resigns from the Panel, a replacement may be appointed by the Board, upon recommendation of the President, to complete that term or appointment.

39. Authority to adopt administrative procedures

This section should be modified to emphasize the independence of the Panel in establishing its internal procedures, for example, in the following manner:

The Panel will have the authority to establish procedures for the administration of Panel activities and for the conduct of investigations, **without the involvement or approval of Bank management**.

79. Board decision

This section states that the Board or the President shall make the “final decision.” However, it is unclear to what decision this refers — a decision to accept or reject the Panel’s findings, a decision on what course of action the Bank should take, or some other decision entirely. This should be clarified. If indeed this paragraph refers to a decision regarding the appropriate course of action in response to the Panel’s findings, we believe that final authority should rest with the Panel itself.

~~The Board or the President, as the case may be, shall make the final decision and instruct Management regarding any subsequent actions that may be deemed appropriate or necessary in light of the Panel findings.~~

81. Monitoring

Following the example of the International Finance Corporation (IFC) Compliance Advisor Ombudsman⁸ and the EBRD Proposed Project Complaint Mechanism Officer,⁹ the

⁶ See WB Inspection Panel, *supra* note 4, at para. 8 (“Members of the Panel may be removed from office only by decision of the Executive Directors, *for cause*.” (emphasis added))

⁷ See EBRD, *supra* note 5, at para. 48 (“Experts may be removed by the Board *for cause*.” (emphasis added))

⁸ See INTERNATIONAL FINANCE CORPORATION, COMPLIANCE ADVISOR OMBUDSMAN OPERATIONAL GUIDELINES, § 2.4.5 (Apr. 2007) available at <http://www.cao-ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf> [hereinafter IFC CAO] (“The

Proposed Mechanism's Panel should monitor the implementation of all remedial actions, not only when requested by the Board.

~~At the Board's request, The Panel will~~ **shall** monitor implementation of any approved remedial actions as a result of a Compliance Review and ~~will~~ report at least annually to the Board and the President.

III. Accessibility

The Mechanism should be more accessible to affected communities by taking into account their particular needs and circumstances prior to and throughout the consultation and investigation process. An accountability mechanism can only be effective if affected communities are able to access it. Thus, maximum accessibility to project-affected communities, including indigenous peoples, should be a primary feature of the Mechanism. Affected communities may face serious obstacles to accessing information on Bank Financed Operations and making effective Requests. For indigenous peoples, language, cultural, and geographical barriers are often serious concerns. As it is designed, the *Proposed Mechanism* falls short of providing reasonably adequate access to all affected communities. We therefore recommend the following changes:

43. Who can file a Request for Consultation?

To increase the accessibility of the Mechanism to local communities, Requesters should be permitted to appoint whomever they choose to represent them, regardless of where the representative resides. Residency in the national territory should not be required for the purpose of filing a Request, as is the case with the EBRD Proposed Project Complaint Mechanism.¹⁰ Requesters may wish to appoint representatives residing outside of the national territory of the project, since such individuals or organizations may have more knowledge of Bank policies and procedures and better access to information. Indeed, this is also the governing standard with regard to the WB Inspection Panel.¹¹

A request may be presented to the Office by one or more persons, groups or organizations or by a qualified representative of the Requester ~~residing in the national territory of the relevant borrower, recipient or technical cooperation beneficiary~~. If a Request is presented through a representative, it should clearly identify the person or people on whose behalf it is acting and provide evidence of its authority to represent them.

55. Consultation Phase exercise

Ombudsman may also review implementation of its own recommendations by the sponsors, IFC/MIGA, and report to the President and inform the Board of the World Bank Group.” (emphasis added))

⁹ See EBRD, *supra* note 5, at para. 44 (“The PCM Officer will monitor the implementation of any actions approved by the Board or President, as the case may be, to address the findings of non-compliance.” (emphasis added))

¹⁰ See *id.* at 3. (“2. Two or more individuals and/or one or more organization(s) (including national and international NGOs) may submit a Complaint seeking a Compliance Review.” (emphasis added))

¹¹ See WB Inspection Panel, *supra* note 4, at para. 12 (“The Panel shall receive requests for inspection presented to it by an affected party in the territory of the borrower ... or by another representative in the exceptional cases where the party submitting the request contends that appropriate representation is not locally available....” (emphasis added)).

Though it is important that the Consultation Phase be flexible enough to respond to the particular needs and characteristics of the parties involved, we recommend that specific language be included to safeguard the land and resource rights and interests of indigenous communities in the consultation process according to current international law standards. To our surprise, although the IDB Operational Policy on Indigenous Peoples recognizes the importance of such consultation,¹² the *Proposed Mechanism* makes no reference to it.

The legal requirements for consultation with indigenous peoples may vary depending on what the consultation is about. Where a Request concerns rights of indigenous peoples to their lands or resources, international human rights law establishes the obligation to carry out a free, prior and informed consultation with indigenous peoples, as well as to obtain their consent prior the approval of any project affecting their lands. In such circumstances, the resulting consultation process must be characterized by the elements of being prior to a decision, being based on full and complete information, and being genuinely free and without pressure or duress of any kind. Human rights instruments, including the recently adopted United Nations Declaration on the Rights of Indigenous Peoples¹³ and the International Labor Organization (ILO) Convention No. 169,¹⁴ clearly establish the importance of this type of consultation with regard to land and natural resource rights. The same is true with respect to the Inter-American Court on Human Rights decision in the *Saramaka* case.¹⁵ Where the consultation concerns other matters, the standards should in fact be the same, though international law may not absolutely require it.

The *Proposed Mechanism* should pay particular attention to indigenous peoples as Requesters within any consultation process, including the *Consultation Phase Exercise*. Because of the procedural nature of consulting and obtaining the consent of indigenous peoples, the IDB should consider consultation and consent as guarantees within the rules of procedure governing the Mechanism. Apart from referring to consultation and consent in the Operational Policy on Indigenous Peoples, the IDB should reflect these procedural guarantees in the *Proposed Mechanism* according to current international law standards. The Operational Policy was adopted in 2006, and the current international law standards were adopted and further developed by the international community afterwards. For instance, the UN Declaration on the Rights of

¹² See INTER-AMERICAN DEVELOPMENT BANK, OPERATIONAL POLICY ON INDIGENOUS PEOPLES AND STRATEGY FOR INDIGENOUS DEVELOPMENT, OP-765, para. 4.2 (a), 4.4 (a)(ii), 4.4 (a)(iii), 5.3(b) (Feb. 22, 2006).

¹³ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 32(2) (Sep. 13, 2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” (emphasis added)).

¹⁴ International Labor Organization, Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, ILOLEX C169, art. 15(2) (June 27, 1989) (“...governments shall establish or maintain procedures through which they shall consult [indigenous] peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.” (emphasis added)).

¹⁵ Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), para. 129 (stating that the State must ensure the effective participation of indigenous peoples, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan that takes place within their territories).

Indigenous Peoples and the Saramaka decision were adopted in September and November of 2007, respectively.

The objective of a Consultation Phase exercise is to address issues raised in the Request. There is no guarantee that the Consultation Phase will resolve all issues to the satisfaction of the parties. Consultation Phase actions will be tailored to the individual Request, depending on factors such as its urgency, principal parties, remedies sought, and the likelihood that the consultation will have positive outcomes. For example, any or more of the following could be used: fact-finding, promoting further discussion and negotiation among the parties to stimulate self-generated solutions; retainer of experts; and more active, consensual, problem-solving approaches such as facilitation, conciliation or mediation or review or investigation. Because the Consultation Phase process is intended to be flexible and tailored to the needs of each operation, there are no standard rules, timeframes or procedures for this phase, except **that, as otherwise explicitly set forth in this policy in the case of a potentially affected indigenous community, consultation standards in international human rights law shall be applied.**

IV. Scope

The Mechanism should be open to a broader range of potential critical issues for project-affected communities and have greater authority to call on the Bank to act when such issues are identified. While it is designed to address a broad range of potential adverse effects of Bank-Financed Operations, the *Proposed Mechanism* suffers from serious limitations that may hamper its effectiveness. We are particularly concerned that the Proposed Mechanism does not cover Bank activities related to policy-based loans and emergency loans. In addition, the section on Exclusions would preclude many potentially serious complaints from being addressed by the Mechanism.

2. Bank-Financed Operations

Policy-based and emergency loans should be included in the Bank-Financed Operations covered by Mechanism. No justification is provided for the exclusion of these operations. The rules governing the procedures of the WB Inspection Panel and the EBRD Proposed Project Complaint Mechanism do not exclude these operations from inspection.¹⁶ Since these activities also have the potential to negatively impact indigenous and local communities, the Mechanism should apply to them as well.

Covers Bank investment financing activities, whether with or without sovereign guarantee (public or private sector), and includes investment projects and any other operational activities involving loans, grants, technical cooperation assistance and guarantees financed or to be financed in whole or in part from Bank funds or from funds administered or guaranteed by the Bank, including MIF operations. ~~Policy based loans and emergency loans are excluded from the application of the Mechanism.~~ Requests may be filed with respect to operations not yet approved by the Board (a) after the signing of the mandate letter, or (b) after the project number has been issued, for sovereign-guaranteed and MIF operations.

¹⁶ See generally IBRD Resolution 93-10 and IDA Resolution 93-6, (Sep. 22, 1993), available at <http://go.worldbank.org/J19FS7JW50> [hereinafter WB Inspection Panel]; EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, PROJECT COMPLAINT MECHANISM DRAFT RULES OF PROCEDURE, para. 48, (2008), available at <http://www.ebrd.com/about/integrity/irm/dproc.pdf> [hereinafter EBRD].

31. Composition and selection

A significant number of Bank-Financed Operations have human rights implications. In order for the Mechanism to appropriately consider the full range of human rights concerns of Requesters, it is essential that Panel members have some knowledge of human rights law. Preferably, several of the Panel members will have some expertise in this area to allow for more informed analysis and investigation of Requests. The outgoing WB General Counsel released a Legal Opinion on Human Rights and the Work of the World Bank in January of 2006, noting with approval that the balance has now shifted in favor of protecting human rights within Bank-Financed Operations.¹⁷ The IFC and the International Business Leaders Forum developed in June of 2007 a *Guide to Human Rights Impact Assessment and Management, Road-Testing Draft* providing businesses and IFC clients a tool for assessing and managing the risks associated with potential human rights violations related to projects proposed for funding by the IFC.¹⁸ Similarly, the IDB must begin to consider the human rights implications of its operations, since the protection of human rights is a guiding principle of the IDB's parent organization, the Organization of American States.¹⁹

The Panel shall be composed of seven (7) individuals appointed by the Board upon recommendation of the President. Panel members shall be selected for their recognized technical competence, integrity and knowledge of **human rights law and** economic and social development, preferably in Latin America and the Caribbean. The Panel members will be nationals from different member countries of the Bank. The Board shall appoint a Chairperson from amongst the Panel and the Chairperson shall serve in such capacity for the duration of his or her appointment unless otherwise determined by the Board.

41. Exclusions

In subsection 41(a), the *Proposed Mechanism* excludes from review all actions that are not the responsibility of the Bank. However, no process is established for determining and assigning responsibility. In the interest of fairness and impartiality, we strongly urge that each Request be reviewed and an initial determination of responsibility be documented.

Under subsection 41(b) of the *Proposed Mechanism*, Requests related exclusively to the laws, policies, or regulations of the host country, borrower, or executing agency are excluded from review. We recommend that such Requests not be categorically excluded. Bank-Financed Operations often involve legal, policy or regulatory changes on the part of the host country, and these changes may result in harm to indigenous and local communities. If a Request concerning host country laws, policies, or regulations that are related to Bank-Financed Operations meets all

¹⁷ Memorandum from the General Council of the World Bank, Roberto Danino, Legal Opinion on Human Rights and the Work of the World Bank, 17 (Jan. 27, 2006) (on file with authors).

¹⁸ INTERNATIONAL FINANCE CORPORATION AND INTERNATIONAL BUSINESS LEADERS FORUM, GUIDE TO HUMAN RIGHTS AND IMPACT ASSESSMENT GUIDE, ROAD-TESTING DRAFT (June 2007), *available at* [http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/ref_SocialResponsibility_HRIA_ExecutiveOverview/\\$FILE/HRIAexecsummary.pdf](http://www.ifc.org/ifcext/sustainability.nsf/AttachmentsByTitle/ref_SocialResponsibility_HRIA_ExecutiveOverview/$FILE/HRIAexecsummary.pdf).

¹⁹ The IDB has identified itself as part of the Inter-American System. See U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Special theme: Climate change, biocultural diversity and livelihoods: the stewardship role of indigenous peoples and new challenges*, ¶ 2, U.N. Doc. E/C.19/2008/4/Add.10 (Feb. 7, 2008) (reporting on the IDB's response to the request for information on activities implemented or planned related to the recommendations made by the Permanent Forum on Indigenous Issues).

of the other requirements set forth, the Requester should have access to the Mechanism. Both the WB Inspection Panel and the EBRD Proposed Project Complaint Procedure consider such Requests as eligible for a proper investigation.²⁰

Furthermore, in subsection 41(e), all procurement-related matters are excluded from review. We recommend, instead of such a broad exclusion, that the *Proposed Mechanism* incorporate language similar to that adopted by the WB Inspection Panel.²¹ Such language rightfully excludes complaints from suppliers regarding business decisions that may work to their disadvantage. However, it leaves open the possibility of addressing complaints based on the negative effects of procurement decisions on local communities. For example, procurement decisions related to extractive industries may have an impact on the human rights of indigenous communities in areas where such industries operate. To exclude all procurement-related matters may deny affected parties the possibility of remedying significant harms through the Mechanism.

We also strongly urge extending the period for receiving Requests related to a project beyond the date of submission of the Project Completion Report, the time limit imposed in subsection 41(g). We recommend that the *Proposed Mechanism* accept Requests filed within 12 months after the Project Completion Report. Often, a project's effects will not be perceived until after the project has been completed. Moreover, a party may not have adequate information regarding the project's Bank financing or the Mechanism prior to the project's completion. The EBRD Proposed Project Complaint Mechanism accepts those complaints filed either within 12 months after the date of completion of the Project or, where physical completion is not an appropriate measure, within 12 months after the date of the Bank's final disbursement of funds for the Project.²²

Finally, subsection 41(j) of the *Proposed Mechanism* prohibits applying the Consultation and Compliance Review Phases to Requests raising issues already under arbitration or judicial review. We recommend that this exclusion be eliminated. Such prohibition does not exist in the WB Inspection Panel or the EBRD Proposed Project Complaint Mechanism.²³ It is the Bank's obligation to investigate and take corrective action when its operations adversely affect indigenous and local communities, particularly when human rights are at stake. The existence of arbitral or judicial proceedings surrounding an issue should not preclude the Bank from taking swift internal action when such situations arise.

Neither the Consultation Phase nor the Compliance Review will be applied to:

- (a) actions that are determined, **as a result of the assessment described in Section 51**, to be the responsibility of parties other than the Bank, such as a borrower/recipient, technical cooperation beneficiary, or executing agency, and that do not involve any action or omission on the part of the Bank;

²⁰ See generally WB Inspection Panel, *supra* note 16; EBRD, *supra* note 16.

²¹ See WB Inspection Panel, *supra* note 16, at para. 14(b) ("...the following requests shall not be heard by the Panel: ... (b) Complaints against procurement decisions by Bank borrowers from suppliers of goods and services financed or expected to be financed by the Bank under a loan agreement, or from losing tenderers for the supply of any such goods and services, which will continue to be addressed by staff under existing procedures.").

²² EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, PROJECT COMPLAINT MECHANISM DRAFT RULES OF PROCEDURE (2008), available at <http://www.ebrd.com/about/integrity/irm/dproc.pdf> [hereinafter EBRD].

²³ See generally IBRD Resolution 93-10 and IDA Resolution 93-6, (Sep. 22, 1993), available at <http://go.worldbank.org/J19FS7JW50> [hereinafter WB Inspection Panel]; EBRD, *supra* note 22, at para. 18-24.

- ~~(b) Requests related exclusively to the laws, policies or regulations of the host country, borrower, or the executing agency;~~
- (c) actions or activities that do not relate to a Bank-Financed Operation or that are not subject to the Bank's Operational Policies;
- (d) any review of the adequacy, suitability or effectiveness of any of the Bank's policies;
- ~~(e) procurement decisions or processes;~~ **Requests related to procurement decisions from suppliers of goods and services financed or expected to be financed by the Bank under a loan agreement, or from losing tenderers for the supply of any such goods and services**
- (f) a particular matter or matters that have already been reviewed pursuant to the Mechanism, unless justified by clear and compelling new evidence or circumstances not available at the time of the initial Request
- (g) Requests dealing with a Bank-Financed Operation, **which are not filed within 12 months after the completion of an Operation**, defined as of the date when the Project Completion Report is submitted;
- (h) ethics or fraud questions, specific actions of Bank employees, non-operational matters such as internal finance or administration, allegations of corrupt practices, or matters subject to review by other bodies established by the Bank;
- (i) any Request that (i) is without substance, (ii) is frivolous, malicious or trivial, or (iii) has been submitted to gain a competitive business advantage; and
- ~~(j) Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.~~

44. Prerequisites for Consultation Phase

The *Proposed Mechanism's* requirement that a party be *materially* affected in order to enter the Consultation Phase would deny access to communities or individuals who have suffered purely non-physical harms. For example, under the *Proposed Mechanism*, an indigenous community whose spiritual beliefs or practices are harmed or impeded by a project would not have recourse. We therefore propose that "materially" be removed. The UN Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples' spiritual relationship with their lands and natural resources²⁴ and places on States the obligation to provide an effective mechanism for redress and mitigation of adverse spiritual impacts.²⁵ In the *Moiwana* case, the Inter-American Court on Human Rights concluded that the separation of community members from their traditional lands violates the American Convention on Human Rights, since it entails a significant emotional, psychological, and spiritual hardship.²⁶

The Mechanism is intended to be activated only as an instrument of last resort, once Management's efforts to address concerns are exhausted. Before it files a Request under the Mechanism, a party that believes it is or could reasonably be directly, ~~materially~~ adversely affected by the failure of the Bank to follow its Operational Policies in a Bank-Financed Operation must first try in good faith to resolve its concerns through direct contact with the Management of

²⁴ U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 25 (Sep. 13, 2007) ("*Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*") (emphasis added)).

²⁵ *Id.*, art. 32(3) ("*States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*") (emphasis added)).

²⁶ Case of the Moiwana Village v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, para. 102, 103 (Jun. 15, 2005) (stating that the separation of the Moiwana community members from their traditional lands violates Article 5(1) of the American Convention on Human Rights since it constitutes a significant emotional, psychological and spiritual hardship).

the Bank. The Executive Secretary shall satisfy him or herself that the Requester has taken steps to bring the issue to the attention of Management and shall inquire with Management as to its response. In cases where Management is involved in addressing the concerns raised, the Executive Secretary shall allow 45 days from the date of acknowledgement by the Executive Secretary of the Request before it is registered and notice is given to the parties listed in Section 50, below.

49. Impact of the filing of a request

We strongly urge that the Executive Secretary or the Panel be empowered to call for the suspension of Bank-Financed Operations or disbursement, especially when human rights violations or irreparable harms have been identified. Under the EBRD Proposed Project Complaint Procedure, a complaint can produce that effect.²⁷ The effectiveness of the Mechanism in responding to urgent concerns is severely compromised if it lacks the power to suspend operations or disbursements.

~~The filing of a Request does not stop the processing or execution of the Bank Financed Operation, including disbursements by the Bank or the MIF, as the case may be. Processing and execution continue during the Mechanism process, other than in an exceptional case where the Bank decides upon suspension of preparation, disbursement and/or execution in accordance with standard Bank procedures and subject to the relevant legal documentation.~~

51. Assessment

As described in our comments on Section 41, the Executive Secretary should make a preliminary determination of whether the Bank is responsible for the adverse impacts suffered by the Requester and document his findings. Since the result of this determination will dictate whether the Request is eligible for the Consultation and Compliance Phases, the initial assessment is the best point in the process for making this determination.

Following registration, the Executive Secretary shall conduct an assessment. The purpose of the assessment is to clarify the issues and concerns raised by the Request, **including a preliminary determination of whether the responsibility for the adverse effects suffered by the Requester lies with the Bank. In addition, the Executive Secretary shall** identify and gather information from all stakeholders, including potentially other parties similarly situated to the Requester, inquire as to the views and incentives of all stakeholders, and help determine whether a resolution to the issues raised can be reached and what is the best process for doing so.

53. Result of the assessment

The assessment should result in the Executive Secretary's decision, based on a preliminary determination of responsibility, whether the Request is eligible to proceed to the Consultation or Compliance Review Phases.

After the assessment, the Executive Secretary will produce a preliminary report with the determination of responsibility for the adverse effects suffered by the Requester. If the

²⁷ See EBRD, *supra* note 22, para. 30 (“...if at any time during the processing of a Complaint, the PCM Officer believes that *serious, irreparable harm will be caused by the Bank’s continued processing or disbursements in respect of the Project, the PCM Officer may make an interim recommendation to suspend further Bank processing of, or, if possible, disbursement in regards to, the Project.*” (emphasis added)).

Executive Secretary determines that the Bank is not responsible, the Request will not proceed to the Consultation or Compliance Review Phases. If the Executive Secretary assigns responsibility to the Bank, based on the results of the assessment, the Executive Secretary will either (a) work with the stakeholders to produce an explicit agreement to proceed on a Consultation Phase exercise, establishing a process for addressing the issues raised in the Request or identified through the assessment, or (b) determine that a collaborative resolution is not possible, in which case the Executive Secretary will deliver the Request and all pertinent information to the Panel for a Compliance Review assessment. The assessment will conclude with a decision whether or not to proceed in a Consultation Phase exercise, and a clear outline of the course of action proposed and agreed to by the parties.

59. Limitations

The Executive Secretary should have the authority to call for the suspension of a Bank-Financed Operation or stop disbursement of funds if it is determined that a human rights violation or irreparable harm is occurring or is likely to occur in the immediate future should the Operation continue. Moreover, it should be stipulated that all agreements must comply with both customary and positive law developed by the indigenous peoples located within the Project-proponent territory, in addition to domestic and international law. The UN Declaration on the Rights of Indigenous Peoples not only recognizes indigenous peoples' right to maintain and strengthen their legal institutions²⁸ but also places on the States the obligation to respect their laws and customs in regards to property rights to land and natural resources.²⁹ In the *Awas Tingni* Case, the Inter-American Court on Human Rights recognized the existence of customary law of indigenous peoples and ordered Nicaragua to adopt domestic measures in accordance with it.³⁰

The Executive Secretary will not support agreements that would be coercive to one or more parties, are contrary to Bank policies or its code of ethics, or that would violate domestic laws or **indigenous peoples' laws** and customs located within the territory of the parties, or international law. ~~Neither the Executive Secretary (nor any expert participating in the Consultation Phase) may interfere with the processing or execution of a Bank-Financed Operation.~~ The Consultation Phase shall not result in the award of compensation or any other benefits to any person, entity or government beyond that which may be expressly contemplated in any relevant Bank policy and legal documentation or as may be duly and explicitly agreed to by the parties involved.

62. Purpose of the Compliance Review Phase

As in Section 44, we recommend removing "materially".

The purpose of the Compliance Review Phase is to establish a process (a "Compliance Review") that enables a Requester to request an investigation of a Bank-Financed Operation by a Panel of

²⁸ U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 24, art. 5 ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions....").

²⁹ *Id.*, art. 27 ("States shall establish and implement ... a ... process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process." (emphasis added)).

³⁰ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), para. 138 (ordering Nicaragua to adopt the necessary legislative, administrative, or other measures to create an effective mechanism for delimitation and titling of the property of the members of the Awas Tingni Mayagna Community, in accordance with the law and customs of that community).

independent experts if the Requester believes that its rights or interests are, or reasonably may be directly, ~~materially~~ adversely affected by a failure of the Bank to follow its Operational Policies in a Bank-Financed Operation.

V. Transparency

The Mechanism should be more transparent in its operation and decision-making to allow for greater accountability to stakeholders and the public. The credibility of any internal monitoring and accountability mechanism depends to a large degree on the transparency of its operations. We recommend that the following measures be taken to allow for greater stakeholder and public access to information related to the Mechanism's operations and decisions.

60. Consultation Phase Report

As described in this section, the results of the Consultation Phase should be made available to the public. To ensure ease of access to these reports, they should be published on the Bank's website.

As is the case with other internal project complaint mechanisms, the *Proposed Mechanism* should make available to the public all relevant documents related to each Request. The WB Inspection Panel provides full information on its website about the Cases and Reports by country or by request number³¹. Relevant documents available include Requests, Eligibility Reports, Investigation Reports, Management Responses, and Progress Reports, among others.³² The IFC Compliance Advisor Ombudsman also reports the results of many of its findings on its website.³³

The Executive Secretary shall prepare a report on the results of the Consultation Phase exercise, which will be distributed to the President, Board (and the Donors Committee, in the case of a MIF-funded operation), and Requesters, and **made available to the public on the Bank's website**. The terms of a settlement or approved recommendation will be made public, subject to the restrictions on release of information set forth in the Bank's Disclosure of Information Policy, unless the parties request confidentiality.

84. Annual Report

The description of the Mechanism's Annual Report lacks specificity. To promote transparency, the Report should include, at a minimum, a description of the Requests processed

³¹ See generally The Inspection Panel, Cases and Reports, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:21692308~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Aug. 28, 2009).

³² See e.g. The Inspection Panel, Cases and Reports, Cases by Country, Paraguay/Argentina Reform Project for the Water and Telecommunications Sectors, SEGBA V Power Distribution Project (Yacyretá) (2002), <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20228146~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html> (last visited Aug. 28, 2009).

³³ See generally INTERNATIONAL FINANCE CORPORATION, COMPLIANCE ADVISOR OMBUDSMAN OPERATIONAL GUIDELINES, §§ 2.3.2, 2.4.5, 4.4.3 (Apr. 2007), available at ombudsman.org/about/whoweare/documents/EnglishCAOGuidelines06.08.07Web.pdf (stating that, *inter alia*, the notification for assessment, monitoring and follow up reports, and advisory reports will be posted on the website).

in the Consultation and Compliance Review Phases, the results of these phases, and the implementation of all remedial actions. The Report should also be publicly released and posted on the Bank's website, as is the case with the EBRD Proposed Project Complaint Procedure.³⁴

The Executive Secretary, with input from the Chairperson, shall prepare an annual report describing the activities of the Mechanism during the preceding year. The Report shall **include a list of each of all of the Requests filed and a description of the Requests processed in the Consultation and Compliance Review Phases, the results of these phases, and the implementation of all remedial actions. The Report shall** be submitted to the President, for transmittal to the Board for information, and shall be made available **to the public on the Bank's website.**

VI. Conclusion

We hope that these comments and recommendations will be helpful in improving the *Proposed Mechanism*, especially with regard to its independence, accessibility, scope and transparency. The lessons learned and best practices identified thorough the work done by other Banks' project complaint mechanisms should serve as a guide for the IDB to improve its own mechanism. For this reason, we have built our comments around a comparative analysis of the Banks' mechanisms, highlighting concrete changes that the *Proposed Mechanism* should implement.

We welcome the effort of the IDB to review the Mechanism's rules of procedure and acknowledge the importance of this development in terms of accountability. But we strongly believe that all Multilateral Development Banks need to seriously evaluate the human rights dimensions of their operations in developing countries. This is especially important for the IDB in light of the considerable indigenous population in the region where it operates and the potential and actual human rights issues at stake. Any action on the part of the Banks directed at fulfilling their human rights responsibilities would represent substantial progress at the international level, and we hope the IDB can play a greater leading role in this regard.

³⁴ See EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, PROJECT COMPLAINT MECHANISM DRAFT RULES OF PROCEDURE, para 63(2008), available at <http://www.ebrd.com/about/integrity/irm/dproc.pdf> [hereinafter EBRD] ("The [Annual] Report will be submitted to the President and to the Board for information, and will thereafter be publicly released and posted on the PCM website." (emphasis added))