

Comments on the Draft of the Revised Policy of the Independent Consultation and Investigation Mechanism (ICIM)

September 2014

We, the undersigned organizations, want to express our deep concern regarding the significant setbacks that are expected to be carried out at the ICIM with the policy review process created by the Bank that would leave behind a large part of what it has achieved in the last four and a half years since the mechanism came into force. This setback will affect many areas but it will especially affect the Accessibility and Independence of the Mechanism, which are crucial to achieve an effective and efficient instrument. Thus, the Revised Draft Policy establishes provisions that seriously jeopardize the independence of the mechanism as well as shield it and make it much more difficult for affected people to submit a Request. The Bank should know that it is partly responsible for the direct and indirect impacts that are caused by the implementation of the projects it finances. As a public international body, it has the obligation to comply with national and international legislation regarding human rights and also to have accountability mechanisms that safeguard rights that may be at risk throughout the lifecycle of Bank-financed projects.

This document seeks to bring the Inter-American Development Bank (IDB) and the ICIM a series of comments, suggestions and concerns about the current mechanism review process that the IDB is undertaking (now in the Second Phase of Public Consultation). These comments, suggestions and concerns have been raised and compiled by a broad group of civil society organizations that have participated in the First Phase of Consultations, have been involved in the creation of the ICIM and have been monitoring its performance since it came into force in 2010. In turn, some of us represent people and communities affected by projects of the Bank and we have collaborated and supported the filing of requests before the Mechanism. As a result, we have significant understanding and experience regarding the Mechanism.

The comments and suggestions found in this document are far from exhaustive. On the contrary, due to questions of practicality, we have decided to limit these comments to the document that the Bank has published for review (the June 2014 Draft Revised Policy of the Independent Consultation and Investigation Mechanism). But these comments must be taken together with those sent during the First Phase of Public Consultation, as well as with all the recommendations, concerns and suggestions that we have made to the Bank repeatedly since the ICIM came into effect through letters, in-person meetings or

videoconferences, and including in the context of the ConSOCs, the Annual Meetings of the Board of Governors and with IDB - Civil Society Forum.¹

We have already congratulated the Bank for establishing the ICIM and for the enormous step forward that the ICIM represented in terms of accountability and “access to justice” for those affected or potentially affected by Bank projects, in contrast with the ineffective and scarcely utilized Independent Investigation Mechanism (IIM). Nevertheless, we have also emphasized that there are still outstanding issues in the functioning of the ICIM in order for it to be a truly effective mechanism for affected communities and to improve the transparency and accountability of the Bank. Some examples include: the need to ensure better clarity and precision in its mandate; fixing certain deficiencies in terms of accessibility, transparency and effectiveness; and reaffirming its independence and efficacy, among others.

The Revised Policy represents not only a weakening and set back in relation to the Mechanism as it exists today, but also in relation to the rest of the accountability mechanisms that exist in other institutions similar to the IDB. While the majority of mechanisms at these institutions tend to facilitate and promote access to their accountability mechanisms, the IDB is aiming to do the opposite, establishing a mechanism that is not accessible or independent, and therefore is not reliable or effective.

Nonetheless, we believe that the ICIM has great potential to increase its transparency and improve accountability and efficacy of the Bank, remaining at the high level of the rest of the accountability mechanisms of institutions related to the IDB. Nevertheless, it is not too late to reverse this process and take the opportunity of the review to achieve the desired strengthening and improved functioning of the ICIM. The Bank could use this opportunity to position itself in the forefront, improving the mechanism and achieving, in effect, what its name indicates: **Independent** and effective in order to ensure a window of **Consultation** and **Investigation** of cases that may impact people and land.

With this objective, we offer this series of suggestions and comments focused almost exclusively on the weaknesses that we found in the Revised Policy and that should be taken into account in the interest of not permitting the regression that is intended for the Mechanism.

¹ Among others: “*Comments on the Current Policy of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank*” – 30 September 2013. Available at: <http://www.accountabilitycounsel.org/wp-content/uploads/2013/08/9.30.13-MICI-Review-Comments.pdf>; “*Necesidad de un proceso de consulta pública efectivo y participativo para la segunda fase de revisión de la Política del MICI*” – 7 July 2014. Available at: http://www.fundeps.org/sites/default/files/Carta_de_OSCs_Consideraciones_en_torno_a_la_Segunda_Fase_de_revisión_del_MICI.pdf; “*Concerns regarding the Independent Consultation and Investigation Mechanism (MICI)*” – 16 September 2011. Available at: http://www.accountabilitycounsel.org/wp-content/uploads/2012/02/9.16.11-IDB-Letter_1.pdf.

For practical purposes, from now on, the Policy Establishing the Independent Consultation and Investigation Mechanism, dated February 2010, is called “**the Policy**,” and the Draft of the Revised Policy of the ICIM, dated June 2014, is called “**the Draft**.”

Regarding the structure of this document, to facilitate understanding, we have decided to separate the recommendations and comments by issue area or theme. These issue areas are:

- (a) Implementation of the New Mechanism;
- (b) Accessibility;
- (c) Independence;
- (d) Effectiveness;
- (e) Structure, Mandate, and Process; and
- (f) Terminology and Definitions.

Below are the main points that, we believe, are priorities for each of these areas. Later, we continue with a more detailed and meticulous analysis of each issue area.

Implementation of the New Mechanism: this refers to the process of implementing the new Mechanism, independently of the concrete comments and suggestions made on the Draft. Thus, it is a priority:

- That the Bank establishes a participative and inclusive process of implementing the changes introduced in the review that includes civil society participation.

Accessibility: this refers to the form in which the Requesters gain admission to the Mechanism and to the facilities that the Bank provides them to ensure that they can do so in a simple, fast and effective manner. There has been no progress in this area, rather serious and worrying obstacles and limitations, which include:

- The Draft limits accessibility to the ICIM by not allowing complaints about projects that have not yet been approved. It is necessary for the mechanism to be available during all stages in the lifecycle of a project, including after it has ended.
- The Draft incorporates requirements that make the submission of Requests by those affected more complicated. In particular, the exclusion of Requests that raise issues or matters under arbitral or judicial review should be eliminated, or at least limited to the Consultation Phase. Moreover, requesters should not be required to clearly explain alleged harm and its relationship to noncompliance with relevant operational policies, information that Requesters may find difficult to provide and that may lead to the unjustified rejection of Requests.
- Bank Management should not have discretion to temporarily suspend the eligibility determination process.

Independence: this refers to the independent character that the Mechanism should have with respect to the other departments of the Bank, in such a way that it can develop its activities without conditions or limitations. In this regard, the most relevant points are:

- The independence and suitability of the ICIM Director must be ensured, carrying out the Director's nomination through a participatory, transparent and inclusive process. Additionally, it is unacceptable that the ICIM Director can be removed by the Board without just and legitimate cause.
- The independence of the experts that make up the Compliance Review Panel must be ensured and the Policy should describe their skills, responsibilities and conditions of employment.
- The Board should not have the ability to object to a Compliance Review investigation, nor to object to the monitoring of the agreement reached during the Consultation Phase and should not put a time limit on such monitoring.

Effectiveness: this refers to the factors that permit the Mechanism to ensure effective resolution of conflicts. In this respect, we recommend that:

- The objective and means used in the Consultation Phase should not be tied to policy noncompliance, which is contrary to the notion of resolving problems.
- The development of an Action Plan should not be subject to the discretion of the Board, but instead should take place for every investigation in which there are findings of the Bank's policy noncompliance and should also consider comments from Requesters.
- The ICIM should undertake a Compliance Review even when the Requester opts out and also when there has been a positive result in the Consultation Phase.

Structure, Mandate, and Process: this refers to the ICIM's mandate and objectives as well as the new structure of the ICIM proposed in the revision, and the process of addressing Requests. The Draft proposes a series of modifications in this area that can result in a strengthened and better functioning Mechanism, but this will depend on the manner in which these changes are implemented and that certain things are taken into account. Here, we propose that:

- The mandate and objectives of the ICIM should be made more precise as they do not address, for example, the role of the Mechanism in creating effective solutions for those affected (Consultation Phase) or even in investigating the Institution's violation of policies.
- A pre-approved Roster of Experts to staff the Compliance Review Panel should be established through a participatory and inclusive process.
- There should be assurances that the ICIM has an appropriate budget, staff and resources to carry out its activities in an effective manner.

Terminology and Definitions: this refers to the language, terms and definitions used in the Draft. Many concepts, definitions and provisions are stated in an ambiguous, confusing or contradictory way, which threatens their correct implementation. It is recommended that:

- The definition of "relevant operational policies" should be inclusive and should not contemplate the possibility of waivers by the Board. In turn, the ICIM should expressly cover all of the Operational Policies of the Bank and should include other relevant instruments like the Sector Strategies.
- The definition of "harm" should be eliminated in the policy or, if it is retained, should be clarified because as written, it is ambiguous and could lend itself to unjustifiably denying Requests.

Implementation of the New Mechanism

1. ***Establish a participatory and inclusive process to implement the new mechanism:*** The current ICIM review process being conducted by the Bank has included a number of irregularities and shortcomings, principally regarding public consultations and the incorporation of comments from civil society, which call into question the legitimacy of the entire process.

Thus, for example, there have been a series of irregularities in both phases of the Public Consultation, such as: **(a)** few (in the First Phase) or none (in the Second Phase) in-person meetings or videoconferences to receive comments from different interested actors; **(b)** short time frames to make comments; **(c)** unnecessary delays in certain stages (the period between Phases) and urgency in others (the Second Phase); **(d)** the ability to make comments only through electronic communication in the Second Phase, when it is known that many groups that may be interested in using the mechanism do not have access to the internet or do not know how to use online tools; **(e)** while electronic comments submitted during the First Phase were published, the same was not done with all the comments and recommendations made during the meetings and videoconferences held during ConSOCs and the 13th IDB-Civil Society Forum in Colombia; **(f)** appropriate invitations were not made (or if they were made, they were ineffective) to gain participation from groups and communities affected or potentially affected by Bank projects, including indigenous groups and those of African descent, among others; **(g)** there were few attempts to take advantage of the potential of the ConSOCs to spread and thoroughly discuss the revision; among others.

On the other hand, through a meticulous analysis of the comments sent in the First Phase of Consultation and published by the Bank on its website, we can observe that only very few of the recommendations and suggestions made by civil society and intended to improve the functioning of the ICIM were taken into account and considered in the Draft Revised Policy. The Bank showed with these facts that it did not take into account the recommendations of civil society, leaving open the possibility that it simply undertook the Public Consultation as a form of legitimizing its processes and its own policies. This raises doubt regarding whether the comments submitted during the Second Phase will have the same destiny as those in the First Phase, or if they will be taken into account to improve the mechanism.

Nevertheless, we consider it crucial that the Bank rectify its practices to fully comply with its policies and establish a participatory and inclusive process to implement the new mechanism, regardless of the changes that are introduced. Thus, the Bank should call a wide range of actors and interested stakeholders (civil society, past requesters, impacted communities, experts, Bank and ICIM officials, personnel from other accountability

mechanisms, academics, and others) to collaborate with the Bank on an implementation process for the new mechanism.²

Accessibility

2. *The mechanism should be available in any phase of a project, including after it ends:* submitting a Request should be possible during all phases of the project, without limitation, and including after the project has concluded. Otherwise, accessibility to the Mechanism, and its effectiveness in fulfilling its mandate, would be limited. Currently, the Draft proposes two important limitations on this point that should be revised:

(a) **Paragraph 10 of the Draft** states that, “*The ICIM scope of work covers all Bank-Financed Operations, as of the date they are approved by the Board of Executive Directors, the Donors Committee, or the President, as the case may be.*” This limitation is not only contrary to the trends seen in the majority of other accountability mechanisms of other institutions, but even worse, represents a regression in relation to the current ICIM Policy, which permits filing a Request prior to project approval. The Policy establishes that, “[...] Requests may be filed with respect to operations not yet approved by the Board (a) after the signing of the mandate letter, for non-sovereign guaranteed operations, or (b) after the project number has been issued, for sovereign guaranteed and MIF operations” (**paragraph 2 of the Policy**). The Requester should be able to present a Request beginning at the time the Bank begins to consider financing a project, because there are aspects of the Bank’s Operational Policies that can be violated even in these pre-approval phases of the project, such as the consultation or evaluation requirements.

Moreover, this proposal is contrary to one of the principal objectives of the Mechanism, which is to solve the problems caused by projects financed by the Bank (Consultation Phase). Generally, this type of mechanism includes (or should include) a preventative focus by virtue of which the parties (including the Bank itself) prefer to address potential conflicts and harms before they occur and/or get worse, in order to avoid more severe harm. With this case, one can only turn to the mechanism once a project has already been approved and is a reality, contrary to the seeking solutions before harm occurs or is exacerbated.

(b) Additionally, there continues to be a short and overly restrictive time limit for filing a request of 2 years (24 months) after the last disbursement, contained in **paragraph 19(f) of the Draft**. Considering that in many cases, the negative environmental effects of a project may not occur or be detected until after a long time period, the possibility of making a

² A similar process was carried out, for example, for the implementation for the World Bank’s Access to Information Policy

Request should be available even after the Bank's relationship with the project has ended (for example, 5 years after the completion of the Bank's relationship with the project).

3. ***Individuals, organizations, associations or other entities and those who have been affected by transboundary impacts of a project should be able to submit Requests: Paragraph 13 of the Draft***, which establishes who can file a Request, represents a strong weakening in terms of accessibility of the mechanism with respect to the Policy. In the first place, the Draft eliminates the possibility of an individual presenting a Request, limiting it to "*Any group of two or more people [...]*", when the Bank highlighted on numerous occasions that the 2010 Policy was at the forefront in terms of access by being the second mechanism permitting claims by individuals.

Second, the Draft does not consider possibility of a Request by affected people who do not reside in the country where the project is being implemented, but who may be equally affected by the project as a result of transboundary impacts. Therefore, the scope should be broadened to contemplate the possibility that those living in the region where a project is being developed and affected by that project can present a Request.

4. ***Filing of Requests should be facilitated, not made more complex: paragraph 14 of the Draft*** establishes a series of complex requirements regarding the content and form that a Request must follow in order to be considered, which greatly restricts the accessibility of the Mechanism.

Particularly, **subsection f** is a potentially problematic for the potential requesters, establishing the requirement that they provide, "*a clear explanation of the alleged harm and its relation to the noncompliance of the Relevant Operational Policy in a Bank Financed Operation.*" Taking as a given that the vast majority of operational policies are difficult to understand and are unknown to a large number of potential requesters, having to identify the particular violation of these policies and its relation to the reported harm results in a clear restriction on the accessibility of the mechanism and an obstacle that should be avoided.

Similarly, **subsection e** requires that the Requester bring "*an allegation that the Bank failed to correctly apply one or more of its Relevant Operational Policies.*" Again, this presents the problem of the widespread ignorance about what the Bank's operational policies are and what they establish. For this reason, a simple mention that the Bank is causing or may cause harm should be sufficient for the Request to be taken into account. In a similar way, **paragraph 22(b)-(c)** establishes as eligibility criteria that, "*the Request clearly identifies a Bank-Financed Operation that has been approved by the Board, the President, or the Donors Committee*" and "*the Request describes the harm and its relationship with the noncompliance with one or more Relevant Operational Policies,*"

which represents, again, a clear obstacle to accessibility, as Requesters, who do not have complete knowledge of the norms of the Bank and how they relate to the harm or damages caused, will have difficulty complying with these two requirements.

In addition, the provisions established in **paragraph 16(d)** of the Draft result in highly prescriptive rules, stating, for example, that, “[...] *The ICIM cannot advise on the substantive aspect of a Request.*” Basically, this point establishes what the mechanism can and cannot do, but with contradictory results, as the ICIM “*may provide information [...] on the scope of [...] eligibility criteria [and/or] Relevant Operational Policies,*” but cannot advise on the substantive aspects of the Request, when advising on Operational Policies necessarily implies addressing the substantive issues in the Request.

In these ways, the IDB is going against international trends: when the majority of accountability mechanisms of different financial institutions are seeking to facilitate the filing of Requests and to help requesters carry out the process in an adequate manner, the IDB is going in the opposite direction, making the process and the requirements more complex, and establishing limits on the support that the ICIM can give Requesters.

5. ***The ICIM should avoid requiring sequencing of Phases in cases where the Requesters opt for both Phases, leaving them a liberty to decide the sequence that they believe makes most sense:*** **paragraph 17(a) of the Draft** establishes the possibility that Requesters can opt for the Consultation Phase, the Compliance Review Phase, or both. This represents a positive change in relation to the Policy, which requires Requesters who want Compliance Review to first undergo the Consultation Phase.

Nevertheless, the Draft establishes that, “*When Requesters choose both phases, processing will be sequential and begin with the Consultation Phase.*” This can be an obstacle to accessibility and effectiveness of the mechanism because it can impose unnecessary delays in the process and excludes the use of the Consultation Phase after the Compliance Review Phase. This creates a contradiction in what **paragraph 7 of the Draft** establishes: “*The ICIM’s objectives are fulfilled through the following two phases to be selected by the Requesters, allowing the selection of the approach that best addresses the Requests [...]*” In accordance with the best practices of related accountability mechanisms, it is recommended that the ICIM contemplate the possibility of allowing Requesters to initiate both Phases simultaneously or allowing Requesters to choose the sequence that they believe makes the most sense for their Request.

6. ***The exclusions should not be as numerous or as restrictive and should be defined in less ambiguous terms:*** according to the Bank, the Draft seeks to simplify and clarify the Mechanism’s exclusions. Nevertheless, the list in **paragraph 19 of the Draft** continues to contain too many exclusions, many of which are excessively restrictive or are presented in

such an ambiguous and unclear way that they can give rise to the unjustified exclusion of a large number of Requests, limiting the accessibility of the mechanism. In this regard:

- (a) The exclusion in subsection **(b)** (“*Any request that is anonymous, or on its face is without substance*”) is ambiguous and unclear because it does not explain when a Request “is without substance” and when not.
- (b) The exclusions of subsections **(e)** (“*Requests related to operations that have not yet been approved by the Board, the President, or the Donors Committee*”) and **(f)** (“*Requests that are filed more than 24 months after the last disbursement of the relevant Bank-Financed Operation*”) are excessively restrictive, as already mentioned.
- (c) The exclusion of subsection **(d)** (“*Particular issues or matters raised in a Request that are under arbitral or judicial review in an IDB member country*”) is, on one hand, defined in such a broad and ambiguous manner that it could be used to exclude a large number of cases, and, on the other hand, is excessively restrictive, as shown in the following paragraph (paragraph 7).
- (d) The exclusion of subsection **(c)** (“*Particular issues or matters that have already been reviewed by the ICIM*”), which is partially restrictive and it should be considered that an issue may be brought to the Mechanism if a Request initially opted for one Phase and is now choosing to use the other Phase.

7. ***The exclusion of Requests that raise issues or matters that are under arbitral or judicial review should be eliminated, or at least limited to the Consultation Phase:*** according to **paragraph 19(d) of the Draft**, “*Particular issues or matters raised in a Request that are under arbitral or judicial review in an IDB member country,*” an exclusion that, far from advancing with respect to the Policy by reducing the exclusion to only national processes, continues to unnecessarily restrict access to the mechanism and, in turn, reduces its effectiveness.

As stated in the First Phase of Public Consultation, the ICIM may reject requests under this provision even when there are only very tenuous connections between the request and other proceedings, even when only very tenuous connections exist between the request and another proceeding, and even when there is no reason to believe that the other proceeding would impact the ICIM process or vice versa. In addition, this provision ignores the fact that the ICIM’s nature and objectives are different from those of other mechanisms that requesters might be using.

Additionally, the parallel proceedings rule may bar valid requests from seeking remedies only available through the ICIM. For example, there is no other mechanism, judicial or

non-judicial, that can directly address the IDB's violations of its social and environmental policies. As such, the ICIM's Compliance Review Phase is the only opportunity for requesters to hold the IDB accountable to its own policies. Moreover, the compliance reports issued by the ICIM offer the IDB an opportunity to improve development outcomes by correcting detrimental policy violations during the course of a project. No other forum would provide the institution with the same type of feedback.

The ICIM Policy should therefore eliminate the parallel proceedings rule. Alternatively, the rule should be amended to exclude consideration of parallel proceedings for Compliance Review and to allow consideration of these proceedings in the Consultation Phase only when the same parties raising exactly the same issues are seeking identical remedies in another forum where all parties are actively addressing the issues.³

8. ***The registration of Requests should only verify the required information, not the existence or not of exclusions: Paragraph 20 of the Draft*** establishes that, “*When a Request is received by the ICIM, it will verify that the Request contains all required information and, without prejudice to the eligibility process, that it is not clearly linked with any of the exclusions*” and that a decision will be made “*within a maximum term of five business days as of receipt of the Request.*” However, in this registration stage, what is usually done by other related mechanisms is simply determining whether or not a Request contains the required information, because the determination of whether any exclusions apply to the Request is a complex process impossible to tackle effectively in only 5 business days. Therefore, this determination should only be made during the Eligibility Determination.

At the same time, greater flexibility in timing and conditions should be given to Requesters to provide additional information required in **paragraph 20(b)(i)**, as a period of only ten business days may not be sufficient to get the required information.

9. ***Bank Management should not have the ability to temporarily suspend the eligibility determination process: Paragraphs 21 and 23(c) of the Draft*** establishes provisions that undermine the accessibility, independence and effectiveness of the Mechanism, in addition to generating avoidable delays. These provisions establish that Management has a period of 21 business days from the notification of registration to send a response to the Request (**paragraph 21 of the Draft**). The response can include a controversial request to temporarily suspend the eligibility process if Management deems it appropriate in order to make corrections to the Bank-financed operation, but only if Management has a specific plan and a proposed timeline to make corrections to the project (**paragraph 23(c) of the**

³ “*Comments on the Current Policy of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank,*” sent by a group of CSOs under the First Phase of Public Consultation – 30 September 2013. Pp. 9.

Draft). Considering that this suspension would be a period of 45 business days from the date of Management’s Response, the provision, which is not normally considered at other, related accountability mechanisms, would notoriously slow down the whole process and would contradict the intention of the ICIM review to make the process more effective and efficient.

Therefore, Management’s power to suspend eligibility is unacceptable and should be eliminated from the Draft. If it is not eliminated, the following fundamental requirements should, at a minimum, be considered, although they would not solve the problem of slowing down the process: the requesters should approve of Management’s plan and should be allowed to stop the process at any time when they believe it is not functioning.

It is worth noting, as an additional point, that **paragraph 23(b) of the Draft** introduces a change that extends the process even more: “*The ICIM will have a term of up to 21 business days as of the date of receipt of the Response by Management to determine the Request’s eligibility.*” Taking into account the numerous criticisms from communities that use the mechanism during the First Phase of Consultation regarding the delays and long time periods required for each phase, the time periods should be reduced and not extended.

Independence

10. ***The independence and suitability of the ICIM Director should be assured and his/her nomination should be done through a participatory and inclusive process:*** according to the new ICIM structure proposed in the Draft, the new post of ICIM Director will have a principal role (the most important and central) within the Mechanism, leading the office and all of the personnel (including the Phase Coordinators), and will be responsible for a large part of the activities most relevant to the functioning of the mechanism. Therefore, the Bank should ensure the Director’s independence and capacity for action, as well as certify the suitability of the person appointed to the post.

Thus, the Bank should eliminate the provision established in **paragraph 53(a) of the Draft**, which establishes that “*The ICIM Director will be appointed by the Board of Executive Directors*” in order to establish (replicating the example of other mechanisms such as the CAO, for example) a participatory and inclusive selection process for the ICIM Direction, which includes the creation of a committee made up of diverse actors relevant in the region (including civil society, academics, experts, among other stakeholders). This committee should have the power to nominate one or two people as candidates for the post that would be presented for consideration to the Board. Additionally, it should be ensured that the fact that “*The ICIM Director will be a full-time employee of the IDB appointed for*

a five-year period, with the possibility of a single renewal [...]” (**paragraph 53(b) of the Draft**) does not put at risk or condition the Director’s independence.

Finally, it is important that the grade of the ICIM Director, which according to the Draft “*will be determined by the Board*” (**paragraph 53(c) of the Draft**) is sufficiently elevated within the institutional structure of the IDB (at the level of a Vice President, as is the case for similar posts at other mechanisms) to ensure the Director’s capacity for action.

11. ***The Removal of the ICIM Director should only be for just and legitimate cause:*** according to **paragraph 54 of the Draft**, “*The ICIM Director [...] may be removed from office by the Board at its discretion with or without cause.*” It is unacceptable that the Board has the power to remove the Director without a just and legitimate cause, and therefore this provision should be modified. As we mentioned above, the Director will be the central figure with the ICIM and, as such, should be able to act independently not only from Bank Management, but also from the Board, beyond reporting to the Board. If the Board can remove the Director with or without just cause, the Director would not be truly independent and could be conditioned to act based on the possibility of being removed at any moment by the Director. Moreover, this provision is not in line with the practices of other accountability mechanisms, for example the *Project Complaint Mechanism* (PCM) of the European Bank for Reconstruction and Development (EBRD), which establishes that “*The PCM Officer (a figure similar to the ICIM Director) may be removed for cause with the approval of the President.*”⁴
12. ***The independence of the experts who make up the Compliance Review Panel should be ensured:*** While the Draft partially explains the manner in which the Compliance Review Phase Coordinator will be selected and contains Terms of Reference (TOR) that describe the Coordinator’s principal responsibilities, qualifications and competencies (**Annex III**), there is practically no detail regarding the other experts who will form the Panel. Thus, the manner in which the experts are selected should be clarified and the Draft should include a TOR with requirements and competencies for the selection of the experts, similar to those in the Draft for the ICIM Director and Phase Coordinators. The Draft should also include prohibitions on working for the Bank before and after being an expert, in order to ensure independence. Additionally, the experts for each case should be selected from a pre-approved Roster of Experts that is chosen through an open and participatory process, as is described in more detail below in paragraph 30 of this document.
13. ***The Consultation Phase Report should not be distributed to the Board for consideration:*** **Paragraph 33 of the Draft** establishes that “*The [Consultation Phase] report will be*

⁴ *Project Complaint Mechanism (PCM) Rules of Procedure*. EBRD. May 2014. Paragraph 58. Pp. 10. Available at: <http://www.ebrd.com/downloads/integrity/pcmrules2014.pdf>

distributed to the Board or to the Donors Committee for consideration by short procedure and to Management for information.” This is a new provision with respect to the Policy and, in a certain way, undermines the independence of the ICIM and therefore should be eliminated from the Draft or, at least the parties should be given the opportunity to revise the report before it is distributed to the Board.

14. ***The Terms of Reference for the investigation should not be sent to Management for comment, or at least should also be sent to the requestors: Paragraph 40 of the Draft*** indicates that, *“Upon completion of the TOR, the ICIM will send a copy to Management, which will have a term of up to 10 business days to make comments.”* Again, this is giving too much participation to actors outside the ICIM, who could even have a conflict of interest regarding the information and project in question: there is no reason to permit Management to comment on the TOR for the investigation and therefore this provision should be eliminated. If it is retained, it should at minimum include the requirement that the TOR are also sent to the Requesters for comments. In general terms, any time that Management is permitted to comment on something, the Requesters should be as well. In this sense, the Draft is a step backwards in relation to the Policy, which allows Requesters to comment on the TOR.
15. ***The Board should not have the power to object to an investigation: Paragraph 41 of the Draft*** proposes that the ICIM should submit to the Board a recommendation to conduct an investigation and that this recommendation will be considered by the Board, which can object to the investigation. Considering the example of other, related accountability mechanisms, such as the CAO, the participation of the Board in this step of the process does not make sense, as the Board should not have the power to object to an investigation.

Effectiveness

16. ***The ICIM should expressly cover all of the Bank’s Operational Policies, as well as other relevant instruments such as the Sector Strategies: according to paragraph 11 of the Draft,*** *“The ICIM applies to all Relevant Operational Policies, which include the following: Access to Information (OP-102); Environment and Safeguards Compliance IOP-703); Disaster Risk Management (OP-704); Public Utilities (OP-708); Involuntary Resettlement (OP-710); Gender Equality in Development (OP-761); [and] Indigenous Peoples (OP-765).”* Nevertheless, it is not clear what other Operational Policies the Bank considers “relevant,” which creates confusion with respect to the scope of the Mechanism.

The Bank should expressly establish that the ICIM applies to all of the Bank’s Operational Policies in their totality, considering that Global Framework of the Cancun Declaration for the Ninth General Capital Increase (GCI-9) established the ICIM’s gradual coverage of all

Bank policies. Specifically, point 7 of this Global Framework established that: “*Governors direct Management to rapidly staff and implement the new Inspection Mechanism with phased-in coverage of all Bank policies by the time of the overview process.*”⁵

Additionally, the ICIM’s scope should include the Sector Strategies formulated by the IDB in the Framework of the Ninth General Increase in Resources, because of their importance and because they are also relevant to the ICIM. Principally, the Sector Strategies on: Climate Change Adaption and Mitigation, and Sustainable and Renewable Energy and Sustainable Infrastructure for Competitiveness and Inclusive Growth.⁶ The Bank can violate or fail to comply with these Sector Strategies just as much as with the Operational Policies, provoking harm and potential harm in communities and for affected individuals, as a result of which these Sector Strategies should be included within the ICIM’s scope.

17. ***The ICIM should conduct a Compliance Review even when the Requesters opt out, as well as when there is a positive result in the Consultation Phase:*** according to **paragraph 17(c) of the Draft**, “*Requesters may opt out of the Compliance Review Phase, but it will be the responsibility of the ICIM Director to assess the relevance of continuing and to submit a recommendation on whether or not to continue with the process to the Board for consideration by short procedure.*” Additionally, **paragraph 38(a) of the Draft** establishes that a Request will proceed to the Compliance Review Phase if “*the Consultation Phase ended without a consensus-based solution*” but does not contemplate the possibility of proceeding to the Compliance Review Phase if a positive result has been reached in the Consultation Phase, even though each of these phases has different objectives and characteristics.

Specifically, the idea that lines behind Compliance Review is to determine whether or not the Bank has violated its operational policies and, based on this, allow the institution to improve its actions, independently of whether the parties reached an agreement in the Consultation Phase. Thus, the Compliance Review Phase is important in all circumstances, without the need for an evaluation by the ICIM Director and approval from the Board regarding the relevance of continuing with the process after a Requester opts out.

18. ***The development of an Action Plan should not be subject to the discretion of the Board, but instead should take place for every investigation in which there are findings of the Bank’s policy noncompliance and should also consider comments from Requesters:*** **Paragraph 47 of the Draft** indicates that “*If deemed appropriate, the Board will instruct*

⁵ AB-2764. *Report on the Ninth General Increase in the Resources of the Inter-American Development Bank*. IDB. 21 May 2010. Available at:

<http://publications.iadb.org/bitstream/handle/11319/2201/REPORT%20ON%20THE%20NINTH%20GENERAL%20INCREASE%20IN%20THE%20RESOURCES%20OF%20THE%20INTER-AMERICAN%20DEVELOPMENT%20BANK.pdf?sequence=1>. Pp. 27.

⁶ See the IDB’s webpage: <http://www.iadb.org/en/about-us/sector-strategies.1326.html>.

Management to develop, in consultation with the ICIM, an action plan and present it for consideration.” On one hand, the development of an action plan should always be done and should not be subject to whether or not the Board deems it appropriate. On the other hand, Requesters should be able to comment on the action plan prior to the Board’s consideration. Moreover, Management should also be required, along with the ICIM, to inform Requesters are the decision of the Board.

19. ***The objectives and means used in the Consultation Phase should not be tied to policy noncompliance. On the contrary, such Phase should be available to address any harm produced by any project financed by the Bank: Paragraphs 24, 25 and 27 or the Draft require that the methods used during the Consultation Phase (mediation, negotiation, consultation and others) be tied to issues of noncompliance with policies, which goes in the opposite direction of the notion of problem solving. It also goes against the interest of the Bank’s clients because, from their perspective, it is a service that the Bank is providing in order to resolve whatever conflicts may undermine the project. Therefore, it should not matter whether an issue is covered by the policy or not. Moreover, there is no concrete analysis of policy violations until after the completion of a compliance investigation, which, as a consequence of the sequencing established in the Draft, will never be possible during the Consultation Phase.***

20. ***The Board should not have the power to object to the monitoring of an agreement reach in the Consultation Phase, nor should it be able to limit the duration of such monitoring: Paragraph 35(c) of the Draft dictates that the monitoring plan developed by the ICIM will include “subject to the Board’s no objection, monitoring for a term consistent with the terms of the agreement, and in no case to exceed five years as of the date the agreement was signed.”*** Again, the Board’s possible objection diminishes the independence and effectiveness of the ICIM’s work, and may even undermine its credibility. On the other hand, the motive for establishing a time period of 5 years for the monitoring is not clear, given that the monitoring should take place until the agreement has been effectively implemented, regardless of the time that this takes.

21. ***The monitoring that MICI conducts at the conclusion of the Compliance Review Phase should focus on whether or not policy noncompliance has been resolved (not on Management’s action plan) and should not have a time period determined by the Board:*** according to **paragraph 49 of the Draft**, “When applicable, the ICIM will monitor implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review.” However, the monitoring that the ICIM conducts should not focus on Management’s action plan, because such a plan may not adequately address noncompliance with Policy. Therefore the monitoring should focus directly on resolving noncompliance, as is the case, for example, at the CAO.

The Draft also establishes that “[...] *the duration of the monitoring [...] will be determined by the Board [...] and [...] in no case will exceed five years as of the date on which the Board approves Management’s action plan.*” This provision should be eliminated because the Board should not have the power to determine the duration of the monitoring, and much less should it establish a specific time period for it: the monitoring should continue until all of the actions necessary to correct the policy noncompliance have been implemented.

22. ***Arrangements for monitoring and accountability should be established in cases where one of the parties does not comply with the agreement reached in the Consultation Phase:*** one of the concerns previously raised to ICIM and Bank officials is the absence in the Policy of procedures to follow in a case in which the parties do not comply with the provisions established in the agreement arrived at in the Consultation Phase. This is a problem that should be addressed in the current review, establishing procedures and mechanisms of control and accountability for the agreements. One could consider, for example, that a breach of this kind would incur a violation of the ICIM’s Policy.
23. ***The contents of the Assessment Report should not be so prescribed:*** according to **paragraph 30 of the Draft**, “*In the event of proceeding with a Consultation Phase, the assessment report will include the course of action, consultation method, and timeline agreed by the Parties for this phase.*” However, these requirements for the Report’s content are unnecessarily prescriptive for a process that is supposed to be dynamic and that is as complex as the Consultation Phase. In many cases, it could require a significant amount of time for the parties to reach an agreement regarding each of these aspects and therefore, given that the deadline for this phase is only 40 business days, such prescriptive requirements should not be established.

Structure, Mandate and Process

24. ***The ICIM’s mandate and objectives continue to be imprecise and should be clarified:*** according to the Bank, and differently than the current Policy, “*The Proposed Revised Policy provides stated ICIM objectives and guiding principles seeking to clarify its mandate*” (**Summary of Key Changes published by the Bank on 30 July 2014**). The clarification of the ICIM’s mandate is a demand previously made by civil society in the region in order to increase efficacy and help in building the internal and external credibility of the Mechanism.

Nevertheless, the ICIM objectives proposed in **paragraph 5 of the Draft** do not meet this demand, as they remain imprecise and incomplete. According to the Draft, the ICIM has objectives to: “*a. Provide an [independent] mechanism and process [...] in order to*

investigate allegations of Requesters [...]; b. Provide information to the Board regarding such investigations; and c. Be a last resort mechanism for address the concerns of Requesters [...],” without mentioning at all, for example, the Mechanism’s role in providing a forum for the resolution of problems and conflicts between the parties (Consultation Phase) or even to serve as a accountability mechanism regarding the Bank’s violation of its own policies.

Specifically, as was already expressed in the comments sent during the First Phase of Consultation, access to effective remedy should be at the heart of the ICIM’s mandate, and it represents a key factor in the ICIM’s external credibility. “Effective remedy may take many forms, but in the context of the ICIM should encompass at least the following elements: (1) transparency about and public acknowledgment of responsibility for harm done or foreseeable harm; (2) provision of appropriate redress to complainants; (3) implementation of measures to prevent further harm; and (4) meaningful institutional learning and change to prevent the same situation from happening in the future.”⁷

Regarding the Guiding Principles in **paragraph 6 of the Draft**, it is difficult to understand the intention of the Bank in determining that one of these guiding principles is to “*Work in a cost-effective manner and avoid duplication with other Bank independent offices.*” The possible implications of this point are at least suspect in directly tying the work of the mechanism to the cost of activities and to not overlapping with other Bank offices.

25. ***There should be assurances that the ICIM has an appropriate budget, staff and resources to carry out its activities in an effective manner:*** Although one of the principle objectives of the current review was to address this issue, and the Bank itself has expressed the intention to provide sufficient resources and personnel to the Mechanism, the Draft, at least as currently proposed, continues to reflect a great uncertainty with respect to this point.

Even though there are some mentions made regarding the Mechanism’s staff and budget and the ICIM Director is assigned the responsibility of establishing the managing the mechanism’s budget and employees, it is not certain that the Bank is going to effectively support the ICIM’s work in practice. This should figure expressly in the Policy. The Draft even mentions, as one of the guiding principles of the ICIM, that it will “[w]ork in a cost-effect manner,” which plants a doubt with respect to the Bank’s intention to support the mechanism with resources and personnel. In any case, the guiding principle should be that the mechanism does everything in its power to work effectively, leaving the Bank the responsibility to provide the necessary resources for it to achieve this objective.

⁷ “*Comments on the Current Policy of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank,*” sent by a group of CSOs under the First Phase of Public Consultation – 30 September 2013. Pp. 3-4.

Regarding the ICIM Director

26. *The Terms of Reference for the position of ICIM Director should be redefined in order to adjust them to the post and the particular functions that the Director will take on:* some of the points contemplated in the TOR for the ICIM Direction (**Annex II of the Draft**) are incongruous with the nature and objective of the ICIM and therefore are not responsive to the role and the function that should be exercised in this position. Thus, it is striking that among the competencies required for the position are mentioned, for example, “*Strategic leadership: Understands the strategic issues facing the IDB, setting business priorities which translate into initiatives that provide the greatest value for the organization.*” Language like this, oriented more at the business side of the Bank, is contrary to ICIM’s nature and it ignores the intention that the Mechanism should have of ensuring the compliance with the Operational Policies of the Bank. The ICIM’s purpose is to review the Cases in which there has been harm due to the incompliance of the operational policies of the Bank, resolve conflicts and avoid more harm. To protect and ensure the business side of the Bank is the Bank’s responsibility, and thus, it is necessary to clarify that this role is not ICIM’s role or of any of its members.

We consider it basic, given the core of the ICIM’s functions, that the person who directs the mechanism has significant experience and knowledge in the field of human rights, civil society, work with communities, sustainability, public consultations, mediation, negotiation, accountability and review of compliance with safeguard policies.

Regarding the Registration of Requests and the Eligibility Process:

27. *The improvements introduced in terms of registration of the Requests and the eligibility process should be translated in the Mechanism’s practice:* certain provisions introduced in the Draft with respect to registration and eligibility are welcome because they may result in a more transparent and effective mechanism. Thus, for example, the registration process for Requests mentioned in **paragraph 20 of the Draft** is more structured and transparent than in the Policy, clarifying the aspects that are taken into account during this stage. Additionally, the unification of the eligibility processes into only one process undertaken by the ICIM Director, as well as the possibility of conducting site visits during the eligibility determination to the project country (**paragraph 23 of the Draft**) may result in a more effective mechanism.⁸ The fact that the Requesters can explain in the Request why it was not possible to contact Management prior to submitting the Request, without

⁸ As long as the visit to the project country does not necessarily require the express approval of the host country, since otherwise there would have been no progress on this point. We have already expressed that countries should have to submit to possible visits from the ICIM in any phase of the process from the moment in which they sign the financing contract with the Bank, otherwise they should not be able to receive financing from the institution.

establishing the express obligation of having to do it anyway (**paragraph 22(d) of the Draft**) also represents a welcome advance in relation to the Policy.

Nevertheless, these advances must be effectively reflected in the practice of the new mechanism, given that, beyond the provisions established in the Policy, the ICIM experienced serious problems in its practice during the years since its entry into force. And, as has been expressed in comments made during the First Phase of Public Consultation, many of the ICIM's performance problems took place in this stage due to a lack of transparency, delays and the lack of specific time periods.

28. ***An appeals mechanism should be implemented for cases in which a Requester believe that his/her Request was unjustifiably excluded:*** given the ambiguous and restrictive way in which the majority of the exclusions are set out, the creation of an independent appeals mechanism should be considered, which would allow Requesters to appeal the ICIM's decision to exclude the request in cases in which they believe that the exclusion was not justified. One could consider an appeal mechanism similar to the current one used for the Access to Information Policy, for example.

Regarding the Consultation Phase:

29. ***The person in charge of determining an extension of the time period should be the Phase Coordinator, not the ICIM Director:*** **paragraph 31 of the Draft** proposes that “*This term [time frame of the Consultation Phase] may be extended if, at the end of the term, the ICIM Director believes that extending the term will help bring about a consensus-based resolution of the issues raised.*” However, it would be more coherent if the person deciding whether an extension is necessary was the Consultation Phase Coordinator, not the ICIM Director.

Regarding the Compliance Review Phase:

30. ***A pre-approved Roster of Experts to staff the Compliance Review Panel should be established through a participatory and inclusive process:*** according to the Draft, the Compliance Review Panel would no longer be permanent and would instead consist of three people: the Phase Coordinator as Panel Chair and two independent experts contracted for each case. However, the manner in which the experts will be selected is not clear, nor are the requirements and conditions for their appointment. The Draft implies that the ICIM will contract 2 of the 3 experts who make up the panel on an ad hoc, case by case basis, which would be inefficient.

Thus, to ensure both the effectiveness and the independence of the Panel, it is necessary for the Bank to have a pre-approved Roster of Experts (independent and unaffiliated with the Bank), which is developed through a participation and inclusive process (with the participation of civil society, academics, experts and other stakeholders). In this way, the

Bank will have at its disposal a list of experts with some accumulated experience regarding the Bank and the ICIM, ready whenever it is necessary to put together a panel for each case, without the necessity of having to “go find” experts on the fly. This is in addition to what was already expressed in paragraph 12 of this document regarding the Panel members.

Another aspect that should be clarified is the manner in which the Panel members make decisions. The current policy establishes that they do so by consensus (**paragraph 67 of the Policy**), but the Draft does nothing to clarify this.

Terminology and Definitions

31. ***The policy should avoid a specific definition of “Harm,” or else the definition should be clarified:*** the Bank’s intentions in incorporating into the Draft’s Glossary a definition of “Harm” defined as “*Any direct, material damage or loss,*” which may open the door to unjustified exclusion of requests, are not understood. The Policy requires the Requester to “*reasonably assert[] that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB [...]*” (**paragraph 40(f) of the Policy**). Thus, the definition of “Harm” in the Draft should be eliminated or rewritten in the terms expressed in the Policy.
32. ***The definition of “relevant operational policies” should be strengthened and should not contemplate the possibility of waivers by the Board:*** the definition of “Relevant Operational Policies” proposed in the Draft is weaker than in the current policy (**paragraph 26 of the Policy**), establishing that “*In the event that the Board of Executive Directors grants an explicit waiver of the obligation to apply a specific Relevant Operational Policy to a particular project, that policy may not be used as grounds for submitting a Request to the ICIM.*” This last provision does not exist in the current Policy and represents a serious risk to the mechanism’s correct functioning because it permits the Board to apply an exemption that blocks the use of particular policies and that interferes with the normal scope of the Mechanism.
33. ***The definition of “Project” should be broader:*** the definition of “Project” as proposed in the Draft as “*A specific project or technical assistance operation in support of which a Bank-Financed Operation, or MIF funding, as appropriate, has been approved*” blocks the filing of requests prior to project approval, a limit that, as mentioned above, should be revised by the Bank.
34. ***It should be expressly clarified that the Requester constitutes an “essential participant” in the Consultation Phase:*** according to **paragraph 26 of the Draft**, given that

participation in the Consultation Phase is voluntary and requires the consent of all the Parties, any of the Parties may unilaterally withdraw from the Phase at any time. It then establishes the “*If the ICIM Director determines that this participant is essential for the process, the Consultation Phase will be considered concluded.*” Although it may be implied, it should be expressly clarified that the Requester constitutes an “essential participant” whose withdrawal from the process should necessarily finalize the Phase.

35. ***Several terms and expressions that are inexact and ambiguous should be corrected:*** the terminology and language used in several passages of the Draft is inexact, erroneous or confusing, which could lead to an incorrect or erroneous interpretation of the provisions. For example:

- (a) **Paragraph 27 of the Draft** establishes that “*Immediately after the Request is declared eligible for the Consultation Phase, the ICIM will start the assessment stage with the objective of [...] determining whether the parties would agree to seek a resolution using consultation methods, and if so, the best process for addressing any policy noncompliance.*” This last phrase should read “the best process for addressing any harm,” because this is the essential objective of the Consultation Phase, not addressing noncompliance with policies, which should be addressed during the Compliance Review Phase.
- (b) **Paragraph 32 of the Draft** establishes that “*The Consultation Phase itself does not result in award of compensation or similar benefits,*” which creates a certain confusion: the process of mediation, negotiation or any other method used in the Consultation Phase can (or should be able to) result in an agreement between the parties involving some type of compensation or benefit for either of them. If what this phrase means to state is that the ICIM does not have the authority to impose this compensation, nor should it be responsible for granting it, than the provision should be rewritten to avoid giving rise to this confusion. One possibility is, for example, to reinstate the clarification contained in **paragraph 50 of the Policy**: “*The Consultation Phase, by itself, shall not result in the award of compensation or any other benefits to any person, entity or government. This does not preclude, however, the possibility of compensation or other benefits that 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.*”
- (c) **Paragraph 35 of the Draft** establishes that “*When applicable the ICIM will develop, in consultation with the Parties, a monitoring plan and time frame for the agreement reached [...]*”. However, it is unclear what is meant by “applicable” and when a case would be applicable or not. These types of ambiguous terms, which lead to confusion, should be avoided.

Thank you for your attention with respect to our considerations. We continue to hope that the results of the consultation and consideration of the above, along with a greater commitment by the Bank in terms of participation in achieving a sufficiently effective, independent, and above all accessible mechanism for the communities.

Please do not hesitate to contact us if you have any questions or would like to discuss these issues in more detail.

Sincerely,

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