

ANNEX 6

THE ACCOUNTABILITY MECHANISM OF THE ASIAN DEVELOPMENT BANK

INTRODUCTION

This section assesses the Asian Development Bank's independent accountability mechanism, the Accountability Mechanism (AM). The assessment uses a standardised framework based on the UNGPs, which is available in Annex 2. This assessment framework clarifies how each of the UNGP criteria was operationalised for the purpose of assessing individual mechanisms. The assessment is based on the following sources: the written policies of the ADB and the AM; reviews of and reports on these policies; the websites of the ADB and the AM; responses from two CSOs to an online survey designed to solicit input for this report from those who have experience with IAMs (see Annex 3).

MECHANISM AT A GLANCE

The ADB's current AM Policy came into effect on 24 May 2012, replacing the previous 2003 Accountability Mechanism Policy. The AM is composed of: the Office of the Special Project Facilitator (SPF) for Problem Solving and the Compliance Review Panel (CRP) which is supported by the Office of the Compliance Review Panel (OCR) for the Compliance Review. The Office of the SPF oversees the Problem-Solving Function and reports to the ADB's President. The CRP oversees the Compliance Review Function, and is comprised of a full-time panel chair and two part-time panel members who report to the ADB's Board of Directors. Both offices share a Complaint Receiving Officer (CRO), who serves as the first point of contact to the AM. Complainants can choose which function they would like to use, or can request both functions.

TABLE 1: AM/ADB CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
89	16	14	12

TABLE 2: AM/ADB PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	11	90 ¹
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ²	9	75
CASES ACHIEVING RESULTS	1	12

KEY FINDINGS AND RECOMMENDATIONS

The 2012 reforms to the AM improved its accessibility and predictability. More can be done to better integrate the websites, consolidating case registries and providing information in more languages. The legitimacy of the AM is compromised by the role of the ADB Board and its General Counsel. The Board should not have a role in reviewing or approving the CRP's Terms of Reference for compliance reviews nor its draft reports. Furthermore, the AM policy should be clarified with regard to the role of the ADB General Counsel and make explicit that it does not advise either the CRP on its investigations or ADB management on its responses to CRP investigations.³ Rather the AM should have its own legal counsel on staff. As with other DFIs, the ADB should comprehensively address all instances of non-compliance and harm in Management Responses and Action Plans, and ensure their prompt implementation.

The table on the next page contains the recommendations derived from the UNGP assessment that follows. The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the DFI. It should be noted, however, that the power to implement some of these recommendations regarding the IAM rests with the DFI's Board of Directors.

UNGP ASSESSMENT

LEGITIMACY

IAM: To secure the independence of the Special Project Facilitator (SPF), the policy prohibits the SPF from working in any ADB operations departments for at least five years before his or her appointment.⁴ ADB Directors, alternate directors, management, staff and consultants will be ineligible to serve as members of the Compliance Review Panel (CRP) until at least three years have elapsed from their time of employment with ADB. In addition, after serving on the CRP, panel members, unlike the SPF, are barred from any future employment at ADB.⁵ Survey respondents report that they trust the CRP to deal

TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	AM	ADB
LEGITIMACY	<ul style="list-style-type: none"> The Special Project Facilitator should be barred from employment at the ADB following his or her term. 	<ul style="list-style-type: none"> CSOs should be included in the selection process for the SPF and the CRP. AM should have its own legal counsel on staff and not be advised by ADB General Counsel. Neither the board nor its committees should review or approve CRP's proposed ToR or draft reports.
ACCESSIBILITY	<ul style="list-style-type: none"> Additional outreach materials could be provided in multiple languages. Websites for the SPF and CRP could be further consolidated to reduce confusion. 	<ul style="list-style-type: none"> The requirement to disclose the availability of the AM should be included explicitly in the ADB's policies and in contracts with clients.
PREDICTABILITY	<ul style="list-style-type: none"> Specify deadlines for compliance reviews. Allow CRP to monitor the instances of non-compliance for as long as necessary until they are rectified. 	<ul style="list-style-type: none"> Comprehensively address all instances of non-compliance and harm in Management Responses and Action Plans, and ensure their prompt implementation. Implement tracking system for all complaints, not just those referred by Mechanism.
EQUITABILITY	<ul style="list-style-type: none"> Disclose final compliance report to complainants at the same time it is sent to the Board. Respect the role of complainants' advisors and representatives. 	<ul style="list-style-type: none"> Consult with complainants on the development of Management Action Plans.

	AM	ADB
TRANSPARENCY	<ul style="list-style-type: none"> Improve the layout of the AM website to improve clarity regarding the separate case registries and make it easier to discern which cases are still active. 	<ul style="list-style-type: none"> Disclose loan agreements.
RIGHTS COMPATIBILITY	<ul style="list-style-type: none"> Make explicit in AM policy that identities of complainants are kept confidential from all ADB staff. Make explicit that the AM is allowed to make a recommendation to suspend financing of a project if imminent harm might occur. Develop protocols to prevent retaliation against complainants and respond if they occur. 	<ul style="list-style-type: none"> Incorporate human rights standards throughout ADB environmental and social policies. Commit not to finance activities that would cause, contribute to or exacerbate human rights violations. Require clients to assess the human rights impacts of their operations. Develop measures to address retaliation against complainants.
LESSONS LEARNED	<ul style="list-style-type: none"> Adopt regular schedule for review of mechanism with opportunity for CSO input. Expand mandate to include a formal advisory role. 	<ul style="list-style-type: none"> Develop a public tracking process to record lessons learned from each complaint. Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.

with complaints in a fair manner, while users of the SPF had mixed views.

The policy allows the SPF to draw on project-level grievance redress mechanisms and/or the operations departments to resolve problems.⁶ If invoked, this provision may jeopardise the Mechanism's independence because complainants often file complaints with an IAM because the local actors are not responsive, trustworthy, or independent.

DFI: The SPF is appointed by the ADB President after consultation with the Board.⁷ CRP members are appointed by the Board upon recommendation of the Board Compliance Review Committee (BCRC) in consultation with the President. Neither selection process includes the participation of external stakeholders. The reporting lines may also undermine the independence of the SPF. The SPF reports to and its budget is approved by the ADB's President, who is also ultimately responsible for the activities that are subject of complaints.

In contrast, the CRP reports to the ADB's Board. The Mechanism's independence is further undermined because it must rely on legal advice provided by the ADB's General Counsel,⁸ who also advises ADB's Board and Management on the activities it finances and provides input to management on its response to CRP reports. In one case, the CRP amended important recommendations to provide effective redress to complainants under the direction of ADB General Counsel, which also advised management on its response to CRP's report and recommendations. To ensure impartiality, the AM should instead have its own counsel on staff to provide legal direction. Further limiting the independence of the CRP is the role of the BCRC in the complaint process. The BCRC approves all terms of reference for CRP compliance investigations and reviews draft compliance reports.

ACCESSIBILITY

IAM: The Mechanism's policy was revised in 2012, in part to make it easier for complainants to use. As a result, the Complaints Receiving Officer position was established to serve as a first point of contact for the Mechanism. The Mechanism's website provides a complaint template,⁹ brochure¹⁰ and other materials.¹¹ The AM policy and the brochure are available in all the major Asian languages,¹² but the complaint template appears to be available only in English. Survey respondents agreed that the requirements for filing a complaint were not burdensome. However, one respondent found the complaint procedures were not easy to follow. The window of time in which complaints can be filed with the AM – from prior to project approval to 24 months after project closure – reflects best practice among IAMs.

DFI: The AM's website is just one click away from the ADB homepage, under a drop-down menu. However, the homepage also provides a direct link for the OCRP's own website, which could cause confusion to potential users who are unfamiliar with the

structure of the Mechanism. Unique among the other mechanisms, the Mechanism's policy requires that ADB staff work with the borrowers to inform those affected by ADB-financed activities about the availability of the Mechanism, including by distributing pamphlets in the national language and other audiovisual materials.¹³ The intensity and format of these disclosure activities varies with the nature of the project. However, this disclosure requirement is not included in the ADB's Safeguard Policy Statement and it is unclear whether it is included in borrower agreements. In practice, though, the ADB may limit the AM's accessibility. One survey respondent recounted an incident in which ADB staff strongly discouraged the filing of a complaint with the AM.

PREDICTABILITY

IAM: The AM's policy does include deadlines for most of the stages of the complaints process. One exception is that there are no deadlines specified for the compliance review.¹⁴ In practice, respondents agreed that they generally know what to expect from the Mechanism, but one respondent reported that the Mechanism did not consistently meet its deadlines. The AM does have a monitoring mandate, but with some limitations. The SPF will monitor and report on the implementation of agreements reached through problem-solving, but generally not for a period longer than two years.¹⁵ The CRP is limited to monitoring the implementation of Management's remedial actions and not whether the instances of non-compliance have been rectified.¹⁶ Again the time period for monitoring is generally limited to three years.¹⁷

DFI: The Mechanism's policy also specifies deadlines for responses and decisions by ADB Board and Management. Survey respondents also reported that ADB Management does not comprehensively address findings of non-compliance in its remedial action plan. In relation to a case in Cambodia, ADB was viewed by users as defensive and reluctant to acknowledge and remedy harms caused. According to a user, Management was *"quick to limit the remedial action plan and slow to implement it"*. Similar to most other DFIs, complainants are required to first raise their concerns with ADB's Operations Department before filing a complaint to the Mechanism. If the complainant fails to do so, the Mechanism will forward complaints to the relevant Operations departments, which are advised to establish a system to track the progress and results of those complaints.¹⁸ Following the conclusion of the process, the Operations department prepares a report summarising the problem, the actions taken, agreement if any, and lessons learned.¹⁹ However, for those seeking to contact the Operations department directly prior to submitting a complaint, there appears to be no standardised procedure for receiving and responding to those concerns or similar tracking system.

EQUITABILITY

IAM: The Mechanism's policy provides complainants several opportunities to review and comment on draft reports. During problem-solving, the complainant has the opportunity

to review and comment on the SPF's assessment report.²⁰ Although the policy does not explicitly allow for complainants to comment on draft monitoring reports, the SPF must consult them, and they, and any other stakeholder, can submit information on the status of implementation to the SPF.²¹ Complainants have an opportunity to review and comment on CRP's draft final report, including its recommendations.²² The complainant's comments are included with the final compliance report when it is sent to the Board. However, the complainant does not receive the final report until after the Board's approval and, consequently, does not know whether their comments have been addressed and integrated.²³ The CRP solicits information from complainants in preparing its monitoring reports, but, unlike the BCRC, the complainant does not have the opportunity to review the draft monitoring reports.²⁴

One survey respondents reported that the SPF has in at least one case failed to respect the role of complainants' advisors and representatives, excluding them from dialogue sessions.

DFI: After the Board has approved the CRP's compliance report, Management must prepare a proposal for remedial actions, which also must be approved by the Board.²⁵ Although Management is required to consult with the CRP on remedial actions,²⁶ Management is not required to consult with the complainant, which is a major flaw in the remedial process.

TRANSPARENCY

IAM: The Mechanism maintains three different case registries: CRO registry,²⁷ the CRP registry²⁸ and the SPF registry, which can result in some confusion.²⁹ The CRO registry lists complaints that are related to ADB-assisted projects and filed by people who seek access to the Accountability Mechanism. Other complaints received by the CRO are also included in the registry. The OSPF and the CRP have separate registries for complaints forwarded to them by the CRO.³⁰ The basic case documents are posted on the CRP and SPF registries, but it is difficult to discern which cases are still active. Contrary to the practice of other mechanisms, the OSPF will not publish any substantive details about the dialogue process prior to a final agreement.³¹ The final agreement resulting from a dialogue process can be kept confidential if the parties agree.³² Although external stakeholders may find it difficult to track the progress of the mechanism's cases, survey respondents reported that the mechanism kept them well informed of the progress of their own cases.

DFI: Users can find a project database on ADB's website with proposed and approved projects, where they can search by country or sector.³³ For each project, the ADB publishes project documents, including environmental and social assessments, resettlement plans, indigenous peoples plans and monitoring reports. The ADB does not disclose the loan agreements.

RIGHTS COMPATIBILITY

IAM: Complainants can request that their identities be kept confidential, but anonymous complaints will not be accepted.³⁴ The SPF and CRP will also ascertain what measures are necessary to keep the complainants' identities confidential while handling the complaint.³⁵ However, while the AM will not disclose complainants' identity to parties external to the ADB, the policy is not clear on whether the AM will disclose that information to ADB staff.³⁶ In its comments on a draft of this report, the AM clarified that it does not disclose complainants' identities to ADB staff.³⁷ Even so, the fact that the policy is unclear about this may discourage complainants who fear retaliation from filing a complaint. The AM policy leaves open the possibility that the Mechanism, while it does not have to mandate to suspend a project, it may have the authority to recommend it: "The filing of a complaint to either the SPF or CRP will not suspend or otherwise affect the formulation, processing, or implementation of the project unless agreed to by the borrower concerned and ADB."³⁸

DFI: The ADB's Safeguards Policy Statement (SPS) makes reference to human rights in relation to indigenous peoples and resettlement.³⁹ With regards to indigenous rights, the ADB "*recognizes the rights of Indigenous Peoples to direct the course of their own development*".⁴⁰ Although the Indigenous Peoples policy makes references to the UN Declaration on the Rights of Indigenous Peoples, which recognises the right to free, prior, and informed consent (FPIC), it reinterprets FPIC to mean broad community support.⁴¹ The SPS entirely fails to reflect labour rights. There is no requirement to assess the risks to all human rights, or a commitment from the ADB to refrain from financing activities that could violate human rights.

LESSONS LEARNED

IAM: The mechanism was reviewed in 2012. The new policy replaced the 2003 version. There was an opportunity for public comment during the 2012 review. However, there do not appear to be regularly scheduled reviews. Although the mechanism does not officially have an advisory function, the policy requires that every three years the OSPF, OCRP, OSPF, Independent Evaluation Department, and Regional and Sustainable Development Department will "*distill ADB's experience, insights, and lessons, including the Accountability Mechanism's development impacts, benefits, and costs*".⁴²

DFI: The ADB does not appear to have a system to capture lessons learned from complaints submitted to its mechanism.

ANALYSIS OF COMPLAINTS CLOSED WITHOUT REACHING A SUBSTANTIVE PHASE

According to the AM website, between 1 July 2014 and 30 June 2015 nine complaints were deemed ineligible for the AM's Special Project Facilitator problem solving function or were otherwise closed without reaching a substantive phase of the complaint process.⁴³ The majority of those cases were referred to other units of the ADB because they concerned procurement, corruption or other financial management matters, and were therefore outside the mechanism's mandate. Four of these nine cases were transferred to the ADB's Procurement Division (OSP 1 or OSP 2) or its Office of Anti-corruption and Integrity (OAI).⁴⁴ Three additional projects were closed by the ADB's AM and forwarded to the Operations Services and Financing Management (OSFM) unit or the OAI within the research period.⁴⁵ One complaint related to the Jilin Urban Development Project in the People's Republic of China was forwarded to the OSFM and OAI in April 2015.⁴⁶ Another complaint regarding an individual consultancy matter, about which no details were provided on the ADB's website, was forwarded to the OSFM department in April 2015.⁴⁷ Finally, a complaint related to the Earthquake Emergency Assistance Project in Nepal was forwarded to the OAI in May of 2015, and then on to the South Asia Department in July 2015 (after the research period).⁴⁸

An eighth case, related to an infrastructure project in India, was terminated when the complainant "chose" to work with the South Asia regional department of the ADB to resolve the issues.⁴⁹

The reason for the AM's closure of the ninth complaint within the research period is unclear. The ADB's website indicates that the complainants who filed a request related to the SASEC Road Connectivity Investment Program in India were given 60 days from 22 December 2014 to address the issues with the Operations Department, after which the process was ended on 20 February 2015. It is unclear whether the referral to the Operations Department was to enable complainants to exhaust remedies within the Bank before resorting to the AM or for other problem-solving reasons.⁵⁰

NOTES

- 1 This number may differ from the 'total completed cases' in the previous table, because it includes all cases filed, including those pending a decision of the mechanism.
- 2 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 3 In its comments on a draft version of this report, the AM provided the following clarification, which could not be verified in the AM policy: "As internal arrangement in ADB, there is a designated Counsel which advises the CRP/OCRP and this counsel is not supposed to advise the Management. Each project in ADB has a project counsel and this project counsel advises the Management during compliance review processes" (review comments by AM ADB, received 19 October 2015).
- 4 Asian Dev. Bank, *Accountability Mechanism Policy 22*, ¶ 109 (2012) [hereinafter ADB Policy].
- 5 *Id.* at 22, ¶ 113.
- 6 *Id.* at 33, ¶ 162.
- 7 *Id.* at 21, ¶ 108.
- 8 *Id.* at 24, ¶ 122.
- 9 Asian Dev. Bank, *How to File a Complaint*, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/how-file-complaint>.
- 10 Asian Dev. Bank, *Accountability Mechanism Brochure*, <http://www.adb.org/publications/accountability-mechanism-brochure>.
- 11 Asian Dev. Bank, *An OCRP Case Study: A Primer on the Office of Compliance Review Panel*, available at [http://compliance.adb.org/dir0035p.nsf/attachments/primer-ocrp-case-study.pdf/\\$FILE/primer-ocrp-case-study.pdf](http://compliance.adb.org/dir0035p.nsf/attachments/primer-ocrp-case-study.pdf/$FILE/primer-ocrp-case-study.pdf); See also Asian Dev. Bank, *Office of the Special Project Facilitator: Problem-Solving Primer*, <http://www.adb.org/publications/office-special-project-facilitator-problem-solving-primer>.
- 12 See: <http://www.adb.org/documents/accountability-mechanism-policy-2012>.
- 13 ADB Policy, *supra* note 4, at 40, ¶ 211 ("Staff, working with the borrower, will disseminate information early in the project cycle about the Accountability Mechanism and its availability as a recourse in case other mechanisms for dealing with harmful project effects are not successful. The intensity and format of this activity will vary with the nature of the project. Operations departments will focus on projects with a high degree of safeguard risks, such as projects with heavy resettlement. Pamphlets in national or official languages, community notice boards, audiovisual materials, or other appropriate and effective means will be used to inform people.")
- 14 *Id.* at 35, ¶ 184.
- 15 *Id.* at 34, ¶ 174.
- 16 *Id.* at 37, ¶ 192.
- 17 *Id.* at 37, ¶ 193.
- 18 *Id.* at 37, ¶ 195.
- 19 *Id.* at 37, ¶ 196.
- 20 *Id.* at 33, ¶ 168.
- 21 *Id.* at 34, ¶ 174.
- 22 *Id.* at 36, ¶ 185.

- 23** *Id.* at 36, ¶ 188.
- 24** *Id.* at 37, ¶ 194.
- 25** *Id.* at 36, ¶ 190.
- 26** *Id.* at 36, ¶ 190.
- 27** Asian Dev. Bank, Complaint Receiving Officer's Complaints Registry, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>.
- 28** Asian Dev. Bank, Compliance Review Panel, <http://compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XGAWN?OpenDocument&expandable=2>.
- 29** Asian Dev. Bank, Complaints Registry By Year, <http://www.adb.org/site/accountability-mechanism/problem-solving-function/complaint-registry-year>.
- 30** Asian Dev. Bank, Complaint Receiving Officer's Complaints Registry, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>.
- 31** ADB Policy, *supra* note 4, at 39, ¶ 204.
- 32** *Id.* at 39, ¶ 204.
- 33** Asian Dev. Bank, Projects, <http://www.adb.org/projects> (last visited Oct. 15, 2015).
- 34** ADB Policy, *supra* note 4, at 30, ¶ 150.
- 35** *Id.* at 33-34, ¶¶ 164, 178.
- 36** *Id.* at 31, ¶ 155 ("The CRO will inform the SPF, the CRP chair, and the operations department concerned about the complaint within 2 days of receiving it; attaching a copy of the complaint letter. In copying or forwarding the information, the CRO will take necessary measures to ensure the confidentiality of the complainants' identities (for example, by masking the names of the complainants) unless the complainants indicated that confidentiality is not required. The CRO will also stress to all parties concerned within ADB the importance of ensuring the confidentiality requested by complainants."). The implication is that the complaint, containing the complainants' identities, is shared with ADB operations, and if confidentiality is requested, the CRO will ask other ADB staff to keep that information confidential.
- 37** Review comments by AM, received 19 October 2015.
- 38** ADB Policy, *supra* note 4, at 28, ¶ 140.
- 39** Asian Dev. Bank, Policy Paper: Safeguard Policy Statement (Jan. 2009), <http://adb.org/sites/default/files/pub/2009/Safeguard-Policy-Statement-June2009.pdf>.
- 40** *Id.* at SR3, A(1).
- 41** *Id.* at SR3, E(2).
- 42** ADB Policy, *supra* note 4, at 40, ¶ 212.
- 43** Asian Dev. Bank, Complaints Registry By Year, <http://www.adb.org/site/accountability-mechanism/problem-solving-function/complaint-registry-year> (last visited 28 July 2015).
- 44** Those four cases are: 1. Loan 2990/2991-NEP(SF): Tanahu Hydropower Project – registered but sent to OAI as not within the AM mandate (Nov. 2014); 2. Loan 2797 – IND: Uttarakhand Urban Sector Development Investment Program – Roorkee Sewerage Subproject Tranche II – registered but sent to OSP, as not within the AM mandate (Dec. 2014); 3. Loan 2835 – PRC: Hebei Energy Efficiency Improvement and Emission Reduction Project – registered but sent to OAI, as not within the AM mandate (Dec. 2014); 4. Loan 3064 and 2825 – UZB: Water Supply and Sanitation Services Investment Program registered and endorsed to OSPI, as not within the AM mandate (Nov. 2014). See Asian Dev. Bank Accountability Mechanism, CRO's Complaints Registry Archive, (June 2012 to December 2014), <http://www.adb.org/sites/default/files/page/161873/adb-accountability-mechanism-complaints-registry.pdf>.
- 45** See Asian Dev. Bank, Complaint Receiving Officer's Complaints Registry, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry> (last visited Oct. 20, 2015).
- 46** See Asian Dev. Bank, Complaint 02/2015, Jilin Urban Development Project, Loan No. 3211, Project No. 46048-002, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>.
- 47** See Asian Dev. Bank, *Complaint, Complaint 03/2015, 'Not Indicated'*, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>.
- 48** See Asian Development Bank, *Complaint 04/2015, Nepal: Earthquake Emergency Assistance Project*, Loan No. 3260 / TA No. 8910, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>.
- 49** See Asian Dev. Bank, *MFF: National Capital Region Urban Infrastructure Financing Facility – Tranche I*, <http://www.adb.org/site/accountability-mechanism/complaints-receiving-officer/complaints-registry>. Notably, however, in July 2015 – after the time period covered by this report – a similar complaint was refiled but was directed to the ADB's office of anti-corruption and integrity, because it was deemed outside the mandate of the accountability mechanism.
- 50** See Asian Dev. Bank, *Loan 3118 – IIND: SASEC Road Connectivity Investment Program – Tranche I*, <http://www.adb.org/sites/default/files/page/161873/adb-accountability-mechanism-complaints-registry.pdf>.