

ANNEX 13

THE EXAMINERS FOR THE GUIDELINES OF THE JAPAN INTERNATIONAL COOPERATION AGENCY AND JAPAN BANK FOR INTERNATIONAL COOPERATION

INTRODUCTION

This section assesses the Examiners for the (Environmental) Guidelines of the Japan International Cooperation Agency (JICA) and Japan Bank for International Cooperation (JBIC). 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 draws on information made publicly available by JICA, JBIC and the Examiners through their websites, and a survey that was sent out to users of the Examiners (see Annex 3). Two CSOs have filled out the survey to share their experiences with the JICA's Examiners. Consequently, the sections on experiences of users are all related to the JICA's Examiners.

MECHANISM AT A GLANCE

The JICA is the Japanese DFI, and JBIC is its export credit agency. JICA's IAM is called the Examiners for the Guidelines, while JBIC refers to its IAM as the Examiners for Environmental Guidelines. In 2010, following their partial merger, JICA and JBIC consolidated their guidelines for environmental and social considerations into a single set of guidelines.¹ In January 2015, JBIC revised its Guidelines and its Objection Procedures. Since JBIC and JICA have similar Objection Procedures (OP), the two mechanisms will be addressed together in the following sections.

TABLE 1: EXAMINERS/JBIC CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
1	1	1	1

TABLE 2: EXAMINERS/JBIC PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	0	1 ²
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ⁵	0	0
CASES ACHIEVING RESULTS	0	1

TABLE 3: EXAMINERS/JICA CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
4	1	1	1

TABLE 4: EXAMINERS/JICA PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	3	4 ⁴
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ⁵	3	3
CASES ACHIEVING RESULTS	1	1

KEY FINDINGS AND RECOMMENDATIONS

It is encouraging that, at least for JICA, its Examiners have been taking up more cases over the last year than before, even though only one of these cases actually achieved a result. JBIC, on the other hand, has only received one case. While the limited number of cases filed could reflect an absence of adverse impacts from JBIC-financed activities, it is more likely it is the result of a lack of awareness about the Examiners' existence among project-affected communities. That conclusion is supported by the lack of procedures to ensure the Examiners' accessibility. The Examiners' procedures are not available in many

languages, inhibiting complainants who do not speak English or Japanese from submitting a complaint. Furthermore, JBIC/JICA do not require their clients to disclose the existence of the Examiners, which limits the awareness of the Mechanism among project-affected communities.

The Examiners and JBIC/JICA must do more to ensure the effectiveness of their systems. Users report that the Examiners have never provided remedy to complainants. Not only does that call into question the Mechanism's legitimacy, it may also prevent others from filing complaints in the future.

Table 5 shows 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.

TABLE 5: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	THE EXAMINERS	JBIC/JICA
LEGITIMACY	<ul style="list-style-type: none"> Prohibit JICA/JBIC's employees from serving as Examiners. Establish an external advisory group to provide guidance and feedback on the Examiners' activities. 	<ul style="list-style-type: none"> The Examiners should be provided with an independent secretariat that reports only to the Examiners.
ACCESSIBILITY	<ul style="list-style-type: none"> Make information about the complaint process available in more languages. 	<ul style="list-style-type: none"> Improve the visibility of the Examiners on JICA/JBIC's websites, including by making the websites available in more languages. Clients should be required to disclose the availability of the Examiners.
PREDICTABILITY	<ul style="list-style-type: none"> Monitor findings of non-compliance until remedied and the implementation of agreements reached through dialogue. 	<ul style="list-style-type: none"> JICA's Guidelines should describe the process for responding to the Examiners' report.
EQUITABILITY	<ul style="list-style-type: none"> Provide complainants and JICA/JBIC with opportunity to comment on draft reports. Always submit the complainants' opinions on reports to the Bank's Management. 	<ul style="list-style-type: none"> Consult with complainants in the development of Management Action Plans. Publish the Examiners' budget and resources.

	THE EXAMINERS	JBIC/JICA
TRANSPARENCY	<ul style="list-style-type: none"> Include sufficient information, such as the original complaint, in the public registry for complaints regarding JBIC-financed activities. Publish information about complaints that fail to meet eligibility requirements. 	<ul style="list-style-type: none"> Disclose project information, including the clients' names and environmental impact assessments, prior to approval of financing.
RIGHTS COMPATIBILITY	<ul style="list-style-type: none"> Make recommendations for suspending the project in the event of imminent harm. Develop protocols to prevent and address reprisals against complainants. 	<ul style="list-style-type: none"> Adopt explicit commitment to not fund activities that would cause, contribute to or exacerbate human rights violations. Require clients to assess the human rights impacts of their operations. Develop protocols to address reprisals against complainants.
LESSONS LEARNED	<ul style="list-style-type: none"> Accept comments from all external stakeholders during reviews of the Examiners OP, not just those who have used the Mechanism. Analyse and document lessons learned from cases. 	<ul style="list-style-type: none"> Develop and publish a monitoring and tracking tool to report on implementation of commitments and changes in policy/practice as a result of complaints handled by the Examiners. Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.

UNGP ASSESSMENT

LEGITIMACY

IAM: The legitimacy of the Examiners is largely safeguarded by the Objection Procedures.⁶ These Procedures state that new Examiners are to be appointed by a separate selection committee. This committee should consist of, amongst others, representatives from CSOs, the business community and the Governments of Japan and developing countries. Examiners cannot be employed by JICA/JBIC during the three years following the end of their term. However, the procedures do not explicitly prevent JICA/JBIC staff from serving as Examiners, which would undermine the Mechanism's legitimacy.

DFI: Despite the OP, there are doubts about the independence of the Examiners. Examiners' support staff, who are actively involved in the Mechanism's investigation and

participate in site visits, are JICA personnel. This raises concerns about the impartiality of the investigations.

ACCESSIBILITY

IAM: The Examiners' accessibility is limited in many ways. On a positive note, the Examiners provide online complaint templates as part of the Objection Procedures documents,⁷ and users report that the procedures are easy to follow. However, the information on the Examiners' websites, such as the Objection Procedures, is only available in English or Japanese. This is a major impediment for local communities who are affected by JICA/JBIC-financed activities, but who do not speak one of these two languages.

DFI: The OP states that the Examiners' contact details should be displayed on JICA/JBIC's website, and that the Examiners should undertake outreach activities to become known to a wider audience.⁸ Indeed, the Examiners webpages can be found with three clicks from JICA/JBIC's homepages. Nonetheless, these pages cannot be found on the French and Spanish versions of JICA's website. JBIC has not translated its website into languages other than English and Japanese. This decreases the Examiners' accessibility significantly. Also, the responsibility for ensuring that project-affected communities are aware of the existence of the Examiners lies fully with the Examiners themselves. JICA/JBIC's Guidelines for Environmental and Social Concerns do not require JICA/JBIC's clients to disclose the availability of the Examiners to possible complainants.

PREDICTABILITY

IAM: The Objection Procedures ensure the predictability by describing a clear outline of the steps to be taken in a complaint process, including deadlines for each step.⁹ Users report that JICA's Examiners meet these deadlines in practice and communicate with complainants, informing them of the steps they are taking and updating them when the process is different from the one expected. It is not clear if the Examiners have the mandate to monitor its findings of non-compliance and/or agreements reached through dialogue.

DFI: The Procedures also describe what is required of JICA/JBIC when responding to the Examiners' findings. Generally, users report that JICA abides by these policies, though experience is limited because the Examiners have only published one investigation report on JICA-financed activities thus far.

EQUITABILITY

IAM: There are some concerns regarding the equitability of the Examiners. The Procedures only provide for disclosing the Examiners' final report, stating that "*the Examiner's report shall immediately be sent to the parties concerned*".¹⁰ They do not

require the Examiners to provide JICA/JBIC and the complainants with an opportunity to comment on the draft. In practice, users expressed doubts about whether the JICA's Examiners provide complainants with the same information as JICA and its client. Another concern about the Examiners' equitability is related to the disclosure of the complainants' opinion on the final report to JICA/JBIC. The complainants are allowed to submit their opinion to the Examiners, but the latter will only transfer that opinion to JICA/JBIC if the Examiners deem that the opinions are useful for the monitoring of the project.¹¹ One positive aspect is that users report that the Mechanism respects the role of complainants' advisors and representatives.

DFI: There is little information on whether JICA/JBIC provides the Examiners with sufficient resources to support the complainants in their complaint process, since the budget is not made public. JICA only states that several JICA personnel will staff the Examiners' Secretariat and that Examiners may use specialists when needed. JBIC's Major Rules of Establishment outline similar measures, but are more specific. JBIC commits to staffing the Examiners' Office with three JBIC personnel.¹² Experience with JICA's Examiners shows that experts are available and can be deployed on field visits, however, users also report that the Mechanism did not provide the necessary resources to support complainants' participation in the process, but it is unclear if this was due to resource constraints.

TRANSPARENCY

IAM: The Examiners are generally transparent, though there is room for improvement. The Examiners' websites give information on the basics of the mechanism, such as the names of the Examiners. Also, JICA's Examiners' website lists the few complaints it has handled, including relevant documents such as the original complaint.¹³ JBIC's Examiners' website only shows the investigation report.¹⁴ For both Examiners, it appears that rejected complaints are not published in the register of complaints. Similarly, neither disclose the budget on the website. JBIC specifically could improve its complaints register by publishing the original complaints.

DFI: JICA's Guidelines state it should disclose information on environmental and social considerations at the main stages of cooperation projects.¹⁵ Indeed, a list of the projects financed by JICA is published on the website.¹⁶ However, the project information provided is extremely limited. For example, even for many category A projects, an environmental impact assessment cannot be found online.¹⁷

JBIC's Guidelines are more specific. They require JBIC to publish the name, country, location, outline and sector of the project, as well as its category classification before a decision has been made on funding. Also, it states it will publish the environmental reviews for projects categorised as A, B, or FI, once funding is decided on. For some projects, these can indeed be found on the JBIC's website.¹⁸ However, for many projects, the information

cannot be accessed online, or is available only “through the JBIC’s information center”.¹⁹ There is no contact information provided for the information centre.

RIGHTS COMPATIBILITY

IAM: The Examiners offer confidentiality for complainants if requested, unless otherwise required by law.²⁰ However, because the Guidelines against which the Examiners measure compliance lack sufficient reference to human rights, the Examiners are limited in their ability to identify human rights abuses. Its mandate is further limited by not having the authority to recommend suspension of a project when there is a risk of imminent harm. Beyond the procedures, users report that the complaint process has never provided remedy to complainants.

DFI: Both Banks require their clients to meet environmental and social standards,²¹ but the extent to which they incorporate human rights is extremely limited. JICA’s Guidelines do specifically refer to international human rights standards. They state that JICA “integrates local human rights situations into decision-making processes that relate to environmental and social considerations”.²² It is unclear, however, how that requirement is operationalised. JBIC’s Guidelines do not reference human rights.

LESSONS LEARNED

IAM: The Examiners’ Procedures are reviewed concurrently with JBIC/JICA’s Guidelines.²³ There is an opportunity for external stakeholders to provide input in those reviews, but that opportunity is limited to those who have made use of the Examiners. Users report that the Examiners do not seem to improve their practices in response to particular cases, nor do they have the mandate to raise trends across cases. However, that experience is limited as the Examiners have only investigated one case out of three complaints submitted.

DFI: Experience with the Examiners’ cases has not been explicitly taken up the JICA/JBIC’s review procedures.²⁴ As a result, JICA does not seem to improve its policies and practices in response to the Examiners’ reports.

ANALYSIS OF COMPLAINTS CLOSED WITHOUT REACHING A SUBSTANTIVE PHASE

The website of the JBIC Examiners does not include any information regarding cases raised between 1 July 2014 and 30 June 2015. At the time of writing, the Examiners had not yet made available the Annual Report of the Examiners for Environmental Guidelines for Fiscal Year 2014, and no cases were mentioned elsewhere on the website.²⁵

According to the website of the JICA Examiners, between 1 July 2014 and 30 June 2015, three requests for investigation were deemed ineligible for the Examiner ‘Procedures to Submit Objections’.²⁶ One of the requests was rejected due to parallel proceedings. The Examiner cited an ongoing administrative procedure in the host state, the completion of which was a prerequisite to the project’s implementation, as the reason for deeming the request ineligible for investigation.²⁷ The other two requests closed without reaching a substantive stage were deemed to be outside the Mechanism’s mandate. In one instance, the Examiner determined that the complainants did not allege violations of specific provisions of the applicable guidelines, and because the project resettlement plan was not yet final, the Examiner could not assess non-compliance with the resettlement-related guidelines.²⁸ In the other instance, the activity that was the subject of the complaint (construction of a seaport) would no longer take place, so it was not subject to the Examiners’ review.²⁹

NOTES

- 1 Japan Int'l Cooperation Agency [JICA], Env'tl and Soc. Considerations, http://www.jica.go.jp/english/our_work/social_environmental/guideline/index.html.
- 2 This number may differ from the 'total concluded cases' in the previous table, because it includes all cases filed, including cases that are currently active and have not yet closed or entered monitoring.
- 3 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 4 This number may differ from the 'total concluded cases' in the previous table, because it includes all cases filed, including cases that are currently active and have not yet closed or entered monitoring.
- 5 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 6 JICA, Objection Procedures (2010), http://www.jica.go.jp/english/our_work/social_environmental/guideline/pdf/objection100326.pdf [hereinafter JICA Objection Procedures]; Japan Bank for Int'l Cooperation [JBIC], Major Rules for Establishment of Examiner for Environmental Guidelines (2010), <http://www.jbic.go.jp/wp-content/uploads/page/2013/08/757/en-examinar-2012.pdf>.
- 7 JICA Objection Procedures, *supra* note 6, at 14; JBIC Summary of Procedures to Submit Objections 14, https://www.jbic.go.jp/wp-content/uploads/page/2014/10/36453/en_disagree-2015.pdf [hereinafter JBIC Summary of Procedures to Submit Objections].
- 8 JICA Objection Procedures, *supra* note 6, at 12; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 15-16.
- 9 JICA Objection Procedures, *supra* note 6, at 26; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 29.
- 10 JICA Objection Procedures, *supra* note 6, at 11; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 13-14.
- 11 JICA Objection Procedures, *supra* note 6, at 12; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 13-14.
- 12 JBIC, Major Rules for Establishment of Exam'r for Env'tl Guidelines 2 (2010), <http://www.jbic.go.jp/wp-content/uploads/page/2013/08/757/en-examinar-2012.pdf>.
- 13 JICA, Objection Procedures based on the Guidelines for Env'tl and Soc. Considerations, http://www.jica.go.jp/english/our_work/social_environmental/objection/index.html.
- 14 JBIC, The Status of Acceptance of the Requests and the Progress of Procedures, <http://www.jbic.go.jp/en/efforts/environment/disagree/progress> (last visited July 21 2015).
- 15 JICA, Guidelines for Env'tl and Soc. Considerations 2 (2010), http://www.jica.go.jp/english/our_work/social_environmental/guideline/pdf/guideline100326.pdf [hereinafter JICA Guidelines for Env'tl and Soc. Considerations]; JBIC, Guidelines for Confirmation of Env'tl and Soc. Consideration 15 (2015), http://www.jbic.go.jp/wp-content/uploads/page/2013/08/36442/Environmentl_Guidelines2015.pdf [hereinafter JBIC Guidelines for Confirmation of Env'tl and Soc. Consideration].
- 16 JICA, Info. Disclosure under new Guidelines, http://www.jica.go.jp/english/our_work/social_environmental/id/index.html (last visited on June 10 2015).
- 17 JICA, Info. Disclosure under new Guidelines: Southeast Asia, http://www.jica.go.jp/english/our_work/social_environmental/id/asia/southeast/index.html (last visited on July 21 2015).
- 18 JBIC, Info. Disclosure on Confirmation of Environmental and Social Considerations, <http://www.jbic.go.jp/en/efforts/environment/projects> (last visited on July 21 2015).
- 19 See, e.g., Projects for Which JBIC Has Already Acquired Environmental Impact Assessment (EIA), <http://www.jbic.go.jp/en/efforts/environment/projects/20552> (Last visited on July 21 2015).
- 20 JICA Objection Procedures, *supra* note 6, at 6, 7; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 7.
- 21 JICA Guidelines for Env'tl and Soc. Considerations, *supra* note 15, at Appendix I: JBIC Guidelines for Confirmation of Env'tl and Soc. Consideration, *supra* note 15, at 19-23.
- 22 JICA Guidelines for Env'tl and Soc. Considerations, *supra* note 15, at 15.
- 23 JICA Objection Procedures, *supra* note 6, at 13; JBIC Summary of Procedures to Submit Objections, *supra* note 7, at 16.
- 24 JICA, *Evaluations*, http://www.jica.go.jp/english/our_work/evaluation/index.html; JICA Guidelines for Env'tl and Soc. Considerations, *supra* note 15, at 17; JBIC Guidelines for Confirmation of Env'tl and Soc. Consideration, *supra* note 15, at 17.
- 25 JBIC, Objection Procedures based on Environmental Guidelines, <http://www.jbic.go.jp/en/efforts/environment/disagree/procedure>.
- 26 The Objectives of the Procedures to Submit Objections are: "(1) To investigate whether JICA has complied with the Guidelines and report the results to the President; this will ensure JICA's compliance with the Guidelines. (2) To encourage dialogues between the parties concerned, with their consent. Specifically, these are dialogues between the party that submitted objections... and the entity that carries out the project..., which are held in order to assist in the early resolution of disputes concerning specific environmental and/or social problems caused by the project for which JICA provides assistance, which have arisen due to JICA's non-compliance with the Guidelines." See JICA Objection Procedures, *supra* note 6.
- 27 See JICA, Mumbai Metro Line 3 Project, http://www.jica.go.jp/english/our_work/social_environmental/objection/india_01.html. The document explaining the results of examination, and therefore the reasoning for not proceeding to investigation, indicates that the specific facility about which the complainants raise concerns (the "car shed") is not financed by JICA. It is not clear, then, whether the complaint was rejected because it is "outside the mechanism's mandate" (i.e. because it concerned something not financed by JICA) or because of "parallel proceedings" (ongoing administrative review of tree-felling procedures, which would affect the likelihood of the impacts raised by the complainant).
- 28 See JICA, Hanoi City Urban Railway Construction Project: (Nam Thang Long – Tran Hung Dao Section (Line 2), http://www.jica.go.jp/english/our_work/social_environmental/objection/vietnam_01.html.
- 29 See JICA, New Bohol Airport Construction, http://www.jica.go.jp/english/our_work/social_environmental/objection/philippines_01.html. (case closed on June 26, 2015).