

## ANNEX 8

# THE PROJECT COMPLAINT MECHANISM OF THE EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

## INTRODUCTION

This section assesses the Project Complaint Mechanism (PCM) of the European Bank for Reconstruction and Development (EBRD). It uses a standardised assessment 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: information made publicly available by the PCM and EBRD's websites; EBRD's policies;<sup>1</sup> and nine CSO responses to a survey that was distributed to seek input from users of the mechanism (see Annex 3).

## MECHANISM AT A GLANCE

The PCM was established in 2010, replacing the EBRD's first accountability mechanism, the Independent Recourse Mechanism, created in 2004. The most recent version of the PCM's Rules of Procedure (RoP) came into force on 7 November 2014. The PCM is composed of a full-time PCM Officer housed in EBRD's Office of the Chief Compliance Officer (OCCO) and a roster of seven PCM experts. The PCM offers both dispute resolution and compliance review. In mid-2015, a new PCM Officer assumed her post, in addition to five new PCM experts.

TABLE 1: PCM/EBRD CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
72	10	10	9

TABLE 2: PCM/EBRD PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	6	79 <sup>2</sup>
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE <sup>3</sup>	3	61
CASES ACHIEVING RESULTS	0	9

## KEY FINDINGS AND RECOMMENDATIONS

Several aspects of the PCM's RoP are in line with best practice among IAMs, including the participation of external stakeholders on the selection committee for PCM Officer and Experts, the mandate to recommend suspension in the event of imminent harm, the opportunity provided to complainants to review draft reports. Unfortunately, these features have not translated to effective outcomes for complainants. The PCM has yet to facilitate a successful mediation. This could potentially be mitigated by allowing complaints requesting problem-solving, as long as the EBRD is involved in the project. Undertaking site visits during the eligibility phase would also help to inform the PCM's assessment, improve its understanding of complainants' concerns, and, in problem-solving initiatives, allow a full discussion on the benefits of mediation. Users report that the EBRD undermines the system by not responding adequately to the PCM's findings of non-compliance. EBRD should consult with complainants in the development of the action plan.

Table 3 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:** The PCM Officer and Experts are prohibited from working for the Bank for at least two years prior to their terms. The PCM Officer may not work for the Bank in any capacity following his or her term, and PCM Experts may not work for the bank as a staff member, consultant or official, but could be appointed as an Executive or Alternate Director.<sup>4</sup> Furthermore, PCM Experts must recuse themselves from any case in which

**TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT**

	PCM	EBRD
<b>LEGITIMACY</b>	<ul style="list-style-type: none"> <li>Establish an advisory group of external stakeholders to provide feedback on the IRM's activities.</li> <li>PCM Officer should be elevated to a higher position and report directly to the Board.</li> </ul>	<ul style="list-style-type: none"> <li>Ensure that at least one CSO representative is included in the external stakeholders serving on the selection committees for PCM Officer and Experts.</li> </ul>
<b>ACCESSIBILITY</b>	<ul style="list-style-type: none"> <li>Accept complaints requesting problem-solving as long as EBRD is involved in the project.</li> <li>Improve outreach to project-affected communities and local CSOs.</li> </ul>	<ul style="list-style-type: none"> <li>Require clients to disclose the availability of the PCM to project-affected communities.</li> </ul>
<b>PREDICTABILITY</b>	<ul style="list-style-type: none"> <li>Adhere to deadlines.</li> <li>Provide regular updates to complainants on the status of their complaints.</li> <li>Monitor the project until instances of non-compliance are remedied, not only the implementation of Management Action Plans.</li> </ul>	<ul style="list-style-type: none"> <li>Address all findings of non-compliance found by the PCM in its investigations.</li> <li>Provide guidance to potential complainants on whom to contact within Bank Management with their concerns and the timeframe in which to expect a response.</li> </ul>
<b>EQUITABILITY</b>	<ul style="list-style-type: none"> <li>Share final reports with complainants and Bank simultaneously.</li> <li>Conduct field visits at the eligibility assessment stage to ensure the concerns of complainants are understood well.</li> </ul>	<ul style="list-style-type: none"> <li>Consult with complainants in the development of Management Action Plans.</li> </ul>

	PCM	EBRD
<b>TRANSPARENCY</b>	<ul style="list-style-type: none"> <li>Publish information on complaints that are not registered.</li> </ul>	<ul style="list-style-type: none"> <li>Improve Public Information Policy and disclose more informative project summary documents, project assessments and monitoring reports, especially for category B projects with significant impacts.</li> </ul>
<b>RIGHTS COMPATIBILITY</b>	<ul style="list-style-type: none"> <li>Develop protocols to prevent and address reprisals against complainants.</li> </ul>	<ul style="list-style-type: none"> <li>Commit not to fund activities that cause, contribute to or exacerbate human rights violations.</li> <li>Require clients to assess the human rights impacts of their operations.</li> <li>Develop measures to address reprisals against complainants.</li> </ul>
<b>LESSONS LEARNED</b>	<ul style="list-style-type: none"> <li>Identify and publish trends and lessons learned from cases.</li> <li>Strengthen mandate to allow PCM to undertake policy reviews without involvement of the Board.</li> </ul>	<ul style="list-style-type: none"> <li>Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.</li> <li>Develop and publish a monitoring and tracking tool to report on implementation of commitments and changes in policies/procedures as a result of PCM cases.</li> </ul>

they may have a conflict of interest and are required to notify the PCM Officer about any circumstances that may affect their independence or any attempts to influence or interfere with their work.<sup>5</sup> Despite these provisions to safeguard the PCM's legitimacy, survey results were mixed on whether, in practice, the PCM handled complaints in a fair manner or was open to feedback. Several respondents expressed concern that the PCM's independence, and therefore its legitimacy, is being undermined by Bank Management. These respondents shared their impression that the Bank had exerted pressure on the PCM and interfered in the handling of a few cases, including delaying the publication of PCM reports.

**DFI:** Unlike in many mechanisms, the PCM's RoP provide that the selection committee for the PCM Officer and Experts will include members external to the Bank.<sup>6</sup> Following the adoption of the revised RoP last year, a selection committee was formed to hire additional PCM experts that did include civil society representatives. However, CSOs expressed concerns that the selection committee established to select the new PCM Officer in early 2015 did not include a civil society representative, though, according to Bank management, it did include two people external to the Bank.<sup>7</sup>

### **ACCESSIBILITY**

**IAM:** The PCM has developed several tools to help ensure that its complaint process is accessible to potential users. Complaints can be submitted in any of the languages of the countries of operation, including via an online complaint form available in English and Russian.<sup>8</sup> The PCM RoP are available in 14 languages, and the PCM has also published a PCM User Guide in 14 languages.<sup>9</sup> Survey respondents report that the filing procedures are easy to follow, with a majority reporting that it is easy for them to contact the PCM for questions or advice. However, some expressed concern that while CSOs may not have difficulty in understanding the PCM's procedures, community members who do not have CSO support might find it more challenging and often are unaware they can ask the PCM for advice. The PCM is also the only IAM that allows CSOs that are not directly affected by the DFI-financed activity to file a complaint requesting a compliance review. However some of the filing requirements diminish the PCM's accessibility. For example, the PCM will only accept complaints requesting problem-solving if they are received within 12 months following the EBRD's last disbursement to the client. However, information about disbursement is not publicly available, so complainants have no way of knowing whether their complaints are eligible prior to filing. Furthermore, there is no logical reason why problem-solving would be more feasible or desirable prior to disbursement. As long as both parties have an interest in resolving the conflict, problem-solving can be effective.

**DFI:** A link to the PCM's website is fairly easy to find on the EBRD's homepage.<sup>10</sup> However, the website is only useful for those who know to look there. Although EBRD clients are required to establish and disclose the availability of project-level grievance mechanisms,<sup>11</sup> they are not required to disclose that they have received financing from

the EBRD nor that project-affected people have access to the PCM. Respondents reported that often local communities affected by EBRD-financed projects are not aware of the Bank's involvement in the project and thus, not aware about the PCM.

### **PREDICTABILITY**

**IAM:** Both the current and previous RoP establish deadlines for each stage of the complaint process. However, many respondents report having experienced significant delays, undermining the PCM's predictability. This could be attributable to a lack staff capacity and available PCM Experts. Prior to 2015, the PCM had only three experts on their roster. Now there are seven.<sup>12</sup> More recently, it appears that the PCM is experimenting with a new approach for registration and eligibility assessments, which introduces more uncertainty into the process.<sup>13</sup> In practice, some users report that the PCM kept them informed of the steps it was taking in their cases, while others expressed they did not receive sufficient information from the PCM about the status of their complaints.

The PCM does have a monitoring mandate. It will monitor the implementation of any agreements made through problem-solving until it determines that monitoring is "no longer needed".<sup>14</sup> With compliance reviews, the PCM does not monitor the instances of non-compliance it found, rather it is limited to monitoring the implementation of Management Action Plans.<sup>15</sup>

**DFI:** While the RoP require Bank Management to respond to the PCM at different points throughout the complaint process, there is seemingly no separate policy or procedure for Bank staff regarding their engagement with the complaint process. For example, before filing a complaint, complainants are required to first raise their concerns with Bank Management or the Bank client. However, the Bank provides no guidance on whom to contact with the concern or the timeframe in which to expect a response. Similarly, the Bank does not have a policy on the design and implementation of its Management Action Plans. Users report that Bank Management does not always commit to address findings of non-compliance.

### **EQUITABILITY**

**IAM:** For the most part, the RoP provide the complainant with an equal opportunity to review and comment on PCM reports as it does for Bank Management. Complainants can review draft Problem-Solving Completion reports,<sup>16</sup> draft Problem-Solving Monitoring Reports,<sup>17</sup> draft Compliance Review Reports,<sup>18</sup> and draft Compliance Review Monitoring Reports.<sup>19</sup> Unlike many other mechanisms, the RoP allow complainants to comment on the Management Action Plan. Those comments are shared with the Board of Directors or President, as appropriate, and the PCM Expert conducting the Compliance Review may also take those comments into consideration when finalising the report.<sup>20</sup>

The final reports are not shared with the complainants until after the Board has approved them. The PCM, however, does not consistently consult with complainants in person during the eligibility phase as it does with Bank Management. In-person meetings with complainants would ensure the PCM adequately understands the complainants' concerns and would inform its Eligibility Assessment Report. In practice, a few survey respondents reported that they thought that the EBRD and its client had access to more information than they did. Most survey respondents did report that the PCM respected the role of the complainants' advisor or representative.

**DFI:** Users expressed that the EBRD often does not communicate sufficiently on the preparation of Management Action Plans (MAPs). In addition to preparing a MAP, management may also prepare a management response to the PCM findings.<sup>121</sup> The RoP, however, do not provide complainants with the opportunity to comment on the management's response. The EBRD should provide the PCM with sufficient resources in order to allow complainants to participate meaningfully in its complaint process. The PCM reports that its budget was increased in 2014 to allow the recruitment of new PCM Experts.<sup>22</sup> Any expenses incurred above its budget can be covered by the Bank's Management Reserve Fund.<sup>23</sup>

## **TRANSPARENCY**

**IAM:** The PCM provides a substantial amount of information about its activities, through its Register,<sup>24</sup> where documentation on registered complaints is disclosed, and its detailed annual reports.<sup>25</sup> However, it is difficult to find information on complaints that did not meet the registration criteria, as this information is not disclosed on the Register or in the annual reports.

**DFI:** The EBRD has ranked the lowest among multilateral development banks on the Aid Transparency Index for the last three years.<sup>26</sup> Its Public Information Policy (PIP) provides for a number of exceptions that allow the EBRD to withhold the Project Summary Documents, which would otherwise be disclosed, limiting the information available to potential complainants. Indeed, survey respondents reported that publicly available project information can be insufficient to develop a complaint to the PCM, especially for projects categorised as B, in spite of their potentially significant adverse impacts. In general, information on monitoring and implementation of mitigation measures is very hard to obtain from the Bank.

## **RIGHTS COMPATIBILITY**

**IAM:** The PCM has some measures that would help ensure the rights compatibility of its outcomes. Complainants can request that their identities remain confidential.<sup>27</sup> Significantly, the PCM has the mandate to recommend suspension of the banks processing of or disbursements related to a project, if the PCM believes the project will

cause serious, irreparable harm.<sup>28</sup> However, this provision has never been invoked. These provisions prevent human rights violations during the process but do not ensure that process outcomes are rights compatible. The PCM could make use of the limited references to human rights in the EBRD's Environmental and Social Policy in its compliance investigations.

**DFI:** The EBRD's Environmental and Social Policy (ESP) recognises the "responsibility of clients and their business activities to respect human rights".<sup>29</sup> Human rights are explicitly referenced throughout the EBRD's Performance Requirements, and included in the definition of "social impacts".<sup>30</sup> However, the ESP stops short of the human rights due diligence called for in the UN Guiding Principles on Business and Human Rights, which would assess impacts against all internationally recognised human rights.<sup>31</sup> Another significant shortcoming is that, although the EBRD makes a commitment that it "will not knowingly finance projects which either involve or result in forced evictions",<sup>32</sup> it does not make a similar commitment regarding the violation of other human rights.

## **LESSONS LEARNED**

**IAM:** The RoP require that the PCM should be reviewed by the Board of Directors every five years,<sup>33</sup> allowing a regular opportunity for the PCM to incorporate lessons learned and improve its own performance. The most recent review, concluded in May 2014, included two comment periods and several regional consultations to solicit feedback from CSOs. However, CSOs were dissatisfied with the extent to which their comments were incorporated into the final policy, many of which were intended to prevent changes that would weaken the policy. There were several improvements to the RoP that seemed to incorporate lessons learned from ongoing or previous complaints. For example, the revised RoP extends the length of time that a complainant can request problem-solving regarding a project in which EBRD has an equity investment, an issue that arose in a previous complaint.<sup>34</sup> Although proposed by CSOs during the revision process, the PCM does not have an advisory function to draw lessons from its cases to improve the implementation of EBRD's environmental and social policies.

**DFI:** The EBRD revises its 'good governance' policies – ESP, PIP, and PCM RoP – at the same time, which, in theory, should help ensure coherence and consistency. However instead of improving the policies or their implementation as a result of PCM findings, users expressed concern that the ESP's biodiversity provisions were weakened as a result of three complaints on hydropower projects, the compliance reviews for which were completed at the beginning of the revision process.

## ANALYSIS OF COMPLAINTS CLOSED WITHOUT REACHING A SUBSTANTIVE PHASE

According to the PCM's website, between 1 July 2014 and 30 June 2015, three complaints were deemed ineligible for the PCM's Compliance Review and Problem-solving Initiative or otherwise closed without reaching a substantive phase of the complaint process.<sup>35</sup> One of the complaints was withdrawn, based on the complainant's formal request that the case be closed following the suspension of the project and changes to the EBRD Environmental and Social Policy and Energy Strategy.<sup>36</sup> With regard to the other two complaints, which the PCM Officer reviewed together, the mechanism determined that there was an insufficient causal link between the anticipated social and environmental impacts of gold mining raised in the complaint and the limited mineral exploration and project preparation activities directly financed under the ERBD project at issue (see Section 4.1.1 for a more extensive analysis of this type of IAM decision).<sup>37</sup>

## NOTES

- 1 See European Bank for Reconstruction and Dev., *Approval of New Governance Policies*, <http://www.ebrd.com/what-we-do/strategies-and-policies/approval-of-new-governance-policies.html> (linking to the 2014 updates of the Environmental and Social Policy, Public Information Policy, and PCM Rules of Procedure).
- 2 This number may differ from the 'total completed 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 European Bank for Reconstruction and Dev., *Project Complaint Mechanism Rules of Procedure* 9-10, ¶¶ 51, 58 (2014) [hereinafter EBRD Rules of Procedure].
- 5 *Id.* at 9, ¶ 54.
- 6 *Id.* at 8-10, ¶¶ 50, 57.
- 7 Letter to European Bank for Reconstruction and Dev. President (Jan. 31, 2015) [hereinafter Letter to EBRD President], *Available at* [http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Jan-31-2015\\_Letter-on-PCM-Officer-hiring-process.pdf](http://www.accountabilitycounsel.org/wp-content/uploads/2012/05/Jan-31-2015_Letter-on-PCM-Officer-hiring-process.pdf); *See also* Response to Letter to EBRD President (Feb 6, 2015).
- 8 European Bank for Reconstruction and Dev., *Complaint Form*, [http://www.ebrd.com/downloads/integrity/sample\\_complaint\\_form.pdf](http://www.ebrd.com/downloads/integrity/sample_complaint_form.pdf) (providing a sample of the PCM complaint form).
- 9 European Bank for Reconstruction and Dev., *How to submit a complaint and what to include* <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/submit-a-complaint.html> (last visited Nov. 11, 2015).
- 10 European Bank for Reconstruction and Dev., <http://www.ebrd.com/home>.
- 11 European Bank for Reconstruction and Dev., *Environmental and Social Policy, Performance Requirement 10*, ¶ 28 (2014) [hereinafter EBRD Environmental and Social Policy].
- 12 European Bank for Reconstruction and Dev., *PCM Experts*, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-experts.html> (last visited Oct. 20, 2015).
- 13 This approach was described in a CSO letter to the EBRD President, *Available at* <http://grievancemechanisms.org/ItronAmulsarfinal.pdf> ("We understand that the PCM is currently trying to redefine the purpose and format of the Eligibility Assessment to prevent duplicating either the Registration or Compliance Review phase of the process. We were assured that in redefining the approach, the PCM would not 'cut corners' in order to speed up the process. Unfortunately, it appears that the PCM's new approach to the Eligibility Assessment phase risks setting a dangerous trend, as demonstrated in the Lydian International complaints.").
- 14 EBRD Rules of Procedure, *supra* note 4, at 7, ¶ 39.
- 15 *Id.* at 8, ¶ 47.
- 16 *Id.* at 6, ¶ 38.
- 17 *Id.* at 7, ¶ 39.
- 18 *Id.* at 7, ¶ 42.
- 19 *Id.* at 8, ¶ 47.
- 20 *Id.* at 7-8, ¶¶ 45-46.
- 21 *Id.* at 7-8, ¶ 45(b).

- 22** European Bank for Reconstruction and Dev., *Project Complaint Mechanism: Annual Report (2014)*, Available at <http://www.ebrd.com/cs/Satellite?c=Content&cid=1395243176018&d=8&pagename=EBRD%2FContent%2FdownloadDocument>.
- 23** *Id.*
- 24** European Bank for Reconstruction and Dev., *PCM Register*, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.
- 25** European Bank for Reconstruction and Dev., *About the Project Complaint Mechanism*, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/about.html>.
- 26** Aid Transparency Index, *European Bank for Reconstruction and Development*, <http://ati.publishwhatyoufund.org/donor/ebd/>.
- 27** EBRD Rules of Procedure, *supra* note 4, at 1, ¶ 4.
- 28** *Id.* at 6, ¶ 35.
- 29** EBRD Environmental and Social Policy, *supra* note II, at ¶ 9.
- 30** *Id.* at n.2.
- 31** UN, *Guiding Principles on Business and Human Rights 19-20, Principle 18, Commentary (2011)*, Available at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).
- 32** EBRD Environmental and Social Policy, *supra* note II, at ¶ 21.
- 33** EBRD Rules of Procedure, *supra* note 4, at 12, ¶ 72.
- 34** *Id.* at 2, ¶ 12(b).
- 35** European Bank for Reconstruction and Dev., *PCM Register*, <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html> (last visited 28 July 2015).
- 36** See European Bank for Reconstruction and Dev. *Project Complaint Mechanism*, Oltenia - Turceni Rehabilitation (No. 2014/01), <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.
- 37** See European Bank for Reconstruction and Dev. *Project Complaint Mechanism*, DIF-Lydian (Amulsar Gold Mine) (Nos. 2014/02 and 2014/03), <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism/pcm-register.html>.