ASIAN DEVELOPMENT BANK

REVIEW OF THE INSPECTION FUNCTION:
ESTABLISHMENT OF A NEW ADB ACCOUNTABILITY MECHANISM

May 2003
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ADB</td>
<td>Asian Development Bank</td>
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<tr>
<td>AfDB</td>
<td>African Development Bank</td>
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<tr>
<td>BCRC</td>
<td>Board Compliance Review Committee</td>
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<td>BIC</td>
<td>Board Inspection Committee</td>
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<td>CAO</td>
<td>Compliance Advisor/Ombudsman</td>
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<td>CRP</td>
<td>compliance review panel</td>
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<td>DMC</td>
<td>developing member country</td>
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<td>EA</td>
<td>executing agency</td>
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<td>EBRD</td>
<td>European Bank for Reconstruction and Development</td>
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<td>EDC</td>
<td>Export Development Canada</td>
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<td>IDB</td>
<td>Inter-American Development Bank</td>
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<td>IEO</td>
<td>Independent Evaluation Office</td>
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<td>IFC</td>
<td>International Finance Corporation</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>JBIC</td>
<td>Japan Bank for International Cooperation</td>
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<td>MDB</td>
<td>multilateral development bank</td>
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<td>MIGA</td>
<td>Multilateral Investment Guarantee Agency</td>
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<td>NAAEC</td>
<td>North American Agreement on Environmental Cooperation</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NBP</td>
<td>New Business Processes</td>
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<td>OCRP</td>
<td>Office of the Compliance Review Panel</td>
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<td>OD</td>
<td>operations department</td>
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<td>OGC</td>
<td>Office of the General Counsel</td>
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<td>OM</td>
<td>Operations Manual</td>
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<td>OSPF</td>
<td>Office of the Special Project Facilitator</td>
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<td>PAI</td>
<td>Project Administration Instruction</td>
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<td>PCR</td>
<td>project completion report</td>
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<td>PPS</td>
<td>private project sponsor</td>
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<td>PSOD</td>
<td>Private Sector Operations Department</td>
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<td>RSDD</td>
<td>Regional and Sustainable Development Department</td>
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<td>SPF</td>
<td>special project facilitator</td>
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<td>TA</td>
<td>technical assistance</td>
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<td>TOR</td>
<td>terms of reference</td>
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<td>WB</td>
<td>World Bank</td>
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**NOTE**

In this report, "$" refers to US dollars.
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EXECUTIVE SUMMARY

In December 1995, the Asian Development Bank’s (ADB) Board of Directors approved the establishment of an Inspection Function to provide a forum for project beneficiaries to appeal to an independent body relating to ADB’s compliance with its operational policies and procedures in ADB-assisted projects. ADB established the Inspection Function in the context of increased attention to accountability, transparency, and public participation by ADB and other multilateral development banks (MDBs). Approval of the Inspection Function was designed to complement ADB’s existing audit, supervision, and evaluation systems.

At the time of approval of the ADB Inspection Function, the Board stipulated a review within 2 years from its approval of the initial roster of experts as panel members; the review would assess the operations of the Board Inspection Committee (BIC) and related inspection procedures, and review the Inspection Function’s application to ADB’s private sector operations. In 1998, ADB commenced a review of the Inspection Function, but ADB had limited experience with the inspection process, and few conclusions could be drawn regarding the existing system. Only two requests, both regarding the Korangi Wastewater Management Project in Pakistan, had been filed by then, and BIC had deemed them both ineligible. Support for strong accountability mechanisms at ADB and other MDBs has continued throughout the past decade. In 2000, ADB’s donors recommended a strengthened and more independent inspection function, and that it should also have oversight of private sector projects.1

The review continued, and in the last quarter of 2001, the President set up a steering committee (to oversee the review) and a working group (to carry out the review). The first full inspection process, relating to the Samut Prakarn Wastewater Management Project in Thailand, was conducted from April 2001 to March 2002, and it became evident that the current inspection process and procedures were lengthy, confusing, and complex for most stakeholders inside and outside ADB. The first full inspection also raised concerns about independence, credibility, transparency and information dissemination, and effectiveness of the Inspection Function. In 2002, ADB engaged two consultants to assist in carrying out the review of the Inspection Function as well as to act as resource persons during external consultations. In 2002 and early 2003, ADB carried out extensive external and internal consultations.

In 2002, the first and second draft working papers were extensively discussed at both internal and external consultations. These two drafts analyzed the issues raised by the current Inspection Function and offered various options for a future mechanism. Following the end of public consultations in August 2002, more internal consultations took place from September to November 2002, and, as part of internal consultations between Management and the Board, a preliminary working paper was prepared in November 2002 to solicit the Board’s views at an informal seminar. In January 2003 the informal Board seminar was held, and in February 2003 the working paper was prepared reflecting the outcome of the internal and external consultations, including the various comments made by the Board at the informal seminar. The working paper was posted on the ADB web site, inviting public comments. The comments received were also posted on the ADB web site and were forwarded to the Board before its consideration of the working paper. The present paper takes into account the various comments of the Board.

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The proposal for the new accountability mechanism consists of two separate but complementary functions. The two functions are (i) a consultation phase consisting of a special project facilitator (SPF), who will respond to specific problems of locally affected people in ADB-assisted projects through a range of informal and flexible methods; and (ii) a compliance review phase consisting of a panel (the compliance review panel [CRP]) to investigate alleged violations of ADB’s operational policies and procedures that have resulted, or are likely to result, in direct, adverse, and material harm to project-affected people, and to make recommendations to ensure project compliance, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project. Although the Offices of the SPF and CRP will be physically and functionally separate from each other, they will be linked for the purposes of responding to the complaints of affected people, and enhancing ADB’s development effectiveness and project quality.

The consultation phase will consist of the SPF, who will be assisted by one professional staff member and two administrative staff/national officers. The SPF will report directly to the President. CRP will consist of three members, one of whom will be the chair. CRP will be assisted by an office of CRP, serving as secretariat, with two professional staff members, one of whom will also act as the secretary of CRP, and three administrative staff/national officers. CRP will report directly to the Board on all activities, including postcompliance review monitoring and its outcomes, except on specific activities where CRP will report to the Board Compliance Review Committee (BCRC). The present BIC will be restructured as BCRC, which will have an oversight function for the following: (i) clear CRP’s proposed terms of reference and time frame before they are released by CRP, and (ii) review CRP’s draft reports on monitoring implementation of any remedial actions approved by the Board as a result of a compliance review before CRP finalizes them. BCRC will consist of the same Board members as BIC.

In addition to public sector operations, the new ADB accountability mechanism will apply to private sector operations (loan, guarantee, equity investment to the extent that ADB’s operational policies and operational procedures are covered by it, or technical assistance grant).

Section I of this paper provides information on the current ADB Inspection Function. The experiences with accountability mechanisms of other institutions are provided in Appendix 1 (MDBs) and Appendix 2 (institutions other than MDBs). A summary of inspection requests received under the current Inspection Function is provided in Appendix 3. Section II provides information on the consultations about the review of the ADB Inspection Function. Appendix 4 gives a summary of the consultations, including the four non-exclusive options presented in the first and second draft working papers. Section III describes the proposal for the new ADB accountability mechanism with its two-step approach (consultation and compliance review), including resource implications, effective date, and transition arrangements. Appendix 5 provides the institutional setup of the new ADB accountability mechanism. Appendix 6 gives an account of the specific issues on the application of an accountability mechanism to private sector operations that were raised during the consultations. Appendix 7 summarizes suggested modes of response to complaints and the dispute settlement procedure. Appendix 8 contains the draft reorganized table of contents of the Operations Manual. Finally, Section IV provides a recommendation on the establishment of the new ADB accountability mechanism and related matters.
I. CURRENT ADB INSPECTION FUNCTION

A. Background

1. In December 1995, the Asian Development Bank’s (ADB) Board of Directors approved the establishment of an Inspection Function to provide a forum for project beneficiaries to appeal to an independent body relating to ADB’s compliance with its operational policies and procedures in ADB-assisted projects. The ADB Inspection Function was the third accountability mechanism established by multilateral development banks (MDBs), following the creation of inspection mechanisms at the World Bank (WB) in 1993 and the Inter-American Development Bank (IDB) in 1994.

2. At the time of approval of the ADB Inspection Function, the Board stipulated that:

   [T]he operation of the Board Inspection Committee and related inspection procedures, and consideration of the application of these inspection procedures to the Bank’s private sector operations, should be reviewed by Management within two years after the Board's approval of the initial Roster, and the results of this review, together with any proposals for improvements in the operation of the Committee or in the related inspection procedures, should be submitted to the Board.

3. In 1998, ADB commenced the review of the Inspection Function. During the initial review ADB sought the views of civil society including nongovernment organizations, private sector lenders and investors, and the ADB Management and Board. An initial working paper was submitted to the Board in September 1999. That working paper considered the functioning of the Board Inspection Committee (BIC), reviews by WB and IDB of their inspection mechanisms, issues and lessons learned, and the application of the Inspection Function to ADB’s private sector operations.

4. At that time, ADB had limited experience with the inspection process, and few conclusions could be drawn regarding the existing system. Only two requests, both regarding the Korangi Wastewater Management Project in Pakistan, had been filed by then, and BIC had deemed both ineligible. Support for strong accountability mechanisms at ADB and other MDBs has continued throughout the past decade. In 2000, ADB’s donors recommended a strengthened and more independent inspection function, and that it should also have oversight of private sector projects. The review continued, and in 2002, ADB carried out extensive external and internal consultations on the review. Also, the first full inspection process relating to the Samut Prakarn Wastewater Management Project in Thailand was conducted from April 2001 to March 2002, and it became evident that the current inspection process and procedures were lengthy, confusing, and complex for most stakeholders both inside and outside ADB. The first full inspection also raised concerns about independence, credibility, transparency and information dissemination, and effectiveness of the Inspection Function.

5. In 2002, the first and second draft working papers were extensively discussed at both internal and external consultations during the review of the ADB Inspection Function. These two
drafts analyzed the issues raised by the current Inspection Function and offered various options for a future mechanism. Following the end of public consultations in August 2002, more internal consultations took place from September to November 2002, and, as part of internal consultations between Management and the Board, a preliminary working paper was prepared in November 2002 to solicit the Board's views at an informal seminar. In January 2003, the informal Board seminar was held, and in February 2003, the working paper was prepared reflecting the outcome of the internal and external consultations, including the various comments made by the Board at the informal seminar. The working paper was posted on the ADB web site, inviting public comments.\(^5\) The comments received were also posted on the ADB web site\(^6\) and were forwarded to the Board before its consideration of the working paper. This paper takes into account the various comments of the Board.

**B. Purposes and Objectives of the Current Inspection Function**

6. The emergence of accountability mechanisms at ADB and other MDBs was a direct response to broader changes both inside and outside the MDBs. Beginning in the 1980s and throughout the 1990s, the activities of MDBs came under increased scrutiny by civil society groups, parliamentarians, and nonfinance ministry officials in both borrowing and funding countries. At the same time, there was a shift in development models toward sustainable development that was formally recognized at the 1992 United Nations Conference on Environment and Development. In response to these trends, MDBs began to develop new environmental and social policies that aimed at improving long-term development effectiveness by emphasizing the interests of affected communities.

7. The environmental and social policy frameworks set minimum standards for the design and implementation of MDB-assisted projects. The policy frameworks were developed to respond to concerns that MDBs not fund projects that had unreasonable environmental impacts (e.g., environment policy), unfairly disadvantaged vulnerable groups (e.g., indigenous people and involuntary resettlement policies), or were conducted with little or no local knowledge or participation (e.g., access to information and consultation policies). The policies were also seen as improving the consistency of project implementation and as an appropriate way for the boards of directors of MDBs to establish substantive standards for staff operations. These policy frameworks were meant to improve the development effectiveness of MDBs and the quality of MDB-assisted projects.

8. Soon after these policy frameworks were developed, concerns arose from civil society groups and member governments that these policies were not being effectively implemented or adhered to properly or consistently. Additionally, MDBs faced an increasing need to carry out independent and objective investigations into the complaints of groups and communities affected by MDB-assisted projects. A number of high profile citizens’ complaints arose in the 1980s, particularly against WB, and stakeholders inside and outside MDBs identified the need to create mechanisms to handle these complaints constructively. Due to the immunities and privileges enjoyed by MDBs under international law and through their charters, MDBs are shielded from private citizen lawsuits in member countries. This immunity basically denied affected people an effective forum to air their grievances and seek redress.\(^7\)

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9. These factors led first WB, and then other MDBs, including ADB, to create accountability mechanisms aimed at enhancing public accountability and compliance with their policies. The WB Inspection Panel was created in 1993, followed by the IDB Independent Investigation Mechanism in 1994, the ADB Inspection Function in 1995, and the International Finance Corporation/Multilateral Investment Guarantee Agency (IFC/MIGA) Compliance Advisor/Ombudsman (CAO) Office in 1999. These accountability mechanisms have all aimed to improve the institutions' development effectiveness both by enhancing staff accountability to their board of directors through monitoring compliance with underlying policy frameworks and by increasing MDBs' responsiveness to complaints from project-affected people. In 2002, two leading bilateral export credit agencies (Export Development Canada and Japan Bank for International Cooperation) announced their intention to create accountability mechanisms. In 2002, the European Bank for Reconstruction and Development (EBRD) developed a proposal for an independent recourse mechanism, which was approved by its board of directors in April 2003. Appendix 1 summarizes the accountability mechanisms at other MDBs, and Appendix 2 summarizes the accountability mechanisms at institutions other than MDBs.

10. ADB identified similar objectives for establishing its Inspection Function. According to the 1995 Board paper, the rationale for establishing the Inspection Function included the following:

(i) Establishment of an inspection function and related inspection procedures would be consistent with ADB's policy of encouraging transparency and accountability in its operations.

(ii) Establishment of such a function would complement ADB's policy of allowing greater public access to ADB documents and publications, as well as ADB's increased emphasis on beneficiary participation in the formulation and implementation of projects.

(iii) Independent investigation of the facts underlying the grievance of a group arguably affected by ADB's failure to follow its operational policies and procedures would permit a fair hearing of the views of the affected group.

(iv) The activities and recommendations of an inspection body would help to educate the public at large about the variety and complexity of issues involved in development programs in the region.

(v) The existence of an inspection body would foster greater confidence in and support for ADB and its operations.\(^8\)

C. Policy and Procedures of the Current Inspection Function

11. The current ADB inspection policy provides a formal channel for local communities and affected people (and in special circumstances, any Board member) to request an independent review or "inspection" of alleged policy violations in the formulation, processing, or implementation of ADB-assisted projects. The Inspection Procedures were approved by BIC\(^9\) in

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\(^9\) BIC consists of six Board members, including four regional Board members (at least three of whom must be from borrowing countries) and two nonregional Board members.
October 1996. The Inspection Procedures\textsuperscript{10} provide detailed guidance on the operation of the inspection policy.

12. Under the current Inspection Function, the following parties can request an inspection regarding an ADB-assisted project: (i) communities, organizations, or other groups residing in the borrowing member country where the project is being implemented or is proposed to be implemented; (ii) similar groups residing in another member country adjacent to the borrowing member country if the group is affected or likely to be affected by the project; (iii) representatives of such groups residing in the same country or, in exceptional cases, where no local representative is available, by nonlocal representatives; and (iv) one or more Board members in special cases involving allegations of serious violations with respect to an ongoing project.

13. Requests must be submitted in writing in English and must describe the following: (i) how ADB has failed to follow applicable operational policies and procedures in connection with the project; (ii) how the requester has been or is likely to be directly and materially harmed by ADB's act or omission, and what rights or interests of the group have been or are likely to be adversely affected; and (iii) a description of the steps taken by the requester to bring the complaint to ADB's attention, ADB's response, and a statement of why ADB's response was inadequate.\textsuperscript{11}

14. Requests that are beyond the scope of the Inspection Function and will not be considered include the following: (i) complaints relating to actions that are the responsibility of other parties or that do not involve ADB action or omission in violation of its operational policies and procedures; (ii) complaints regarding decisions made by ADB, the borrower, or the executing agency (EA) on procurement of goods and services, including consulting services; (iii) complaints relating to completed projects or substantially completed projects where 95% of the loan funding has been disbursed; (iv) complaints that have been already disposed under ADB's inspection procedures, unless the requesters present new evidence not known at the time of the original request; (v) complaints about the adequacy of ADB's existing policies or procedures; (vi) complaints within the jurisdiction of ADB's Appeals Committee or ADB's Administrative Tribunal or that relate to ADB personnel matters; and (vii) complaints involving ADB's private sector operations.

15. The current inspection process includes the following steps. The "days" referred to in these steps are calendar days.

\begin{itemize}
  \item[(i)] An affected party sends a written complaint to the ADB President about an ADB-assisted project.
  
  \item[(ii)] Management responds to the complaint within 45 days from receipt of the complaint by the President.
  
  \item[(iii)] If the affected party is unsatisfied with the response, it can send a request for inspection to BIC. The request for inspection should contain the same information as the initial complaint.
\end{itemize}

\textsuperscript{10} The Inspection Procedures are included in ADB. 1996. \textit{ADB's Inspection Policy: A Guidebook (October)}. Manila. This guidebook is available on the ADB website at \url{http://www.adb.org/Documents/Guidelines/Inspection/default.asp?p=inspdocs}.

\textsuperscript{11} See \textit{ADB's Inspection Policy: A Guidebook} for detailed requirements on filing an initial complaint and a request for inspection.
information as the original complaint as well as a description of the steps taken by the requester to bring the grievance to the attention of Management, and why Management's response was inadequate.

(iv) BIC determines eligibility and asks Management for a response to the request within 30 days from Management's receipt of the request.

(v) Within 14 days from receipt of Management's response, BIC recommends to the Board whether the requested inspection should be authorized.

(vi) The Board determines whether to authorize an inspection within 21 days from receipt of BIC's recommendation.

(vii) Within 7 days from the Board decision, BIC informs the requesters of the Board decision.

(viii) If the Board authorizes an inspection, BIC selects a panel of available experts from the panel roster to inspect the project.

(ix) After the inspection, the ADB panel sends a report to BIC.

(x) Management submits its response to the panel report within 30 days from receipt.

(xi) BIC sends a recommendation to the Board within 14 days from receipt of Management's response, along with the panel report and Management's response.

(xii) The Board makes a decision on the panel report within 21 days from submission to the Board, and recommends to Management appropriate measures.

(xiii) BIC informs the requesters of the Board decision within 7 days from the Board decision.

16. From the above steps, it takes at least 117 days before the requester knows whether an inspection has been authorized. It takes at least 182 days before the requester knows the outcome of the Board decision. These days do not take into account extensions of time to file documents and the duration of the panel inspection, which is not time-bound.

D. Requests for Inspection Received under the Current Inspection Function

17. ADB has received eight requests for inspection to date: three from Pakistan, four from Sri Lanka, and one from Thailand. Six requests have been deemed ineligible by BIC. Only one request—the Samut Prakarn Wastewater Management Project in Thailand—has gone through a full inspection process. The eighth request for inspection—the Chashma Right Bank Irrigation Project (Stage III) in Pakistan—was received by ADB in November 2002. In April 2003, the Board approved BIC’s recommendation, including authorizing an inspection and that any inspection process approved by the Board should commence in December 2003 or earlier if BIC brings forward the timetable for commencement of the inspection process. A summary of the inspection requests received under the current Inspection Function is given in Appendix 3.
II. CONSULTATIONS ON THE REVIEW OF THE ADB INSPECTION FUNCTION

A. Internal and External Consultations

18. In the last quarter of 2001, the President set up a steering committee (to oversee the review) and a working group (to carry out the review). From October 2001 to October 2002, the steering committee and the working group regularly met to discuss the direction of the review. In 2002, ADB engaged two staff consultants (Ms. L. Udall and Mr. D. Hunter) to assist in carrying out the review of the Inspection Function, as well as to act as resource persons during the external consultations.12

19. In 2002, the first and second draft working papers were extensively discussed at both internal and external consultations during the review of the ADB Inspection Function. These two drafts analyzed the issues raised by the current Inspection Function and offered various options for a future mechanism. In 2002, the Board met twice to discuss on the Inspection Function review. Internal consultations with concerned ADB departments, including the regional departments, the Regional and Sustainable Development Department (RSDD), and the Private Sector Operations Department (PSOD) were also held in late 2002 and early 2003 to discuss the review.13

B. Issues during Consultations Relating to the Current Inspection Function

20. As the review of the Inspection Function retains the rationale of the inspection policy adopted in 1995, it focused on several difficult issues relating to structural and procedural problems that emerged in ADB’s experiences with the Inspection Function.

21. The ad hoc nature of the panel of experts being selected from the roster of experts on a case-by-case basis will not develop an accumulation of knowledge and expertise as part of institutional memory, nor contribute to the continuity and stability of the panel of experts. BIC, whose members are Board members, also faces the same shortcomings as that of the panel of experts. Since the panel of experts reports to BIC, the relationship between the panel and BIC, on the one hand, and the relationship between BIC and the Board, on the other, have not only affected the independence of the panel, but also the functions of BIC and Management’s relations with the Board and BIC, resulting in delays, debates, and potential conflicts of interest in the application of the inspection policy. The perceived lack of the independence of the panel has threatened the credibility and viability of the inspection process.

22. Procedurally, the process is complex and difficult to follow for project-affected people, who have to go through many steps, and the process needs to be streamlined. Regarding transparency and communication, neither the panel of experts nor BIC had, unhappily, clear guidelines dealing with the release of information to the public.

23. Also controversial is the confusion created by the treatment of operational policies and procedures included in the Operations Manual (OM). Some operational policies and procedures have been approved by the Board, but have not yet been incorporated in the OM. Some of the

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12 They attended staff meetings, including the working group; interviewed ADB staff, including operations staff; and interviewed ADB Board members, including BIC members, prior to preparing an initial issues paper, followed by initial first and second drafts of the working paper. They are not responsible for preparing subsequent papers.

13 ADB acknowledges with thanks the inputs of all workshop participants and all contributors who provided written comments during the consultations in 2002 and early 2003.
OM provisions are not consistent with the underlying Board-approved policies. As a result, an OM review and updating exercise has been undertaken since March 2002 in parallel with the review of the Inspection Function.

24. In addition, the major issues relating to the current Inspection Function identified during the consultations include the following:

(i) the need to establish proactive and preventive steps inside ADB that will keep problems from escalating into controversies that are brought to the accountability mechanism;

(ii) the scope of the Inspection Function, including the policies and procedures that it should cover, and the 95% disbursement limit in filing a request;

(iii) the application of the Inspection Function to ADB's private sector operations and related concerns, such as protection of business confidentiality and the differences between the private sector and the public sector project cycles;

(iv) eligibility and screening requirements and questions relating to who should be able to file a request for inspection, the number of requesters required, and the language and substantive requirements for filing a request;

(v) how to ensure that site visits by the panel are accepted by all stakeholders;

(vi) the cost of the inspection process, particularly in terms of staff time and resources and costs to developing member countries (DMCs);

(vii) transparency and information dissemination in the inspection process;

(viii) the potential for real and perceived conflicts of interest and the resulting impact of establishing "firewalls" and outside perceptions of independence;

(ix) the adversarial nature of inspections; and

(x) the need for post-inspection monitoring to ensure that Board recommendations are implemented and that processes exist for learning broader lessons from the accountability mechanism's experiences.

25. Appendix 4 gives an account of the consultations on the review of the ADB Inspection Function, including the four non-exclusive options presented in the first and second draft working papers, which were extensively discussed during the public consultations. From the consultations, and based on ADB's experiences with the Inspection Function, including the Samut Prakarn Inspection case, there is nearly universal agreement that the current system should be replaced. Any change proposed for improvement premises that (i) the accountability mechanism is an important learning tool that will allow ADB, including its Board, Management, and staff, to draw on lessons learned, thereby enhancing development effectiveness and project quality on the ground; and (ii) the mechanism is a productive asset for ADB, building confidence in the credibility of the institution, and is not intended to be a liability for ADB.
C. Outcome of the Consultations

26. The consultations reinforced broad support for (i) an independent accountability mechanism that addresses the complaints of adversely affected people in ADB-assisted projects, and (ii) increased problem-solving efforts and problem prevention measures by ADB. Additionally, there was a strong expectation that the new mechanism should enhance ADB's development effectiveness and project quality on the ground.

27. The combined results of both internal and external consultations indicated, at the minimum, broad support for a compliance review panel that is an improved version of the WB panel. The term "compliance review" has been used, during the review, as well as in the earlier draft working papers, the final working paper, and this paper, instead of "inspection," to avoid any negative associations in the use of the term "inspection."

28. There was a diversity of views of how the consultation phase should be designed and implemented. The design of the consultation phase preceding the compliance review presented the more difficult challenges in terms of consensus building. Key questions presented around this phase included the following: (i) whether consultation should be conducted by ADB operations staff or management, a senior official located in DMCs, or an independent office; (ii) whether the project counselor (the term "project counselor" was used in Option D of the second draft working paper, and the term "special project facilitator" [SPF] is used in subsequent papers, including this one) should be appointed by, and should report to, the President or the Board; (iii) the relationship between the project counselor/SPF and the compliance review panel; and (iv) the sequence or choice of the claimants' initial approach to the two phases.

III. PROPOSAL FOR A NEW ADB ACCOUNTABILITY MECHANISM: A TWO-STEP APPROACH OF CONSULTATION AND COMPLIANCE REVIEW

A. Reasons for a New ADB Accountability Mechanism

29. A majority of external stakeholders has preferred Option D of the second draft working paper or a variation, which involves what is commonly referred to as a "problem-solving" function and an "inspection" function. In the second draft working paper, the "problem-solving" function is referred to as a "consultation process" in order to avoid unrealistic expectations that every problem will be resolved by ADB and to give a more flexible, informal, and multimethod approach to the facilitation of problem-solving efforts between the parties to a problem. Even with the establishment of an independent compliance review panel appointed by the Board upon the recommendation of the President, it is now universally recognized that under the present system—at both ADB and WB—once a request for inspection is authorized, the inspection process will run its own course entirely within the organization. At the end of the long process, the complainants are finally informed of what happened to their requests, but the complaint could remain unresolved on the ground.

30. The choice of Option D or a variation therefore reflects the common recognition that ADB needs to address the complaints of people affected by ADB-assisted projects. It is accepted that, as a development finance institution, ADB is a principal interested party in the success of every project it supports, and, accordingly, cannot walk away from problems on the ground. Nonetheless, it is acknowledged that, because the legal ownership of the project lies with the DMC government concerned, the question of "problem-solving" in general, and during project implementation in particular, is primarily the function of the government. It cannot be
denied that the government has all the resources needed to solve the problem, such as technical expertise, institutional backing, local knowledge, financial resources, and so on, at its disposal that could be mobilized at will. The EA/DMC government or the private project sponsor (PPS) is naturally the immediate party that the complainants should first approach to present any complaints about a project.

31. The question faced by ADB as a principal interested party in the success of a project it finances is how it can best facilitate the resolution of problems on the ground as the other party to the loan agreement, recognizing that the complaints are primarily between the project owner, i.e., the EA/DMC government or the PPS, and the project beneficiaries, i.e., the local people affected by the project. Nevertheless, as some issues are embedded in the political decision-making processes of the DMC government, the role of the SPF may be limited depending on the nature of the complaints.

32. The new approach seeks to strike a balance between the need for an objective, detached perspective on a project and the need for sufficient knowledge of and experience with it. Striking the appropriate balance suggests that the consultation phase should be located within the organization directly under Management. Any complaint of affected people will arise in the course of the formulation, processing, or implementation of a project, and all of these stages of the project cycle are directly under Management's responsibility. As long as the SPF reports directly to the President and is detached from, and not directly involved in, any aspect of the formulation, processing, or implementation of a project, he/she will be in a position to take a second look at the problem submitted by complainants in a more objective and detached manner. Needless to say, he/she cannot perform the consultation function without the cooperation of staff in the operations departments (ODs)\(^{14}\) concerned, who are knowledgeable about the project and equipped in terms of technical competence and experience relating to it.

33. The consultation process is not for the determination of liability or apportionment of blame or fault among the parties concerned; rather, it is designed to have genuine complaints properly addressed by ADB as a principal interested party in the resolution of the complaints of people affected by ADB-assisted projects. It is incumbent upon Management to facilitate the resolution of the problem. Whether the SPF can maintain his/her credibility and effectiveness in the performance of the problem-solving function (and correspondingly, enhance the credibility of Management) hinges upon his/her good faith efforts in trying to facilitate the resolution of the problem on the ground.

B. Introduction to the New ADB Accountability Mechanism

34. The proposal for the new ADB accountability mechanism consists of two separate but complementary functions. The two functions are (i) a consultation phase consisting of the SPF, who will respond to specific problems of locally affected people in ADB-assisted projects through a range of informal and flexible methods; and (ii) a compliance review phase consisting of a panel (the compliance review panel [CRP]) to investigate alleged violations of ADB's operational policies and procedures that have resulted, or are likely to result, in direct, adverse, and material harm to project-affected people, and to make recommendations to ensure project compliance, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project. Although the Offices of the SPF and CRP will be physically and functionally separate from each other, they will be linked for the purposes of responding to the

\(^{14}\)The term "operations department" refers to any department that handles the formulation, processing, or implementation of any ADB-assisted project. The ODs include the regional departments, RSDD, and PSOD.
complaints of project-affected people, and to enhance ADB's development effectiveness and project quality.

35. The proposal here reflects expectations widely shared among all the stakeholders inside and outside ADB that ADB should strengthen its so-called "problem-prevention" capabilities. Problem prevention is, at the least, part of the result of ADB's compliance with its operational policies and procedures in the formulation, processing, or implementation of a project. It is premised on the basis that adequate project preparation and proper consultation with stakeholders in the project area have been undertaken so as to ensure project quality. Such problem-prevention efforts are part of an ongoing process within the ODs based on feedback from the Operations Evaluation Department's project performance audits and, strictly speaking, are outside the ADB accountability mechanism. Within this broad problem-prevention function of the ODs, however, certain areas of activities performed by the ODs can be considered as part of the "problem-solving" function within them, in that all the complaints relating to a project are invariably filed with the OD concerned in the first place. The OD is usually the first contact point within ADB to respond to such complaints. The consultation phase is designed ultimately to improve and strengthen the internal problem-solving function of the ODs.

36. The consultation phase will consist of the SPF, who will be assisted by one professional staff member and two administrative staff/national officers. The SPF will report directly to the President. CRP will consist of three members, one of whom will be the chair. CRP will be assisted by an office of the compliance review panel (OCRP), serving as secretariat, with two professional staff members, one of whom will also act as the secretary of CRP, and three administrative staff/national officers. CRP will report directly to the Board on all activities, including postcompliance review monitoring and its outcomes, except on specific activities where CRP will report to the Board Compliance Review Committee (BCRC). The present BIC will be restructured as BCRC, which will have an oversight function for the following: (i) clearance of CRP's proposed terms of reference and time frame before they are released by CRP, and (ii) review of CRP's draft reports on monitoring implementation of any remedial actions approved by the Board as a result of a compliance review before CRP finalizes them. BCRC will consist of the same Board members as BIC. Appendix 5 provides the institutional setup of the new ADB accountability mechanism.

C. Specific Issues Related to the New ADB Accountability Mechanism

37. The following specific issues relating to the mechanism received significant comments during the internal and external consultations: (i) relationship between the consultation phase and the compliance review phase; (ii) application to private sector operations; (iii) cost implications; and (iv) site visits.

1. Relationship between Consultation Phase and Compliance Review Phase

38. Complaints relating to an ADB-assisted project under the proposed accountability mechanism will first go to the consultation phase without seeking to establish ADB's accountability under the compliance review phase. The reasons for this sequence are as follows: (i) the filing of complaints about a project is not necessarily contingent upon the alleged noncompliance by ADB with its operational policies and procedures, and (ii) the objectives of the consultation phase are to listen to complaints from the project-affected people and to facilitate the resolution of the problem on the ground, whereas the objectives of the compliance review phase are to establish whether the direct and material harm complained of by the
project-affected people is the result of ADB's failure to follow any of its operational policies and procedures in the course of the formulation, processing, or implementation of the project.

39. Since the objectives of each phase are different from the other phase, it is theoretically possible to run the consultation phase and the compliance review phase in parallel, allowing project-affected people to make a choice. Nevertheless, the proposed accountability mechanism places the consultation phase first for the following reasons: First, the project-affected people are more interested in having their complaints addressed first rather than focusing on the establishment of ADB's accountability, which may not necessarily result in a satisfactory resolution of the complainant's problem on the ground. Second, it is more urgent to address the alleged direct and material harm complained of by the project-affected people than to deal with the question of compliance, which will remain irrespective of the resolution of the problem. Third, it is in the interest of economy and efficiency to have the consultation phase proceed before the compliance review phase in terms of the urgency of addressing alleged direct, material harm and ADB's resources, as ADB is not in a position to conduct two separate processes at the same time right from the outset when the complaint is filed.

40. Fourth, in any event, eligibility and fact-finding must be undertaken under either phase, and such information gathered under the consultation phase will be shared with CRP under the compliance review phase. Fifth, the time taken in accessing the accountability mechanism will be minimized so that the complainant is free to file a request for compliance review as soon as possible. The complainant can file a request either when the complaint is found ineligible by the SPF (at the end of step 3 of the consultation process) or in the event of an eligible complaint, when the complainant receives the SPF's findings on his/her review and assessment of the complaint, and decides not to proceed with the consultation phase (at the end of step 4 of the consultation process).

41. Finally, the informal and flexible consultation is a more conducive forum and should be carried out first to address the problems of the complainants in view of the limited remedies available under the compliance review phase, which may not necessarily resolve the complainant's problem on the ground. Although the proposed mechanism contemplates the filing of a request for compliance review even before the completion of the consultation phase, a request for compliance review is not an appeal to a higher body of authority in the form of an appellate jurisdiction. Irrespective of whether a problem on the ground is resolved or not to the satisfaction of the parties concerned, the question of accountability remains. The filing of a request for compliance review is, therefore, a separate process altogether for that purpose.

42. On occasion, there could be serious concerns on compliance issues from a complainant who also wishes to file a request for compliance review while carrying on with the consultation process. To accommodate these concerns, the complainant may also file a request for compliance review at any time during the implementation of the course of action (step 7 of the consultation process). Proceeding to file a request for compliance review will still be consistent with the purpose of the new ADB accountability mechanism in first addressing the problems of the complainants on the ground, followed by a compliance review.

2. Application to Private Sector Operations

43. The current Inspection Function excludes ADB's private sector operations, which represent less than 5% of ADB's lending activities. In establishing the Inspection Function, the Board stipulated that the application of the inspection procedures to ADB's private sector operations should also be considered in the review of the Inspection Function.
44. The same objectives for enhancing accountability and ensuring compliance exist with respect to private sector operations as with public sector operations. Private sector projects financed by ADB can have similar impacts on project-affected people as public sector projects. Most of ADB's operational policies apply to its private sector operations, with some variations in operational procedures to reflect differences in private sector project cycles. Unlike public sector operations, judicial actions against private sector project sponsors are not barred by ADB immunity, and thus project-affected people may be able to bring their claims for harm in domestic courts (although ADB's immunity will be raised to defeat the affected people's action against ADB). Appendix 6 gives an account of the specific issues on the application of an accountability mechanism to private sector operations that were raised during the consultations.

45. IFC and MIGA focus on private sector operations. The IFC/MIGA CAO Office has three roles (ombudsman, advisory, and compliance). The compliance audit cannot be triggered directly by affected persons, but through ombudsman investigations, at the request of management or at the CAO's initiative. In addition to public sector operations, the IDB independent investigation mechanism applies to private sector operations such as loans and guarantees but not to equity operations. The IDB mechanism has limited experience with private sector claims involving IDB loan funding. The EBRD mechanism applies to both public sector and private sector operations.

46. The new ADB accountability mechanism will apply to private sector operations (loan, guarantee, equity investment to the extent that ADB's operational policies and operational procedures are covered by it, or technical assistance [TA] grant).

3. Cost Implications

47. The costs associated with an ADB accountability mechanism are of widespread concern—not only the direct costs of operating the accountability mechanism but also the indirect costs of staff time and the potential increases in costs of implementing projects. The cost estimates for the first inspection authorized by the Board in the Samut Prakarn Wastewater Management Project were approximately $1.7 million in ADB staff time and resources, and $200,000 for the ADB panel. The cost estimates for the inspection request on the Southern Transport Development Project in Sri Lanka are about $160,000 in ADB staff time. These estimates do not include BIC costs related to the inspections.

48. By comparison, in 2001, the WB panel's budget allotment was $2.0 million and its expenses were about $1.8 million. In 2002, the WB panel's budget allotment was about $2.5 million and its expenses were about $2.4 million. In some years, the WB panel utilizes all the funds, but in slower years it has had a surplus. The expenses are directly related to the number of inspections that are carried out within a given year. WB management has also expressed concern about costs in terms of staff time. For example, the management estimated that the China Western Poverty Reduction Project (Credit No. 3255-CHA and Loan No. 4501-CHA) inspection—probably the most expensive and controversial claim under the WB system—cost $1.5 million in staff time and resources.

49. By contrast, the 2001 operating budget for the IDB mechanism was $236,500, of which $45,000 was spent due to the small workload.

50. In 2002, the IFC/MIGA CAO Office had an annual operating budget of about $1.6 million. Although several of the CAO's complaints have been handled with minimal resources, a full mediation process can be labor intensive and costly. The ongoing mediation involving Peru's
Yanacocha mine, for example, has reached $2.5 million in costs (at least 80% of which is being paid by the company, which has received the value of increased dialogue with the affected community). The President of the WB Group has agreed to contribute more funds if needed.

51. Also significant are the costs relating to time spent by the ADB Board and BIC on inspection matters. BIC’s investment in the inspection process requires extensive time and resources. If other requests come in, BIC members may not have time to fulfill their other Board duties. Currently, BIC has one professional staff member and one administrative staff member, both on a part-time basis. BIC has no extra resources or staff for assisting with the workload. Since WB, IDB, and the IFC/MIGA CAO Office do not have Board committees with this role, no comparisons can be drawn in this regard.

52. DMC governments, in particular, have also expressed concerns that an accountability mechanism may directly or indirectly increase the costs of projects financed by ADB as the result of project delays or change in project design. Experience with other MDB accountability mechanisms suggests that project delays and significant changes in project design as a direct result of inspections are relatively rare. Moreover, any remedial changes suggested by OSPF or CRP that would result in changes in project design would have to be made in consultation with the concerned DMC and Management, and will have to be approved by ADB in accordance with its procedures. In any event, the filing of a complaint with the SPF or a request for compliance review with CRP will not affect project processing or implementation.

53. Some indirect costs related to policy compliance in projects may be unavoidable if one assumes that an independent compliance review panel is effective in improving compliance with ADB’s operational policies and procedures. These costs reflect the costs of doing business under policy frameworks adopted by the Board in enhancing ADB’s development effectiveness and project quality.

54. The new ADB accountability mechanism will entail significantly more direct costs than the current system. It will require the SPF at the equivalent level of director general and three CRP members. The SPF will be full time, and the chair of CRP will be full time for a minimum of 1 year. The consultation process and the compliance review panel will each have a full-time secretariat (one professional staff member and two administrative staff/national officers for the consultation phase, and two professional staff members and three administrative staff/national officers for the compliance review phase).

4. Site Visits

55. Site visits in borrowing countries under the inspection policy have become a particularly controversial issue that affects the independence as well as effectiveness of the panel investigation. In both the internal and external consultations, there were strong voices saying that site visits are essential for the effectiveness of compliance review, stakeholder participation, and independent verification of facts and alleged policy violations. As a result, some stakeholders have suggested that ADB must insist on site visits in the new mechanism; otherwise, the process will be compromised. Some of these stakeholders suggest that site visits and general cooperation with the panel should be included in the conditions of loan agreements for all projects, similar to the requirement that member governments permit entrance to ADB representatives, including its officials and staff. On the other hand, DMC governments have legitimate concerns that they should be able to schedule and condition site visits based on the local context. In part, DMCs are concerned that the inspection process creates a misperception that the DMC government has done something wrong and is being inspected. Some argue that
requiring site visits unconditionally infringes on the DMC’s sovereignty, and that DMCs have every right to turn down a site visit, both legally and within the current procedures.

56. If, as many stakeholders believe, site visits are important to the compliance review process, then a sensible approach is to enable site visits to take place in consultation with the borrowing country. When the Board approves the proposed mechanism, the policy and procedures should assume the good faith cooperation of all parties in the compliance review process, including the borrowing country. This would also contribute to a collaborative spirit of improving ADB accountability and policy compliance. Seeking prior consent of the borrowing country, under an operating assumption that such consent would be routinely given, would be preferable to the heavy-handed approach of including conditions in the loan agreement. For this reason, ADB does not propose at this time any changes regarding site visits during panel investigation. ADB expects that site visits will be a routine and noncontroversial aspect of the accountability mechanism in the future, and that the ADB accountability mechanism personnel and borrowing countries will cooperate with each other to enhance the effectiveness of the compliance review process.

D. Policy under the New ADB Accountability Mechanism

57. The rationale for the establishment of the Inspection Function as provided in the 1995 Board paper continues to apply to the new ADB accountability mechanism, namely, (i) establishment of the mechanism is consistent with ADB’s policy of encouraging transparency and accountability in its operations; (ii) establishment of the mechanism complements ADB’s policy of allowing greater public access to ADB documents and publications, as well as ADB’s increased emphasis on beneficiary participation in the formulation and implementation of projects; (iii) independent investigation of facts underlying the complaint of a group arguably affected by ADB’s failure to follow its operational policies and procedures permits a fair hearing of the views of the affected group; (iv) the activities and recommendations of CRP helps to educate the public at large about the variety and complexity of issues involved in development programs in the region; and (v) the existence of CRP fosters greater confidence in, and support for, ADB and its operations.

58. The new ADB accountability mechanism is guided by the following principles in its establishment and operation. The mechanism will (i) enhance ADB’s development effectiveness and project quality; (ii) be responsive to the concerns of project-affected people and will be fair to all stakeholders; (iii) reflect the highest professional and technical standards in its staffing and operations; (iv) be as independent and transparent as possible; and (v) be cost-effective, efficient, and complementary to the other supervision, audit, quality control, and evaluation systems already existing at ADB.

59. The new ADB accountability mechanism will apply to private sector operations (loan, guarantee, equity investment to the extent that ADB’s operational policies and operational procedures are covered by it, or TA grant).

60. The policy of the consultation phase of the new ADB accountability mechanism is to assist project-affected people with specific problems caused by ADB-assisted projects through a number of informal, consensus-based methods with the consent and participation of all parties concerned, e.g., consultative dialogue, good offices, or mediation. To this end, the consultation phase is designed to deal with complaints from any complainant who (i) is, or is likely to be, directly affected materially and adversely by an ADB-assisted project, irrespective of any allegation of noncompliance by ADB of its operational policies and procedures; and (ii) claims
that the direct and material harm is, or will be, the result of an act or omission of ADB in the
course of the formulation, processing, or implementation of the ADB-assisted project. Also, the
consultation phase will not supplant the existing project administration and problem-solving
functions inherent in each OD, which has the initial responsibility for responding to the concerns
of affected communities. The SPF will confine his/her role to ADB-related issues on ADB-
assisted projects. The SPF will not interfere in the internal matters of any DMC and will not
mediate between the complainant and local authorities.

61. The policy of the compliance review phase of the new ADB accountability mechanism is
to establish ADB's accountability in its operations by providing a forum in which project-affected
people (and in special circumstances, any Board member) can air their complaints against ADB
in a fair, objective, and transparent manner by filing requests for compliance review. To this end,
the compliance review phase is designed to deal with requests for compliance review from any
requester who (i) is, or is likely to be, directly affected materially and adversely by the ADB-
assisted project; and (ii) claims that the direct and material harm is, or will be, the result of an
act or omission of ADB's alleged failure to follow its operational polices and procedures in the
course of the formulation, processing, or implementation of the ADB-assisted project. The
compliance review will focus on ADB's conduct in connection with the particular project under
compliance review, and the conduct of other parties, including the borrowing country, EA, the
borrower, or the PPS, is not the subject of the investigation. The conduct of these other parties
will be considered only to the extent directly relevant to an assessment of ADB's compliance
with its operational policies and procedures. Since the compliance review is not intended to
provide judicial-type remedies, such as injunctions or money damages, CRP's findings and
recommendations are not adjudicative.

E. Consultation Phase

1. Basic Features and Appointment

62. The SPF will be a special appointee at the equivalent level of director general appointed
by the President, after consultation with the Board. The SPF will report directly to the President.
As the SPF will be independent of the ODs and have full control of the consultation phase,
he/she will enhance the credibility of ADB in facilitating the resolution of problems in projects in
which it is a principal interested party. The Office of the Special Project Facilitator (OSPF) will
include one professional staff member and two administrative staff/national officers to provide
secretariat support. Subject to the President's approval, the SPF may engage technical experts
as consultants in accordance with ADB's Guidelines on the Use of Consultants and other
arrangements satisfactory to ADB, to assist him/her in his/her work, including monitoring
activities.

63. The selection criteria for the SPF will include (i) the ability to deal thoroughly and fairly
with complaints brought to him/her; (ii) integrity and independence from the ODs; (iii) exposure
to developmental issues and living conditions in developing countries; and (iv) knowledge of and
experience with the operations of ADB or comparable institutions, and/or private sector
experience. The term of the SPF will be 3 years, renewable. The SPF must not have worked in
any OD for at least 5 years prior to the appointment. The SPF must disclose to all stakeholders
immediately upon learning that he/she has a personal interest or has significant prior
involvement in the matter. In the discharge of his/her function, the SPF will have access to all
ADB staff and Management, and all ADB records the SPF deems relevant.
2. **Functions of the Special Project Facilitator**

64. The consultation phase is to assist project-affected people with specific problems caused by ADB-assisted projects through a number of informal, consensus-based methods with the consent and participation of all parties concerned, e.g., consultative dialogue, good offices, or mediation. The SPF will seek consensus and agreement among the parties as to the identification of the matters in dispute, the modality of problem-solving, and its time frame by creating a common forum conducive to problem-solving among the parties concerned. The SPF may suggest different approaches, including convening meetings with various stakeholders, organizing and facilitating consultation processes, or engaging in a fact-finding review of the situation. Appendix 7 summarizes suggested modes of response to complaints and the dispute settlement procedure, all subject to the consent of the parties concerned.

65. OSPF will prepare, after consultation with the Board, operating procedures to give effect to the operational provisions in this paper. The operating procedures will be approved by the President and furnished to the Board. OSPF will also adopt administrative procedures to implement its powers and obligations. These administrative procedures will be complementary to the provisions in this paper and to the operating procedures, as well as to any ad hoc procedures adopted by OSPF for the conduct of any complaint and follow-up action related to the complaint pursuant to the operating procedures. In light of experience, OSPF will, if it considers necessary, revise the administrative procedures. At any time after the President's approval of the operating procedures, OSPF may review these procedures, and recommend changes, after consultation with the Board, for the President's approval.

66. Specific activities of OSPF include the following:

(i) collate and integrate internal and external experiences of problem-solving to be fed back into ADB's operations, including the formulation, processing, or implementation of projects;

(ii) provide generic support and advice to the ODs in their problem-solving activities but not for specific cases under review by the ODs;

(iii) conduct outreach programs to the public;

(iv) review and assess complaints;

(v) obtain from the ODs all materials and analyses relating to the complaints;

(vi) facilitate a consultative dialogue, use its good offices, and/or facilitate the establishment of a mediation mechanism (see Appendix 7);

(vii) inform the Board and other stakeholders about the results of specific consultation activities; and

(viii) report at least annually to the President on the progress of activities, with a copy to the Board, with the publication of an annual report which will be integrated with CRP's annual report.

67. The Office of the General Counsel (OGC) will be responsible for providing OSPF with advice on any matters relating to ADB's rights and obligations with respect to any complaint,
including the issuance and implementation of any course of action taken under the consultation process.

3. Eligibility

68. Who Can File a Complaint. Complaints may be filed only by (i) any group of two or more people (such as an organization, association, society, or other grouping of individuals) in a borrowing country where the ADB-assisted project is located or in a member country adjacent to the borrowing country; (ii) a local representative of the affected group; or (iii) a nonlocal representative, in exceptional cases where local representation cannot be found and the SPF agrees. The term "ADB-assisted project" refers to a project financed or to be financed, or administered or to be administered, by ADB and covers both public sector operations (loan, guarantee, or TA grant) and private sector operations (loan, guarantee, equity investment to the extent ADB's operational policies and operational procedures are covered by it, or TA grant). If a complaint is made through a representative, it must clearly identify the people on whose behalf it is made and provide evidence of authority to represent the project-affected people. The filing of a complaint will not suspend or otherwise affect the formulation, processing, or implementation of the project unless agreed to by the DMC or PPS concerned and ADB.

69. How to File a Complaint. Complaints must be in writing and be specifically addressed to the "Special Project Facilitator." The working language of the new ADB accountability mechanism is English, but complaints may be submitted in any of the official or national languages of ADB's DMCs if the complainant is unable to provide an English translation. In those cases where the complaints are submitted in languages other than English, additional time will be required for translation. Complaints will be accepted by mail, facsimile, electronic mail, or hand delivery to the SPF at ADB headquarters. Complaints will also be accepted by any ADB office such as a resident mission or representative office, which will forward them to the SPF. The identity of complainants will be kept confidential if requested, but anonymous complaints will not be accepted.

70. Contents of the Complaint. The complaint must specify the following:

(i) that the complainant is, or is likely to be, directly affected materially and adversely by an ADB-assisted project, irrespective of any allegation of noncompliance by ADB of its operational policies and procedures;

(ii) that the complainant claims that the direct and material harm is, or will be, the result of an act or omission of ADB in the course of the formulation, processing, or implementation of the ADB-assisted project;

(iii) a description of the direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely by the ADB-assisted project;

(iv) an identification of the complainant (and any representatives) and contact information;

(v) if a complaint is made through a representative, identification of the project-affected people on whose behalf the complaint is made and evidence of authority to represent them;
(vi) a brief description of the ADB-assisted project, including the name and location if available;

(vii) the desired outcome or remedies that the project-affected people believe ADB should provide or help through the accountability mechanism;

(viii) a description of the complainant's good faith efforts made to address the problems first to the OD concerned;

(ix) an explanation of why any of the above information cannot be provided; and

(x) any other relevant matters or facts with supporting documents.

4. Scope and Exclusions

71. The scope of the consultation phase is broader than either the current Inspection Function or the proposed compliance review phase. The consultation phase is outcome-driven, focusing not on the identification and allocation of blame, but on finding ways to address the problem of the project-affected people in ADB-assisted projects.

72. Complaints will be excluded if they are

(i) about actions that are not related to ADB's action or omission in the course of the formulation, processing, or implementation of ADB-assisted projects;

(ii) about decisions made by ADB, the borrower or EA, or the PPS on procurement of goods and services, including consulting services;

(iii) about allegations of fraud or corruption in ADB-assisted projects and by ADB staff;

(iv) about an ADB-assisted project for which a project completion report (PCR)\textsuperscript{15} has been issued;

(v) relating to matters already considered by the panel under the current Inspection Function or by CRP (unless there is new evidence presented that was not known at the time of the original complaint or unless the subsequent complaint can be readily consolidated with the earlier complaint);

(vi) about the adequacy or suitability of ADB's existing policies and procedures;

(vii) frivolous, malicious, trivial, or generated to gain competitive advantage;

(viii) within the jurisdiction of ADB's Appeals Committee or ADB's Administrative Tribunal or relate to ADB personnel matters; and/or

(ix) about ADB's non-operational housekeeping matters, such as finance and administration.

\textsuperscript{15} A PCR is issued by ADB within 1-2 years after the project is physically completed and in operation.
5. Procedural Steps and Time Frame

73. The following are the procedural steps and proposed time frames for the consultation process. The "days" referred to in these steps are calendar days.

74. The consultation process is expected to take about 3 months from the date when the complaint is filed with ADB. This period excludes translation time, any request for extension of time to provide information or file documents, and the time needed by the parties to facilitate resolution of their problems during the implementation of the course of action. It is in the parties' interests to move along in the process, to have their problems resolved as early as possible. The complainant is free to refer the matter for compliance review at certain stages, including as early as the end of step 3 (if and when the complaint is rejected by the SPF as ineligible) or at the end of step 4 (if and when the complainant exercises the option to file a request for compliance review instead of continuing with the consultation phase after receiving the SPF's findings). In addition, the complainant may also file a request for compliance review while carrying on with the implementation of the course of action (step 7 of the consultation process).

75. **Step 1: Filing of the Complaint.** The affected party, or its representative, files a complaint with the SPF. If a complaint is received by Management or another department at ADB headquarters, or by an ADB office such as a resident mission or a representative office, it will be forwarded to the SPF.

76. **Step 2: Registration and Acknowledgement of the Complaint.** Upon receipt of the complaint, the SPF will register it in the registry of complaints and will send an acknowledgement to the complainant, with a copy to Management. This step is mainly administrative, although if the SPF immediately determines that the complaint cannot be accepted because it is not within ADB's mandate or he/she cannot assist with the problem, he/she will notify the complainant, with a copy to Management.

77. **Step 3: Determination of Eligibility of the Complaint.** Upon receipt of the complaint, the SPF will screen the complaint and determine eligibility. The SPF must be satisfied with the following requirements: (i) the complaint satisfies the matters provided in para. 70; (ii) the complaint is genuine and does not fall within any of the exclusions specified in para. 72; and (iii) the SPF believes, at his/her sole discretion, that his/her involvement could be useful.

78. During the eligibility stage, the SPF may consult all stakeholders, including ADB staff, the complainant, the EA/DMC government or the PPS, and the Board member representing the country concerned. The determination of eligibility includes a desk-based review and/or a site visit. If, for any reason, the SPF rejects the complaint, he/she will inform the complainant of the reason why the complaint is ineligible and will also inform the complainant that a request for compliance review may be filed with OCRP if the complainant so wishes. The SPF will also inform the complainant that CRP will determine independently whether the request meets CRP's eligibility criteria.

79. **Step 4: Review and Assessment of the Complaint.** If the complaint is accepted, the SPF will undertake a review to determine how best to address the issues raised in it. The review will normally include site visits, interviews, and meetings with the complainant and the EA/DMC government or the PPS, as well as any other people the SPF believes would be useful. The SPF will obtain information from the OD, and if necessary, will request advice and support. The SPF will review relevant documents, and will field a fact-finding mission on his/her own initiative or participate, in consultation with the OD, in a special project administration mission of the OD.
80. After the review is completed, the SPF will make an assessment and determine what the real problems are; who the real parties to the problem are; what kind of remedies the complainant seeks to obtain; and how best a mechanism for the resolution of the problem can be worked out. The SPF will complete the review and assessment, and report his/her findings to the President, with a copy to the Vice-President concerned. The SPF will also refer the findings to the OD and the complainant.

81. The SPF will inform the complainant of the following two options: (i) the complainant can carry on with the consultation process and provide comments on the SPF's findings (as provided in step 5), or (ii) the complainant can abandon the consultation process if the complainant finds the process not purposeful, and file a request for compliance review with OCRP if the complainant so wishes. The SPF will highlight the different remedies available under the two phases, e.g., indicating that remedies available under the consultation phase are intended to address the problems on the ground and facilitate resolution of the problem, and that the remedies under the compliance review phase focus on bringing the project into compliance and/or mitigating any harm, if appropriate, following the Board's decision of the outcome of a compliance review resulting in the determination of noncompliance with ADB's operational policies and procedures. The SPF will give the complainant 7 days from receipt of the SPF's findings to respond to the SPF with the complainant's decision.

82. **Step 5: Decision by the Complainant to Carry on with the Consultation Process or to File a Request for Compliance Review.** Upon receipt of the complainant's decision to carry on with the consultation process and provide comments on the SPF's findings, the SPF will inform the OD and the complainant that they have 14 days from the date of the SPF's notification to provide their comments on the SPF's findings. Upon receipt of the complainant's decision to file a request for compliance review, the SPF will close the complaint. The SPF will submit a report to the President, with a copy to the OD concerned, the Board, and the chair of CRP, summarizing the complaint, the steps taken in addressing the problem, and the decision of the complainant.

83. **Step 6: Comments on the SPF's Findings by the OD and the Complainant, and Recommendation by the SPF.** Upon receipt of comments on the SPF's findings from both the OD and the complainant, the SPF will take into account their comments, make a recommendation, and seek the President's approval for either of the following: (i) determine that no further review will be purposeful and conclude the consultation process; or (ii) work out the proposed course of action in consultation with the complainant, the OD concerned, and the EA/DMC government or the PPS, and obtain their concurrence with its issuance. If the complainant finds the consultation process not purposeful, the complainant may file a request for compliance review with OCRP if the complainant so wishes.

84. **Step 7: Implementation of the Course of Action in the Consultation Process.** The SPF will implement the course of action in the consultation process in consultation with the complainant, the OD concerned, and the EA/DMC government or the PPS. Each course of action will be tailored to the individual complaint, depending on such factors as the type and seriousness of the problem, the principal parties to the problem, the remedies being sought by the complainant, the urgency required in fashioning appropriate mitigation measures, and the likelihood that the consultation process could have positive outcomes.

85. The object of the consultation process is to find a flexible, informal, and cost-effective way to address issues raised in the complaint. The SPF may choose one or more of several approaches including (i) continuing the consultative dialogue on the consultation process in
seeking to find a mutually acceptable solution to the complaint, (ii) facilitating the consultation process by creating a forum through the SPF’s good offices between the complainant and the EA/DMC government or the PPS, and (iii) facilitating the establishment of a mediation mechanism.

86. Implementing the consultation process requires the consent of every party involved, including ADB, the complainant, and the EA/DMC government or the PPS. If consent does not exist, then the options available for dialogue and consultation will be necessarily reduced. If the consultation process is working, all parties will continue with the process until an agreement is reached.

87. When the consultation process using the consultative dialogue and/or good offices modes is complete, the SPF will submit a report, including the settlement agreement (if any), subject to ADB’s procedures, to the President with a recommendation agreed to by the complainant, the OD concerned, and the EA/DMC government or the PPS. The SPF will issue a report incorporating the President's decision on the recommendation and furnish the report to the complainant, the EA/DMC government or the PPS, and the Board for information. When the consultation process using the mediation mode is complete, the mediator will be required to furnish his/her report to the SPF. The SPF will submit the report to the President for information, with a copy to the Board.

88. In some circumstances, the consultation process may end with no resolution. The SPF may, for example, determine that no further consultation will be purposeful. In such circumstances the SPF will submit a report to the President summarizing the complaint, the steps taken to try to resolve the issues raised in the complaint, and a recommendation. The final report incorporating the President's decision on the recommendation will be furnished to the complainant, the EA/DMC government or the PPS, and the Board for information. Upon submission to the Board, the final report will be provided to the public. If the complainant finds the consultation process not purposeful, the complainant may file a request for compliance review with OCRP if the complainant so wishes. If the complainant finds the consultation process purposeful but has serious concerns on compliance issues, the complainant may also file a request for compliance review while carrying on with the implementation of the course of action.

89. **Step 8: Termination of the Consultation Process.** All parties to the consultation except the SPF can “walk away” from the process if there is no consensus on the course of action or if its implementation is not working in the SPF’s reasonable opinion. Termination of mediation is subject to the procedural rules of mediation. These actions are a formal closure to the consultation process.

6. **Transparency and Information Dissemination**

90. The SPF’s operations at all stages of the consultation phase will be as transparent as possible, subject to this paragraph, and consistent with relevant ADB policies and procedures and the need to ensure that any dialogue and consultation process is given the maximum opportunity for success. General descriptions about the process can be made public, but substantive details about the discussions will be kept confidential until a final solution is reached. The final agreement and resolution will also be kept confidential if the parties so agree. The SPF and other OSPF staff will be subject to ADB's confidentiality and disclosure of information policy, including those provisions aimed at ensuring that confidential business information is not disclosed.
91. Any material or information submitted to the SPF on a confidential basis from any party may not be released to any other parties without the consent of the party that submitted it. The SPF will exercise discretion, maintain a low profile in the borrowing country, and not give media interviews while making site visits or otherwise operating in the borrowing country. The SPF will not give any media interviews at any stage of the consultation process.

92. The SPF will also carry out outreach programs to the public, including meeting with the public, preparing materials describing the SPF, and providing advice to prospective complainants. The SPF will regularly update the registry of complaints, including changes in the status of any ongoing consultation. The SPF will have authority to issue press releases and public communications. Prior to releasing any news releases or other media communications, the SPF will inform the Office of External Relations (OER), not for purposes of review, but in order to provide ADB with an opportunity to prepare response to queries from the media or the public. OSPF will maintain its own web site. Specific milestone events during the consultation phase for which information disclosure is helpful will include updating of the registry of complaints, termination of the consultation process, and monitoring reports. The SPF will also inform the Board of these milestone events.

7. Remedial Actions

93. Any remedial actions that are adopted as a result of the consultation process will reflect an agreement among the relevant parties, subject to ADB's procedures. The range of potential remedies is quite broad. Remedial actions, if any, will be specified in a written agreement or series of agreements made by the relevant stakeholders. Remedial actions involving a major change in the project will require approval by Management or the Board according to ADB's procedures.

8. Monitoring

94. The SPF will be in charge of monitoring implementation of any agreement. Unless the President specifies a different timetable, the SPF will report annually to the President, with a copy to the Board, regarding the status of implementation. As part of the monitoring activity, the SPF will consult with the OD concerned, the complainant, and the EA/DMC government or the PPS. All stakeholders, including the public, may submit information regarding the status of implementation to the SPF. The SPF’s monitoring reports will be sent to the complainant and posted on the web site after being submitted to the President and furnished to the Board for information.

F. Compliance Review Phase

1. Basic Features and Appointment

95. ADB will establish CRP consisting of three members, one of whom will be the chair, and OCRP to provide secretariat support. OCRP will have two professional staff members, one of whom will also be the secretary of CRP, and three administrative staff/national officers. CRP may engage technical experts as consultants in accordance with ADB's Guidelines on the Use of Consultants and other arrangements satisfactory to ADB, to assist it in its work, including postcompliance review monitoring.

96. Two panel members will be from regional countries, with at least one from a DMC. The third panel member will be from a nonregional country. The selection criteria for panel members
will include (i) the ability to deal thoroughly and fairly with the request brought to them; (ii) integrity and independence from Management; (iii) exposure to developmental issues and living conditions in developing countries; and (iv) knowledge of and experience with the operations of ADB or comparable institutions, and/or private sector experience. The Board will approve the panel members upon the recommendation of the President. Each panel member will have a 5-year, nonrenewable term, except that the first three panel members will be appointed on a staggered basis of 3, 4, and 5 years, respectively.

One of the first three panel members will be appointed as the chair of CRP, to work full-time for a minimum of 1 year to organize OCRP, prepare the operating and administrative procedures, participate in public debate on the operating procedures, carry out outreach programs to the public, and facilitate access of the public. The remaining two panel members will be appointed part-time to work only when the workload of CRP requires their time. Directors, alternate directors, directors’ advisors, Management and staff, and consultants will be ineligible to serve on CRP until at least 3 years has elapsed from their time of employment. After serving on CRP, former panel members will be barred from employment at ADB. In the performance of their duties, panel members will be entitled to the privileges and immunities accorded under the ADB charter. A panel member may be removed from office for cause only by a majority decision of the Board. A panel member will be disqualified from participation in a compliance review where he/she has a personal interest or has had significant prior involvement.

CRP will report directly to the Board on all activities, including postcompliance review monitoring and its outcomes, except on the specific activities provided for in para. 102 below, about which CRP will report to BCRC. CRP will have access to all ADB staff and Management, and all ADB records CRP deems relevant. CRP will adopt operating procedures to provide detail to the operational provisions in this paper. CRP will specify in the operating procedures the procedures to be followed in carrying out the compliance review and in preparing reports. CRP will also adopt administrative procedures to implement its powers and obligations. The administrative procedures will be complementary to the provisions in this paper and to the operating procedures, as well as to any ad hoc procedures adopted by CRP for the conduct of any particular investigation in a request for compliance review pursuant to the operating procedures. In light of experience, CRP will, if it considers necessary, revise the administrative procedures.

2. Functions of the Compliance Review Panel

The purpose of CRP is to investigate alleged violations by ADB of its operational policies and procedures in any ADB-assisted project that directly, materially, and adversely affects local people in the course of the formulation, processing, or implementation of the ADB-assisted project. The purpose of the compliance review is to focus on ADB's accountability in determining whether ADB has or has not complied with its operational policies and procedures in connection with the particular project under compliance review, and not to investigate the borrowing country, EA, the borrower, or the PPS. The conduct of these other parties will be considered only to the extent directly relevant to an assessment of ADB's compliance with its operational policies and procedures. After carrying out a compliance review, CRP will issue to the Board its findings and recommendations, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project.

Specific activities of CRP include the following:

(i) receiving and determining the eligibility of requests for compliance review;
(ii) engaging with all stakeholders, including Management and staff, the requester, the EA/DMC government or the PPS, and the Board member representing the country concerned, in a thorough understanding of the issues during the compliance review;

(iii) coordinating its activities, to the extent appropriate, with those of the compliance review mechanism of any other cofinancing institution that is conducting a separate compliance review of the same project;

(iv) conducting thorough and objective reviews of policy compliance;

(v) consulting with Management and staff, the requester, the EA/DMC government or the PPS, and the Board member representing the country concerned on its preliminary findings and recommendations;

(vi) issuing draft reports to Management and requesters that include findings and recommendations on policy compliance;

(vii) issuing final reports to the Board with its findings and recommendations;

(viii) monitoring implementation of decisions made by the Board;

(ix) issuing annual reports that provide advice based on lessons learned from past cases;

(x) developing a roster of independent technical experts who can assist CRP in carrying out its work; and

(xi) liaising with accountability mechanisms at other institutions.

101. OGC through the General Counsel will be responsible for advising OCRP, BCRC, and the Board concerning ADB’s legal status, rights, and obligations under the ADB charter and any agreement to which ADB is a party, and on any other matters relating to ADB’s rights and obligations with respect to any request for compliance review.

3. Board Compliance Review Committee

102. BIC will be restructured as BCRC to have an oversight function for the following: (i) clear CRP’s proposed terms of reference (TOR) and time frame before they are released by CRP, and (ii) review CRP’s draft reports on monitoring implementation of any remedial actions approved by the Board as a result of a compliance review before CRP finalizes them. BCRC’s function in clearing the proposed TOR and time frame is to ensure that CRP operates within the scope of compliance review. BCRC will review CRP’s draft monitoring reports to ensure that CRP has carried out a satisfactory process in monitoring the implementation of any remedial actions approved by the Board following the compliance review. BCRC will consist of the same Board members as BIC, i.e., six Board members, including four regional Board members (at least three of whom must be from borrowing countries) and two nonregional Board members. The replacement and reappointment of BCRC members will be in accordance with the Board’s Rules of Procedure. OCRP will provide secretariat support to BCRC. Operating expenses will include costs of administrative support to BCRC. BCRC will adopt operating procedures to
provide detail to the operational provisions provided in this paper, including conflict of interest provisions to ensure that BCRC members are not directly involved in CRP's operations.

4. Eligibility

103. **Who Can File a Request for Compliance Review.** Requests for compliance review may be filed only by (i) any group of two or more people (such as an organization, association, society, or other grouping of individuals) in a borrowing country where an ADB-assisted project is located or in a member country adjacent to the borrowing country; (ii) a local representative of the affected group; (iii) a nonlocal representative, in exceptional cases where local representation cannot be found and CRP agrees; or (iv) any one or more members of the Board of Directors, after raising their concerns first with Management, in special cases involving allegations of serious violations of ADB's operational policies and procedures relating to an ongoing ADB-assisted project that have or are likely to have a direct, material, and adverse effect on a community or other grouping of individuals residing in the country where the project is being implemented or residing in a member country adjacent to the borrowing country.

104. If a request for compliance review is made through a representative, it must clearly identify the people on whose behalf it is made and provide evidence of authority to represent the project-affected people. If a request for compliance review is made by a Board member, it is understood that the compliance review is not intended to affect or limit the existing rights of Board members individually or collectively to request or initiate reviews of ADB policies and procedures.

105. The filing of a request for compliance review will not suspend or otherwise affect the processing of formulation, processing, or implementation of the project unless agreed to by the DMC or PPS concerned and ADB.

106. **How to File a Request for Compliance Review.** Requests for compliance review must be in writing and specifically addressed to the "Secretary, Compliance Review Panel." The working language of the ADB accountability mechanism is English, but requests may be submitted in any of the official or national languages of ADB's DMCs if the requester is unable to provide an English translation. In those cases where the complaints are submitted in languages other than English, additional time will be required for translation. Requests will be accepted by mail, facsimile, electronic mail, or hand delivery to the Secretary, CRP at ADB headquarters. Requests will also be accepted by any ADB office such as a resident mission or representative office, which will forward them to the Secretary, CRP. The Secretary, CRP will keep the identity of requesters confidential if requested to do so, but anonymous requests will not be accepted.

107. **Contents of the Request for Compliance Review.** The request for compliance review must specify the following:

   (i) that the requester is, or is likely to be, directly affected materially and adversely by the ADB-assisted project;

   (ii) that the requester claims that the direct and material harm is, or will be, the result of an act or omission of ADB's alleged failure to follow its operational polices and procedures in the course of the formulation, processing, or implementation of the ADB-assisted project;
(iii) a description of the direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely by the ADB-assisted project;

(iv) an identification of the requester (and any representatives) and contact information;

(v) if a request is made through a representative, identification of the project-affected people on whose behalf the request is made and evidence of authority to represent them;

(vi) a brief description of the ADB-assisted project, including the name and location if available;

(vii) the desired outcome or remedies that the project-affected people believe ADB should provide or help through the accountability mechanism;

(viii) an explanation of the results of the requester's efforts to address the complaint first to OSPF (or if the SPF has rejected the complaint as ineligible, an explanation of why the request is nonetheless eligible for compliance review);

(ix) an explanation of why any of the above information cannot be provided; and

(x) any other relevant matters or facts with supporting documents.

108. Although there is no mandatory requirement to cite alleged violations of specific policies in the request, the requester is free to allege any policy violations that the requester believes are linked to an action or omission of ADB because of ADB's alleged failure to follow its operational policies and procedures.

109. If the SPF has already determined that the complaint meets the eligibility criteria for the consultation phase, CRP will determine whether in the request for compliance review, the direct and material harm claimed by the requester is linked to ADB's alleged failure to follow its operational policies and procedures in the course of the formulation, processing, or implementation of the ADB-assisted project. CRP will obtain from OSPF all materials and analyses relating to the complaint at the consultation phase, including the SPF's determination on the eligibility criteria. If the SPF has rejected the eligibility of the complaint, CRP will determine independently whether in its judgment the request for compliance review meets CRP's eligibility criteria.

5. Scope and Exclusions

110. CRP will examine whether the direct and material harm complained of by the requester is the result of ADB's alleged failure to follow its operational policies and procedures in the course of the formulation, processing, or implementation of the ADB-assisted project. The scope includes all ADB operational policies and procedures as they relate to the formulation, processing, or implementation of the project (including situations where ADB is alleged to have failed in its follow-up on the borrower's obligations under the loan agreements with respect to such policies and procedures). These policies and procedures are referred to as "ADB's operational policies and procedures." They do not include guidelines and similar documents or statements, but staff instructions or other documents that relate to the formulation, processing,
or implementation of a project and that are intended to be incorporated eventually into ADB's operational policies and procedures are subject to compliance review.

111. ADB's operational policies and procedures that apply to the project under compliance review will be (i) in the case of a proposed project, those that were in effect when the complaint was filed with the SPF; and (ii) in the case of an ongoing project, those that were in effect at the time of Board approval with respect to the formulation or processing of the project, and those that were in effect when ADB's alleged act or omission took place with respect to the implementation of the project. A "proposed project" refers to a project under preparation that has not yet been approved by the Board of Directors or the President (as delegated by the Board), and an "ongoing project" refers to a project that has been approved by the Board of Directors or the President (as delegated by the Board).

112. On a project processed or approved prior to the updating of the OM, the operational policies and procedures that apply will be those approved by the Board, whether or not they were expressly incorporated into the existing OM. CRP will determine the relevant policies and procedures based on the information provided in the request for compliance review and through consultation with the OD concerned and other stakeholders.

113. All types of complaints specifically excluded from the consultation phase are also specifically excluded from the scope of CRP. In addition, for the purpose of compliance review, the following complaints will be excluded from the scope of CRP: (i) complaints relating to actions that are the responsibility of other parties, such as a borrower, EA, or potential borrower, unless the conduct of these other parties is directly relevant to an assessment of ADB's compliance with its operational policies and procedures; (ii) complaints that otherwise do not involve an action or omission by ADB's failure to follow its operational policies and procedures; (iii) complaints relating to the laws, policies, and regulations of the EA/DMC government concerned unless they directly relate to ADB's compliance with its operational policies and procedures; and (iv) complaints that have not first been filed with the SPF.

114. CRP will not consider the policies and procedures of other institutions (except to the extent that ADB's policies and procedures expressly refer to those of the other institutions).

6. Procedural Steps and Time Frame

115. The following are the procedural steps and proposed time frames for the compliance review process. The "days" referred to in these steps are calendar days. This phase is preceded by the consultation phase described in Section E, except in cases where a member of the Board of Directors files a request for compliance review, which then would go directly to CRP.

116. The requester will know whether the request for compliance review has been authorized by the Board after at least 49 days from receipt of the request for compliance review by ADB. The requester will know the outcome of the Board decision after at least 128 days from receipt of the request for compliance review by ADB. These periods exclude the time taken by the parties in the consultation phase, translation time, any request for extension of time to provide information or file documents, and the duration of CRP's review, which is not time bound. The 128-day period takes into account the step for the complainant to respond and comment on CRP's draft report (step 7 of the compliance review process), which is provided for the first time in any international financial institution accountability mechanism on compliance review. Also, the procedure has been streamlined so that the Board will now decide on one document from
CRP, which attaches responses from Management and the requester, instead of several documents from CRP.

117. In terms of minimum time taken by the parties in the consultation phase, excluding translation time, and any request for extension of time to provide information or file documents, before the complainant can file a request for compliance review, there are three scenarios: First, the complainant can file a request if and when the complaint is found ineligible by the SPF (at the end of step 3 of the consultation process). Second, the complainant can file a request in the case of an eligible complaint if and when the complainant receives the SPF's findings on his/her review and assessment of the complaint, and decides not to carry on with the consultation phase (at the end of step 4 of the consultation process). Third, in instances when the complainant has serious concerns on compliance issues, the complainant may also file a request while carrying on with the implementation of the course of action (step 7 of the consultation process).

118. **Step 1: Filing of the Request.** A request for compliance review is filed with OCRP. As long as the complaint is subject to the consultation process conducted by the SPF, an affected party or its representative is not allowed to request compliance review unless the request is made for a parallel process of both compliance review and consultation at any time during the implementation of the course of action (step 7 of the consultation process).

119. **Step 2: Registration and Acknowledgement of the Request.** Within 7 days from receipt of a request for compliance review, OCRP will register the request and acknowledge it. The registration of the request will be made on a register accessible to the public through the web site. CRP will inform the Board of any registration of the request. CRP will also release a press advisory that it has registered the request.

120. **Step 3: Determination of Eligibility of the Request.** Within 14 days from registration of the request for compliance review, CRP will determine the eligibility of the request and will inform the requester of its decision. If the SPF has determined that the complaint is ineligible, CRP will determine the eligibility of the request within 21 days from registration of the request for compliance review. Because the SPF would have already reviewed most eligibility issues, the primary issue for CRP to address is whether the request implicates potential policy violations. If the requester does not allege any specific policy violations, CRP will evaluate the request itself to determine if, in its opinion, the request raises issues of potential policy violations. During the eligibility stage, CRP may consult all stakeholders, including Management and staff, the requester, the EA/DMC government or the PPS, and the Board member representing the country concerned. The determination of eligibility includes a desk-based review and/or a site visit. If CRP determines that the request is ineligible, it will inform the Board of the ineligibility of the request. If CRP determines that the request is eligible, it will recommend to the Board that a compliance review should be authorized.

121. **Step 4: Board Authorization of the Compliance Review.** Within 21 days from receipt of CRP's recommendation, the Board will authorize the compliance review on a no-objection basis and without making a judgment on the merits of the request. Within 7 days from receipt of Board authorization, the requester will be informed of the Board’s decision on authorization of the compliance review, and the Board’s decision will then be posted on the web site.

122. **Step 5: Conducting the Compliance Review.** As soon as the Board authorizes the compliance review, CRP will begin its review. CRP’s review is not time bound, because the amount of time will vary considerably depending on the nature, complexity and scope of the
project and the potential policy violations. CRP will clear with BCRC the proposed TOR and time frame before they are released by CRP. Within 14 days from receipt of Board authorization of the review, CRP will release the TOR and time frame that will indicate the methodology and estimated duration of the review. The TOR and time frame will be provided to the Board and to all stakeholders, and posted on the web site in the registry of requests.

123. During this period, CRP will conduct the review and consult all concerned stakeholders, including Management and staff, the requester, the EA/DMC government or the PPS, and the Board member representing the country concerned. They will be given an opportunity to record their views. CRP will review documentation. CRP may also carry out site visits in its investigation while conducting the compliance review. Any site visit carried out in CRP's investigation will take place only if the country concerned and the PPS concerned as applicable have no objection, and the prior consent of the country concerned and the PPS concerned as applicable have been obtained by CRP.

124. **Step 6: CRP's Draft Report.** At the completion of its review of compliance, CRP will issue a draft report of its findings and recommendations to Management and the requester for comments.

125. **Step 7: Management's Response and Requester's Response to CRP's Draft Report.** Both Management and the requester will have 30 days from receipt of CRP's draft report to provide their responses to it. Each party is free to provide comments on the draft report, but only CRP's final view on these matters will be reflected in its final report.

126. **Step 8: CRP's Final Report.** Within 14 days from receipt of the responses to CRP's draft report from Management and the requester, CRP will consider their responses and make changes as necessary before issuing to the Board its final report with its findings and recommendations to ensure project compliance, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project. CRP's final report will contain CRP's findings and recommendations, and the responses from Management and the requester will be attached to it. CRP's findings and recommendations will be reached by consensus and, in the absence of a consensus, the majority and minority views will be stated.

127. **Step 9: Board's Decision.** Within 21 days from receipt of CRP's final report, the Board will consider the report and make the final decision regarding any recommendations on how to bring the project into compliance and/or mitigate any harm, if appropriate. Within 7 days from the Board’s decision, the Board decision and CRP's final report, with the responses attached, will be released to the requester, and then posted on the web site.

128. Any remedial actions in project scope or implementation approved by the Board (or, if warranted, the suspension or cancellation of the project) will be carried out in accordance with applicable ADB procedures (which will require the consent of the borrower or grant recipient concerned or the PPS concerned, except as otherwise provided in ADB's Loan Regulations, as applicable, or other relevant legal documents).

7. **Transparency and Information Dissemination**

129. CRP's operations at all stages of the compliance review phase will be as transparent as possible, subject to this paragraph, and consistent with relevant ADB policies and procedures and the need to ensure that there is engagement with Management and staff, the requester, the EA/DMC government or the PPS, and the Board member representing the country concerned.
on a thorough understanding of the issues during the compliance review. CRP will have the
duty to issue its own press releases and media communications. Prior to releasing any
news releases or other media communications, CRP will inform OER, not for purposes of
review, but in order to provide ADB with an opportunity to prepare a response to queries from
the media or public. CRP will exercise discretion, maintain a low profile in the borrowing country,
and not give media interviews while making site visits in the borrowing country. CRP will not
give any media interviews at any stage of the compliance review.

130. Specific milestones during the compliance review phase where there is information
disclosure will include the following:

(i) registration and acknowledgement of the request (step 2);
(ii) determination of eligibility of the request (step 3);
(iii) Board authorization of the compliance review (step 4);
(iv) conducting the compliance review (step 5);
(v) CRP's draft report (step 6);
(vi) CRP's final report (step 8); and
(vii) Board's decision (step 9).

131. CRP will issue annual reports that contain a description of the claims considered, a
summary of activities, monitoring information, budgetary information, and policy advice based
on lessons learned from previous requests for compliance review. CRP will maintain its own
web site and have its own distinctive logo and letterhead.

132. CRP members and OCRP staff will be subject to ADB's confidentiality and disclosure of
information policy, including those provisions aimed at ensuring that confidential business
information is not disclosed. When requested, CRP may withhold the identity of the claimants
from other stakeholders. Any material or information submitted to any CRP member or the
Secretary, CRP on a confidential basis from any party may not be released to any other parties
without the consent of the party that submitted it.

8. Monitoring

133. CRP will monitor implementation of any remedial actions approved by the Board as a
result of a compliance review. Unless the Board specifies a different timetable, CRP will
annually report to the Board implementation of Board decisions related to remedial measures,
including its determination on the progress in bringing the project into compliance. The
methodology for monitoring will include consultations with Management, the requester(s), the
EA/DMC government or the PPS, and Board members; document review; and site visits. CRP
will also consider any information received from the requester and the public regarding the
status of implementation. CRP will forward to BCRC its draft reports on monitoring
implementation of any remedial actions approved by the Board as a result of a compliance
review for its review. CRP will finalize the reports in consultation with BCRC before making them
available to the Board, Management, the requester, the EA/DMC government or the PPS, and
the public.
G. Resource Implications

134. The institutional setup of the accountability mechanism, including staffing needs, is provided in Appendix 5. The implementation of the recommendation as set out in this paper will have budgetary implications. Based on the proposed staffing and the start-up costs, including outreach programs and translation, the budget for the new mechanism in the first year of operation is estimated to be about $1.25 million. About $400,000 will be for OSPF, and about $850,000 for OCRP.

1. Office of the Special Project Facilitator

135. The SPF, one professional staff member, and two administrative staff/national officers will be required in OSPF.

2. Office of the Compliance Review Panel

136. Two professional staff members and three administrative staff/national officers will be required in OCRP. One of the professional staff will also act as the secretary of CRP.

137. OCRP will also perform various functions, including (i) carrying out information dissemination and conducting public outreach regarding the ADB accountability mechanism, and the functions of OSPF and CRP, both within ADB and in member countries; (ii) providing advice or guidance to potential requesters; (iii) providing secretariat support to BCRC, including administering the yearly operating expenses of BCRC; and (iv) coordinating with OSPF and carrying out public outreach on the ADB accountability mechanism, including producing joint annual reports on the ADB accountability mechanism.

138. OCRP will, in coordination with the ODs, the NGO Center, and OER, ensure that such information dissemination and public outreach is integrated with ADB’s activities designed to promote interaction with project beneficiaries or stakeholders including civil society groups.

3. Compliance Review Panel

139. CRP will consist of three members, one of whom will be the chair, who will be appointed full-time for a minimum of 1 year. Before the end of the initial full-time appointment, the Board will review the need for the chair to work on a full-time or part-time basis.

4. Related Staff Requirements

140. With the establishment of the accountability mechanism, it is expected that overall demands for legal services in OGC will increase for provision of focused legal advice in both the consultation phase and the compliance review phase. OGC will require two additional lawyers assigned to the accountability mechanism.


141. A review process on the OM updating in the context of the current inspection policy is under way. The intention underlying this review is for the inspection policy to cover all elements of all operational policies and procedures that provide ADB staff with mandatory directions on how to formulate, process, and implement projects. The inspection policy will not cover non-operational housekeeping matters such as finance and administration. In March 2002, a senior
staff committee was established by the President to oversee the review process and implement a work plan. The work done by the senior staff committee was separately undertaken from, but related to, the review of the Inspection Function. The result of this review process was intended to be linked to the review of the Inspection Function, as the compliance review refers to "ADB's operational policies and procedures."

142. A memorandum was presented to the Board in October 2002 on the status of the review process, together with a list of ADB’s operational policies and procedures subject to inspection, contained in a compendium. The compendium was posted on the ADB web site for public comments from November 2002 to January 2003. The comments received were not positive and in response, ADB withdrew the compendium from the web site in February 2003 and is presently moving forward on the OM review and updating.

143. The Board will decide whether a particular policy is an operational policy subject to compliance review and it is for CRP to determine which part of the operational policies and procedures was or is not complied with after carrying out a compliance review of the request concerned. Management will not carve out which operational policies or procedures should be excluded from compliance review. The draft reorganized table of contents of the OM is provided in Appendix 8. The current OM does not include sector policies, and the question whether sector policies should be incorporated in the OM is under review. For the present and for purposes of the policy on the new ADB accountability mechanism, the scope of compliance review is "ADB's operational policies and procedures" as they relate to the formulation, processing, or implementation of an ADB-assisted project, and excludes matters relating to the procurement of goods and services, including consulting services, and non-operational housekeeping matters, such as finance and administration. They are included in the current OM, the Project Administration Instructions (PAIs), and the New Business Processes (NBP). The revised OM will make reference to the PAIs and the NBP and eventually include them. For those operational policies and procedures that have been approved by the Board, but have not been properly incorporated into the OM, original policy papers as approved by the Board will be used in the absence of either express incorporation in OM sections or as staff instructions or similar documents that are intended to be issued eventually as OM sections, or in the event that there is a conflict between a Board-approved policy and an OM section.

I. Effective Date of the New ADB Accountability Mechanism

144. The effective date of the ADB accountability mechanism will be 30 days from the appointment of the SPF or CRP members, whichever occurs later. This period will be within 6 months from the date of Board approval of the accountability mechanism described in this paper, unless extended by the Board. Upon the effectiveness of the new ADB accountability mechanism, BIC will be restructured as BCRC with its operating procedures; the current Inspection Procedures will cease to apply; and the members of the roster will be informed of the termination of their services, subject to the need to satisfy the transition arrangements described in para. 146.

145. With respect to private sector projects, however, the new ADB accountability mechanism will apply to private sector operations (loan, guarantee, equity investment to the extent ADB’s operational policies and operational procedures are covered by it, or TA grant) not for ongoing projects but for proposed projects that will have concept clearance by Management or by staff delegated by Management after Board approval of the ADB accountability mechanism, and such projects that will subsequently be approved and implemented.
J. Transition Arrangements

146. Requesters who have filed an initial complaint to the President under the current Inspection Procedures or intend to file a request for inspection after receiving Management's response will transfer their original requests for inspection directly to the compliance review phase of the ADB accountability mechanism. Any request for inspection filed will, at the option of the requester, either go through the current inspection process or wait until the new mechanism becomes effective and go directly to the compliance review phase, except that when an inspection under the current system has been authorized by the Board, the current inspection mechanism will continue to apply. Claims brought under the current inspection process, and disposed of by BIC, are precluded from being considered under the new ADB accountability mechanism unless new evidence is presented that was not known at the time of the original request.

K. Review of the ADB Accountability Mechanism

147. A review of the accountability mechanism will be carried out by Management after 3 years from the effectiveness of the ADB accountability mechanism, and the results of the review will be submitted to the Board. The review will cover the operation of the mechanism and related operating and administrative procedures.

IV. RECOMMENDATION

148. The appointment of staff and the organization of offices come squarely under the power of the President, together with his power to delineate areas of responsibility and to prescribe functions among various departments and offices in accordance with policies approved by the Board. The consultation phase of the new ADB accountability mechanism, particularly the function of the SPF, may be considered part of the President's authority if it is segregated from the rest of the proposed mechanism, since the function of the SPF is aimed at strengthening the internal processes of the ODs. The consultation phase, however, is part and parcel of an integrated accountability mechanism, and as such, it cannot be described in isolation from the rest of the ADB accountability mechanism recommended here for Board consideration.

149. In this connection, it is recognized that the consultation phase underpins the effective functioning of the new ADB accountability mechanism upstream. The relationship between the ODs and the SPF is designed to support the purpose of the new ADB accountability mechanism. To this end, the President will review, from time to time, the working of the consultation phase and make necessary adjustments or revisions to its structure and the operating procedures.

150. Accordingly, the President recommends that the Board approve the following:

(i) the establishment of the new ADB accountability mechanism, referred to in paras. 57-133 of this paper, providing for the Office of the Special Project Facilitator under the President and the Compliance Review Panel under the Board of Directors;

(ii) the establishment of the Office of the Compliance Review Panel, referred to in para. 136 of this paper;
(iii) the allocation of budgetary resources to meet the staffing requirements referred to in paras. 134-140 of this paper;

(iv) the effective date of the new ADB accountability mechanism and the application of this mechanism to private sector operations referred to in paras. 144 and 145 of this paper;

(v) the transition arrangements referred to in para. 146 of this paper;

(vi) the restructuring of the Board Inspection Committee as the Board Compliance Review Committee upon the effectiveness of the new ADB accountability mechanism, referred to in paras. 102 and 144 of this paper; and

(vii) the operation of the ADB accountability mechanism and related operating and administrative procedures to be reviewed by Management after 3 years from the effectiveness of the ADB accountability mechanism, and the results of this review to be submitted to the Board.
ACCOUNTABILITY MECHANISMS AT OTHER MULTILATERAL DEVELOPMENT BANKS

A. World Bank Inspection Panel

1. The World Bank Inspection Panel (WB panel)\(^1\) was created in September 1993 "for the purpose of providing people directly and adversely affected by a [WB]-financed project with an independent forum through which they can request the [WB] to act in accordance with its own policies and procedures."\(^2\) The WB panel is an independent unit within WB that is separate from management and reports directly to the Board. The WB panel receives and investigates claims from project-affected people alleging that they have been harmed by the WB’s violations of its policies and procedures. The WB panel consists of three permanent members, each of whom serves for 5 years. Panel members are recommended by the President and selected by the Board. The chairman is the only full-time member of the WB panel, while the others work and are compensated only as required by the inspection workload. In practice, they have been engaged full-time. The WB panel also has a permanent secretariat consisting of an executive secretary, two assistant executive secretaries, and two support staff members. The permanent secretariat presently has two long-term consultants to assist in its work. The present annual operating budget of the WB panel is about $2.5 million.

2. Claims to the WB panel can be filed by any affected party—other than a single individual—in the borrower's territory.

The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the [WB] as a result of a failure of the [WB] to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the [WB] (including situations where the [WB] is alleged to have failed in its follow-up on borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.\(^3\)

3. The affected party's local representative, WB's board of executive directors, or, in some cases, any one executive director are also eligible to file claims. Nonlocal representatives can represent affected parties only in "exceptional cases" where "appropriate representation is not locally available and the [WB] Executive Directors so agree at the time they consider the request for inspection."\(^4\)

4. Claims must be in writing and must include the following information: a description of the project; an explanation of how WB policies, procedures, or contractual documents were violated; a description of the claimant's interests harmed by the violation of policies, and a description of the steps taken to have WB staff resolve the violations. The claimant must demonstrate that it has exhausted other remedies by first providing WB staff a reasonable opportunity to respond to the

\(^{1}\) Information on the WB panel is available at [http://www.worldbank.org/inspectionpanel](http://www.worldbank.org/inspectionpanel).
allegations. If the claim is related to one already submitted to the WB panel, the request must also specify any new evidence or changed circumstances that justify revisiting the issue.

5. The following types of complaints are explicitly excluded from the WB panel's jurisdiction: (i) complaints about actions that are the responsibility of parties other than WB and that do not involve any act or omission on the part of WB; (ii) complaints relating to procurement decisions; (iii) complaints filed after the loan closing date or after at least 95% of the loan proceeds on the project concerned have been disbursed; and (iv) complaints addressing matters already heard by the WB panel unless justified by new evidence.

6. Upon receiving a complete request for inspection that is not clearly outside the scope of the panel's authority, the panel registers the claim in the WB panel register, notifies the claimant and the executive directors, and forwards a copy of the claim to WB management, which has 21 days to respond. The WB panel then has 21 days to review WB management's response, to seek clarification from management or the claimant, and to make a recommendation to the executive directors regarding whether the claim is eligible and warrants a full investigation. Prior to submitting its recommendation in this initial phase, the WB panel typically undertakes a preliminary assessment, including a site visit, to gather more information regarding the request.

7. For investigations that go forward, the WB panel enjoys broad investigatory powers, including access to all WB management and staff. Any member of the public may provide the WB panel with supplemental information relevant to evaluating the claim. After the investigation, the WB panel issues its report, which includes at least the following: (i) a summary of the relevant facts and of the steps taken to conduct the investigation; (ii) a conclusion regarding whether WB has complied with relevant policies and procedures; (iii) a list of supporting documents available from the panel; and (iv) statements of any separate views of any panel members.

8. Within 6 weeks after receiving the WB panel's report, WB management must submit its response to the executive directors. The executive directors review both the panel's report and management's response and make any necessary decisions. Within 2 weeks of any decision, the WB panel informs the claimant of the results of the investigation and any action decided by the board, and publicly releases the panel's report, management's recommendations, and the board's decision.

9. The Resolution establishing the WB panel called for a review after 2 years from the date of appointment of the first panel members. The WB board completed its first review of the WB panel in October 1996. In this review, the WB board determined that opinions of the general counsel relating to inspection panel issues and management's initial response to the claim could be released to the public after the board considered them. The board determined that the "affected party" was defined to include any two or more persons who shared some common interests or concerns, and stated that the WB panel could cover only claims where there was an alleged failure by WB to follow its operational policies and procedures in the design, appraisal, or implementation of a project. The WB board confirmed that it will continue to have the ultimate authority to interpret the panel's resolution and authorize inspections. The WB board stated that in "applying the Resolution to specific cases, the [WB] Panel will apply it as it understands it, subject to the [WB] Board's review." The WB board also stipulated that, in determining

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eligibility, the WB panel could make a "preliminary assessment" of the damages alleged by the requesters for the purpose of establishing whether the complaint is, on the surface, justified and warrants a full investigation.

10. The second review of the WB panel concluded in 1999 and resulted in a second clarification of the resolution. Prior to the second review of the panel in 1999, the first phase of the inspection process caused substantial controversy and delay. Management was frequently providing a full action plan (with little or no consultation with the claimant) in an attempt to avoid an inspection. The WB panel was responding with a preliminary report that essentially drew conclusions about the noncompliance of WB and resulting material harm, if any, to project-affected people. The WB board frequently rejected the WB panel's request for an inspection, and therefore very few claims were getting through the entire process. In the 1999 clarification, the WB board determined that the "preliminary assessment" concept provided in the 1996 clarification was no longer needed. The 1999 clarification stipulated that the WB panel will determine the eligibility of a request for inspection independently of any views that may be expressed by WB management. Most importantly, if the WB panel recommended an investigation, the WB board agreed to authorize it without making a judgment on the merits of the claimants' request, and without discussion except with respect to certain technical eligibility criteria. The 1999 clarification thus essentially streamlined the panel process from a two-step to a one-step process, with the board restricting its role to reviewing the final panel and management reports.

11. The 1999 clarification instructed WB management to follow the resolution. WB management will direct its response to the request, including any steps it intends to take to address its failures, if any, to the WB panel. Management will report to the WB board any recommendations it may have, after the WB panel completes its investigations and submits its findings. Management was not supposed to comment on the eligibility of the claimants or on the merits of the claim. The WB board also decided that "action plans" agreed between the borrower and WB, in consultation with the requesters, that seek to improve project implementation are outside the WB panel's mandate, except that the WB panel could review the adequacy of consultations with affected parties in the preparation of action plans.

12. As of 10 April 2003, the WB panel had received a total of 27 formal requests for inspection: nine from Africa, 7 from South Asia, 9 from Latin America, and 2 from East Asia and the Pacific. A majority of the requests cited violations of WB's safeguard policies, including the policies on environmental assessment, indigenous peoples, and involuntary resettlement. Also frequently cited were WB's policies on information disclosure and project supervision. Of these 27 requests, the WB panel has recommended an investigation in 13, and the WB board has approved investigation of 9. In some cases where the WB board had rejected a full investigation, it asked the WB panel to be involved in reviewing the WB's implementation of action plans or progress on the project. Since the 1999 clarification, however, the board has approved every investigation recommended by the panel on a no-objection basis.

13. Some general conclusions can be drawn from the extensive history of the WB panel. The WB panel is widely respected as credible and independent by civil society organizations around the world. The WB panel has also clearly strengthened the WB board's ability to review staff compliance with WB policies. On the other hand, the WB panel's lack of authority to provide recommendations in its reports and its lack of authority to provide post-inspection monitoring of

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implementation of WB management recommendations and board decisions on the final panel report have reduced its long-term impact in aiding project-affected people on the ground or improving project quality. Many WB requesters have reported few improvements in projects due to continued noncompliance and non-implementation of remedial measures. Additionally, the WB panel’s mandate to "inspect" the performance of WB initially created strong dissent among staff and some developing country members, polarizing the entire inspection process. In recent years, however, the WB panel has become better understood, and it now engenders less fear and resentment among WB staff.

B. International Finance Corporation/Multilateral Investment Guarantee Agency Compliance Advisor and Ombudsman (CAO) Office

14. The WB panel does not apply to the International Finance Corporation (IFC) or Multilateral Investment Guarantee Agency (MIGA), which provide loans, insurance guarantees and other support to private sector projects. Although part of the WB Group, IFC and MIGA are separate institutions distinct from one another and from the International Bank for Reconstruction and Development and International Development Association. When the WB panel was created, neither IFC nor MIGA had any environmental or social policies, and there was thus little discussion about whether the WB panel should cover their activities.

15. In 1996, IFC and MIGA began to analyze what type of accountability mechanism should be applied to their operations, including whether the WB panel should be extended to the IFC and MIGA and what accommodations, if any, should be made for the special characteristics of the private sector.10 This board-driven process was essentially tabled after the WB president announced in 1999 the creation of an office of the compliance advisor/ombudsman (CAO).11

16. The CAO Office consists of the CAO (presently Ms. Meg Taylor), three specialists (two for the ombudsman role and one for the compliance role), and four administrative staff members. The CAO is appointed by, and reports to, the President of the WB Group. The CAO is a full-time employee of IFC and MIGA at the vice-president level. The CAO's Office also uses a number of consultants, mediation experts, and other advisors as needed. In addition, the CAO has established a volunteer external reference group of independent stakeholders from the private sector, the nongovernment organization community, academia, and other institutions. This group meets annually to provide advice regarding the CAO's activities.

17. The CAO Office, which reports directly to the President of the WB Group, has the following three distinct but related roles:

(i) responding to complaints by persons who are affected by projects and attempting to resolve the issues raised using a flexible, problem-solving approach (the ombudsman role);

(ii) providing a source of independent advice to the President and management of IFC and MIGA; the CAO provides advice both in relation to particular projects


11 Information on CAO is available at http://www.ifc.org/cao/.
and in relation to broader environmental and social policies, guidelines, procedures, resources and systems (the advisory role); and

(iii) overseeing audits of IFC’s and MIGA’s social and environmental performance, both overall and in relation to sensitive projects, to ensure compliance with policies, guidelines, procedures, and systems (the compliance role).\(^{12}\)

19. **Ombudsman Role.** The CAO is driven by the concerns and interests of project-affected communities or groups that file a request. The ombudsman has a proactive and flexible mandate aimed at solving problems. According to the CAO Operational Guidelines, the "aim is to identify problems, recommend practical remedial action and address systemic issues that have contributed to the problems, rather than to find fault."\(^{13}\)

20. Any individual, group, community, entity, or other party affected or likely to be affected by the social and/or environmental impacts of an IFC or MIGA project may make a complaint to the CAO. Representatives of those affected by a project may also file a complaint on their behalf, provided they provide explicit evidence of authority to represent them.

21. The CAO acknowledges receipt of all complaints, typically within 5 days of receipt. The CAO then evaluates whether the complaint falls within his/her mandate, and, if it does, whether to accept or reject the complaint. Complaints must demonstrate that the complainant has been, or is likely to be, affected by actual or potential social or environmental impacts on the ground. The complaint must relate to an aspect of the planning, implementation or impact of an IFC or MIGA project. Complaints that are "malicious, trivial or which have been generated to gain competitive advantage" are not accepted.\(^{14}\)

22. When a complaint is accepted for assessment, the CAO immediately notifies the complainant and registers the complaint on a database. The CAO also immediately refers the complaint to the relevant IFC or MIGA management with a request for information and response, and informs the project sponsor that a complaint has been lodged. Management has 20 working days to respond to the CAO's request.

23. The CAO then undertakes a preliminary investigation in order to assess the complaint and determine how it should be handled. This process is not time bound but normally takes 30 working days after the decision to accept the complaint. A critical decision to be taken in assessing a complaint is whether it should be further dealt with under the ombudsman role. Although a complaint may be accepted, the CAO has the discretion after assessment to determine that no further investigation would be profitable. If the CAO decides as a result of the assessment to proceed further, he/she will determine which of the options for action should be followed.

24. The proposal may include anything from convening informal consultations with IFC/MIGA or the project sponsor, to organizing a more formal problem-solving intervention (such as conciliation or mediation), or to conducting a compliance audit. During the early stages of handling a complaint, the CAO seeks to facilitate self-generated, mutually acceptable solutions, rather than identifying fault or apportioning responsibility. In some cases, the CAO will


\(^{13}\) Ibid., p. 13.

\(^{14}\) Ibid., p. 17.
further investigate the facts underlying the complaint. Such investigations may provide the basis for conciliation or mediation, or for making recommendations to the President. The CAO has broad investigatory powers and designs the investigations to meet the needs of the specific complaint, but may include review of IFC or MIGA files; meetings with the affected people, IFC or MIGA staff, project sponsors, and government officials of the country where the project is located; project site visits; public meetings held in the project area; written or oral submissions requested from any source; and expert consultants to research specific issues relating to the complaint.\(^\text{15}\)

25. The CAO concludes the complaint process either when a settlement agreement has been reached or when the CAO determines that further investigation or problem-solving efforts are unlikely to be productive. At that point, the CAO will inform the complainant of his/her decision and report to the president of the WB Group. The report to the president may include specific recommendations the CAO believes could help to solve problems raised by the complaint. The CAO may also conduct a compliance audit to address noncompliance issues identified in the course of responding to the complaint, or may refer any policy issues to the advisory role of the CAO's Office.

26. As of 10 April 2003, the CAO's ombudsman function had received 13 claims, of which 3 have been resolved and 1 has been closed.

27. **Compliance Role.** Compliance audit may be triggered through ombudsman investigations, at the request of management or at the CAO's own initiative. The purpose of a compliance audit is to determine whether IFC, MIGA, or in some cases the project sponsor has complied with the environmental and social safeguard policies of the institution concerned. The compliance report may also contain specific recommendations for improving compliance both in the specific project and more generally. A report with findings and recommendations from each compliance audit is first provided to the president of the WB Group, because the CAO reports to the president. After discussion with the president, the report is disclosed to the board of IFC or MIGA, as applicable. There is a strong presumption, subject to concerns of business confidentiality, of public disclosure of the findings and recommendations of a compliance audit. In June 2002, the CAO issued its guidelines on conducting compliance audits, including guidelines on reporting, confidentiality, and disclosure. The CAO has identified a number of projects of which he/she expects to conduct a compliance audit pending the selection of the specialist for compliance. This specialist has been appointed in January 2003.

28. **Advisory Role.** The CAO is meant to provide formal advice stemming from lessons learned in the ombudsman and compliance roles to help IFC and MIGA identify, analyze, and improve systemic problems in existing policies or their implementation. The advisory role provides a way in addressing potential problems early in the evolution of a project. The advisory function is not intended to prescreen or endorse any specific project. The CAO's advisory activities result from requests by the president, IFC or MIGA management, or on the CAO's own initiative. Examples of the CAO's advisory activities include managing the review of IFC's environmental and social safeguard policies, contributing several case studies to the extractive industry review, and participating in the preparation of IFC's sustainability agenda.

29. Given the relatively short period of time in which the CAO has been operating, there is insufficient experience to determine his/her long-term success in resolving the problems of project-affected people or in improving IFC's and MIGA's policy compliance. To date, there have

been no internal or external evaluations of the CAO’s work. The CAO is planning an internal
review of his/her operations after 3 years of operation. In several cases, however, the affected
people have been satisfied with the outcomes of the process. In other cases, affected people
have appreciated the CAO’s preliminary assessments because it validated their initial concerns.
IFC and MIGA staff also emphasize that the focus of the ombudsman function is primarily
problem-solving and not identifying policy violations. On the other hand, the CAO’s compliance
function, which will conduct environmental and social audits of specific projects, is only now
being fully implemented; it is likely to engender more tension with IFC and MIGA staff than has
the ombudsman function.

C. Inter-American Development Bank Independent Investigation Mechanism

30. The Inter-American Development Bank's Independent Investigation Mechanism (IDB
mechanism)\(^\text{16}\) was established in August 1994 to address "complaints that the [IDB] has failed
in the design, analysis or implementation of proposed or ongoing operations to follow its own
established operational policies, or norms formally adopted for the execution of those policies
(including enforcement of compliance with borrower's obligations required by such policies
and/or norms), when material adverse effects have or might reasonably be expected to occur as
a result of such failure by the [IDB]."\(^\text{17}\) The IDB mechanism is similar to the Asian Development
Bank Inspection Function in that they both employ a roster system of independent experts for
their panel. The IDB mechanism does not have a board committee specifically dealing with
inspection issues, however, as the full board approves investigations and considers the final
investigation report. It covers IDB-supported activities for its operational activities to "loan,
technical cooperation and guarantee operations."\(^\text{18}\) The IDB mechanism also applies to its
private sector operations such as loans and guarantees, but not to equity operations.

31. Any affected party, defined as an organization, association, society, or other grouping of
individuals, can file a request to the IDB mechanism. The affected party must offer reasonable
evidence that its rights or interests have been or are likely to be directly and materially affected
as a result of the failure of IDB to follow its operational policies or norms. A request may be filed
on behalf of affected people by local representatives and, in exceptional cases when no local
representative is available and the executive directors so agree, by nonlocal representatives.
Any director of IDB may also file a claim in exceptional circumstances when a serious violation
of IDB's operational policies or norms may have occurred.

32. Requests for inspection must be in writing and must state facts and provide any
evidence explaining how IDB has failed to follow or enforce its operational policies and norms,
how such failure has harmed the affected people, how the situation was brought to the attention
of IDB's management, and the response of IDB's management.

33. When the IDB mechanism was created, all requests had to be submitted to the president
for an initial determination of eligibility. In 2000, after a brief review of its policy, the IDB board
created a staff "coordinator" position that reviews the initial complaint along with the legal
department to determine whether the request meets the initial eligibility requirements. If the
request appears eligible, the president assigns a member from the panel roster to review the

\(^{16}\) Information on the IDB Mechanism is available at http://www.iadb.org/cont/poli/investig/brochure.htm.

\(^{17}\) Inter-American Development Bank. 2000. The IDB Independent Investigation Mechanism, Rules and Procedures,
para. 1.1. Washington, DC.

\(^{18}\) Inter-American Development Bank. 2000. The IDB Independent Investigation Mechanism, Rules and Procedures,
para. 1.2. Washington, DC.
claim to determine whether it is substantive or frivolous. If the request is deemed nonsubstantive or frivolous and the IDB board concurs, the requester is informed that IDB management will not be asked to form a response and that an investigation is not warranted. If, on the other hand, the consulting member of the roster concludes that the request is substantive, the request is sent to IDB management for a response.

34. IDB’s management has 30 calendar days to prepare its response. After reviewing management’s response, the consulting member of the roster makes a recommendation to the board regarding whether a full investigation is warranted. At the same time, the coordinator informs the requester that the matter is before the board for consideration. Within 15 days of the board's decision on whether an investigation will proceed, the coordinator will notify the requester the outcome of the decision.

35. Once the IDB board determines that an inspection is warranted, it selects a panel of no fewer than three members of the roster, each of a different nationality. In consultation with the president, the board also selects one member of the panel to serve as its chair. The panel determines its own procedures for investigating the request. The panel has access to all IDB staff and records and can carry out site investigations with the prior consent of the government within which the project is located. IDB’s office of the secretary serves as the panel's secretariat.

36. The IDB panel submits its findings along with any recommendations to the board and president. Within 30 calendar days, IDB management submits a response to the panel's findings. The board then makes a determination of what preventive or corrective steps, if any, will be taken in response to the request. Management reports on its implementation of the board decision within a period designated by the board. The panel report and management's response are made public within 90 days of the board receiving them. Management's report on implementation of the board decision is also made public.

37. IDB has had only one full "investigation" since its establishment, and that was before the amendments in 2000. In the Yacyretá Hydroelectric Project, the IDB board agreed to an independent review of the situation in the project area rather than authorizing an investigation. In 1997, the IDB board took note of the panel report and management's comments, without taking a final decision on the recommendations of the panel. In June 2002, the IDB board authorized an investigation of the Termoeléctrica del Golfo Project. A panel of investigators was appointed in October 2002. The panel completed its investigation and submitted its findings in February 2003. As of 10 April 2003, IDB management is in the process of submitting its response to the panel's findings.

D. European Bank for Reconstruction and Development

38. In October 2002, the European Bank for Reconstruction and Development (EBRD) developed a proposal for an independent recourse mechanism. EBRD's decision to develop a mechanism is apparently in response to the continued interest of the Group of Seven (G-7) donor governments in the creation of a compliance mechanism at all MDBs, as well as a specific request to create such a mechanism made in 2001 by a coalition of civil society groups from EBRD borrowing countries. EBRD's Independent Recourse Mechanism was approved by its board of directors in April 2003.

E. African Development Bank

39. The African Development Bank (AfDB) developed and circulated a proposal for an inspection panel in 1994. That proposal would have included a three-member, part-time panel patterned substantially after the WB panel. The proposal did not explicitly address whether the proposed panel would have covered private sector projects. AfDB’s board of directors did not approve the proposal, in part because beginning in January 1995, AfDB went through major reorganizations involving its environment and social policy divisions. AfDB hired a consultant in 2002 to prepare a study and proposal for an inspection mechanism, and a draft study has been prepared.

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ACCOUNTABILITY MECHANISMS AT INSTITUTIONS OTHER THAN MULTILATERAL DEVELOPMENT BANKS

A. International Monetary Fund

1. In July 2001, the executive board of the International Monetary Fund (IMF) established the Independent Evaluation Office (IEO) to provide objective and independent evaluations on issues related to the IMF, including IMF policies, comparative cross-country analysis of IMF's economic policies, and evaluations of completed country operations. The overarching objective is to improve IMF's effectiveness through, among other things, lessons learned, increased transparency, providing feedback to the IMF executive board and promoting greater understanding of IMF work. The IEO was set up to be independent from IMF management and staff and operate at arm's length from the IMF executive board.\(^1\) The IEO is relatively new and untested.

B. Export Development Canada

2. In April 2002, Export Development Canada (EDC)\(^2\) announced the creation of a new "compliance officer" position "to review and help resolve issues concerning transparency and disclosure, environmental reviews, human rights and business ethics."\(^3\) The compliance officer will help to resolve complaints in these areas by encouraging dialogue between EDC and stakeholders. The compliance officer will also provide EDC with advice regarding best practices, oversee compliance audits, and monitor EDC's performance in these areas. Any individual, group, community entity, or other party affected or likely to be affected by EDC's corporate social responsibility issues can file a complaint. Complaints do not have to follow any specific format, but must be in writing in either French or English. The compliance officer reviews the complaint, registers eligible complaints, and makes a preliminary assessment to determine what actions would be appropriate. The focus is on facilitation and problem-solving at first, but in some cases the compliance officer will conduct investigations into the facts and policy compliance. This mechanism is relatively new and untested.

C. Japan Bank for International Cooperation

3. In 2002, the Japan Bank for International Cooperation (JBIC) approved its environmental policy. This policy requires environmental assessments and certain other standards. JBIC is presently in the process of developing an accountability mechanism to respond to concerns of locally affected people. This would make JBIC the second export credit agency to create such a mechanism, after Export Development Canada (para. 2).

D. Citizen Submissions under the North American Agreement on Environmental Cooperation

4. The three countries (Mexico, Canada, and the United States) that joined the North American Free Trade Agreement (NAFTA) also agreed to the North American Agreement on

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\(^2\) Information on the EDC compliance officer is available at http://www.edc.ca/corpinfo/csr/compliance_officer/index_e.htm.

Environmental Cooperation (NAAEC). NAAEC created the North American Commission for Environmental Cooperation (the commission), which among other things receives citizen submissions under Article 14 of NAAEC.

5. Article 14 of NAAEC creates a mechanism for citizens residing in any of the three NAFTA countries to assert that one of the countries is failing to enforce its environmental laws effectively. Submissions must be in writing and must provide sufficient information to allow the secretariat of the commission to review the submission, including any supporting documentary evidence. Once the secretariat finds that a submission meets the eligibility criteria and more generally warrants a response from the country, the secretariat forwards to the country the submission and any supporting information. After receiving a country's response, the secretariat informs the parties if it believes a factual record is warranted. The commission must approve preparation of the factual record by a majority vote of the three NAFTA countries. Thus, an investigation cannot be blocked simply because the party complained against refuses to consent. Once the final record is completed, the commission's council may make it available to the public by majority vote; otherwise it remains confidential.

6. Although not completely analogous to the ADB Inspection Function, the NAAEC citizen submission process is informative. It is part of the broader trend in international institutions toward transparent compliance monitoring mechanisms triggered by citizens. The NAAEC process has received over 30 citizen complaints in the nearly 10 years that it has been operating. All three countries have been subjected to complaints, and the process has at times been very controversial. Factual records are typically made public and have in several cases catalyzed improvements in the enforcement and implementation of national environmental laws.

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4 Information on NAAEC is available at http://www.naaec.gc.ca/eng/index_e.htm.
SUMMARY OF INSPECTION REQUESTS RECEIVED UNDER THE CURRENT INSPECTION FUNCTION

1. The Asian Development Bank (ADB) has received eight requests for inspection to date: three from Pakistan, four from Sri Lanka, and one from Thailand. Six of the requests have been deemed ineligible by the Board Inspection Committee (BIC). Only one request—the Samut Prakan Wastewater Management Project in Thailand—has gone through a full inspection process.

2. ADB's first and second requests for inspection related to the Korangi Wastewater Management Project in Pakistan and were deemed ineligible by BIC because the requesters had not cited specific policy violations or demonstrated that policy violations were linked to direct and adverse impact on their rights and interests. Additionally, by the time of the second request, the loan agreement had been terminated before the project commenced, and there had been no disbursements.¹

3. In April 2001, BIC received a request for inspection from the Mayor of Klong Dan and two Klong Dan villagers regarding the Samut Prakan Wastewater Management Project, located in Samut Prakan Province, an industrialized urban area outside Bangkok, Thailand. The project was designed to improve the health and wellbeing of Samut Prakan district residents, and will directly benefit one million residents through providing a cleaner environment and improved water quality by eliminating 72,000 tons of organic pollutants and 90 tons of heavy metals that were previously discharged with little or no treatment into the Gulf of Thailand. The complaint alleged that ADB moved the wastewater treatment plant to a new location at the Klong Dan site without reassessing the environmental and social impacts of the project on local communities and without conducting a full reappraisal at the time of a supplementary loan to the project. The requesters charged that ADB had violated 13 policies, including, among others, the policy on supplementary financing of cost overruns of ADB-assisted projects.

4. The ADB panel inspecting the request concluded that there was noncompliance with 6 policies, and that by failing to conduct a full reappraisal at the time of the supplementary loan, ADB violated the policy on supplementary financing of cost overruns.³ While Management disagreed with the panel's conclusions, BIC agreed that there should have been a full reappraisal and that, by not conducting the full reappraisal, there was also a breach of policies on involuntary resettlement, incorporation of social dimensions, and benefit monitoring and evaluation. Key recommendations from BIC and the Board on the outcome of the Samut Prakan Inspection case included the following: (i) ADB should affirm its commitment to being an active participant in the discussions with the Klong Dan Community; and (ii) Management should monitor resettlement impacts, ensure public participation, and provide semiannual reports on the status of resettlement implementation. BIC and the Board also requested Management to provide semiannual reports on initiatives that Management had already undertaken, including the system for monitoring of socioeconomic impacts based on baseline

¹ ADB. 2000. Inspection Request: Korangi Wastewater Management Project (Loan 1539-PAK(SF)), Manila.
² ADB. 1995. Report and Recommendation of the President to the Board of Directors on a Proposed Loan to the Kingdom of Thailand for the Samut Prakan Wastewater Management Project, and ADB. 1998. Report and Recommendation of the President to the Board of Directors on a Proposed Supplementary Loan to the Kingdom of Thailand for the Samut Prakan Wastewater Management Project (Supplementary). Manila.
data, progress in community development, and measures taken to respond to any problems associated with odor and effluent.⁴

5. Between November 2001 and March 2002, four requests were filed regarding the Southern Transport Development Project in Sri Lanka.⁵ The requests alleged violations of 10 ADB policies. In the first two requests, BIC concluded that there was insufficient basis to recommend an inspection to the Board, and the Board did not authorize an inspection. The third and fourth requests were also deemed ineligible by BIC because it concluded that the requesters did not present reasonable evidence that their rights and interests had been or were likely to be directly, materially, and adversely affected by a failure of ADB to follow its policies or procedures.

6. In November 2002, ADB received a request for inspection regarding the Chashma Right Bank Irrigation Project (Stage III)⁶ in Pakistan from six nongovernment organizations representing local persons affected by this project. The request alleges violations of ADB’s policies and guidelines. Management filed its response in February 2003. In March 2003, BIC made a recommendation to the Board. In April 2003, the Board approved BIC’s recommendation, including authorizing an inspection and that any inspection process approved by the Board should commence in December 2003 or earlier if BIC brings forward the timetable for commencement of the inspection process.⁷

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⁶ ADB. 1991. Report and Recommendation of the President to the Board of Directors on a Proposed Loan and Technical Assistance to the Islamic Republic of Pakistan for the Chashma Right Bank Irrigation Project (Stage III). Manila.

SUMMARY OF CONSULTATIONS ON THE REVIEW OF THE ADB INSPECTION FUNCTION

1. This appendix gives a summary of the consultations on the review of the Asian Development Bank (ADB) Inspection Function, including the four non-exclusive options presented in the first and second draft working papers.

2. ADB carried out intensive external and internal consultations on the review of the Inspection Function in 2002 and early 2003. The extensive public consultation exercise included the following: (i) posting on the ADB web site a consultation plan on the review of the Inspection Function;¹ (ii) a timetable of activities relating to the review;² (iii) a schedule of workshop consultations;³ (iv) a dedicated e-mail address to receive comments on the issues paper and the first and second draft working papers, all of which were posted on the web site;⁴ and (v) posting of comments received on the web site.⁵ The working paper was posted on the ADB web site inviting public comments. ⁶ The comments received were also posted on the ADB web site.⁷ ADB acknowledges with thanks the inputs of all workshop participants and all contributors who provided written comments during the consultations in 2002 and early 2003.

3. From October 2001 to October 2002, the steering committee and the working group met on 12 occasions to discuss preliminary drafts of the issues paper and the draft working papers, and the direction of the review. In 2002, the Board met twice to discuss the Inspection Function review. Internal consultations with concerned ADB departments, including the regional departments, the Regional and Sustainable Development Department, and the Private Sector Operations Department, were also held in late 2002 and early 2003 to discuss the review. In January 2003, the Board held an informal seminar to discuss the preliminary draft working paper.

4. ADB held two rounds of public consultations in June and August 2002 to solicit comments on the first and second draft working papers, respectively. The public consultations were held in 10 venues in ADB member countries. The first round was held in Tokyo, Manila, Frankfurt, Ottawa, and Washington DC. The second round was held in Phnom Penh, Kathmandu, Beijing, and Sydney. Prior to the second round, a special consultation was held in Karachi in early August 2002. The purpose of the special consultation was to obtain the views of the requesters and their representatives in the inspection requests concerning the Korangi Wastewater Management Project in Pakistan on their experience in accessing the inspection process and on the establishment of a more efficient and cost-effective mechanism. Similar special consultation missions were also scheduled at the same time in Bangkok and Colombo to obtain the views of the requesters and their representatives in the inspection requests in the Samut Prakarn Wastewater Management Project in Thailand and the Southern Transport Development Project in Sri Lanka, but these consultations did not materialize.

1 At http://www.adb.org/inspection/consultation_plan.asp.
2 At http://www.adb.org/inspection/timetable.asp.
5 External comments received were posted at http://www.adb.org/inspection/comments.asp.
6 At http://www.adb.org/inspection/review.asp.
7 At http://www.adb.org/inspection/comments_wp.asp.
5. The public consultations were attended by representatives from developing member countries (DMCs) and donor countries, the private sector, civil society (including nongovernment organizations), project-affected people, and requesters from inspection requests received by ADB under the current Inspection Function. ADB staff, ADB panel roster members, and Board members also participated in these consultations. The outcome of each public consultation, including a summary discussion report (for the special consultation in Karachi) and a summary proceedings report (for the remaining consultations), and presentation of group findings at the various workshops, are posted on the ADB web site.\(^8\)

6. The following two general purposes of an ADB accountability mechanism emerged from the internal and external consultations: (i) to provide an opportunity for hearing and resolving the specific complaints of locally affected people in project areas, and (ii) to provide an independent office for determining violations of ADB’s operational policies and procedures that adversely affect local populations.

7. Building on these purposes and the experiences and lessons learned at ADB and the other multilateral development banks, the first and second draft working papers presented the following four non-exclusive options (with variants) for consideration:

(i) **Option A**: the existing system with improvements;

(ii) **Option B**: an independent compliance review panel, based on the World Bank Inspection Panel (WB panel) model with improvements;

(iii) **Option C**: an ombudsman or problem-solver, based on the compliance advisor/ombudsman (CAO) model; and

(iv) **Option D**: a two-step approach of consultation and compliance review.

8. These four options differ in structure, but share several important attributes. All options would involve establishing a permanent independent secretariat with at least one full-time professional staff member. All options would require the claimants to attempt in good faith to resolve their issues or problems with Management before filing a complaint. All options would either restructure or eliminate BIC, and all would reflect a more streamlined process with fewer days for determining eligibility and authorizing a consultation or compliance review. All options would also allow for increased information disclosure and enhanced rights of participation for the claimants. The eligibility requirements would be broadened to allow claims in the official or national languages of ADB’s DMCs, and in each of the options the identity of claimants would be protected from disclosure, if requested.

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\(^8\) At [http://www.adb.org/Inspection/review.asp](http://www.adb.org/Inspection/review.asp) generally and at the following for each specific consultation:

9. **Option A**, the existing mechanism with improvements, includes creating a permanent full-time secretariat reporting to the Board Inspection Committee (BIC). The secretariat would conduct public outreach and assist potential claimants. BIC’s role would be restructured primarily to authorize inspections and select the panel members from the roster of experts. At the end of the compliance review process, BIC would not make recommendations to the full Board, but would forward the panel report with Management response to the Board for consideration. The roster would be reconstituted with only five professionals of high credentials, who would be expected to be available more regularly during their tenure as roster members. This would result in a roster of experts that would be more accountable and more experienced. The panel would be chosen by, and report to, BIC. The compliance review process would be streamlined, because the complaint to the President would be eliminated and other procedural steps would be shortened. In Option A, eligibility would be determined and a compliance review could be authorized within 35 days from receiving a request for review.

10. **Option B**, the independent compliance review panel, would be similar to the WB panel model with improvements, with variations to reflect ADB’s institutional context and to streamline the process. This option would create a permanent, full-time compliance review panel with at least one full-time senior panel chairperson and two part-time panel members who would work only when required. In this system, this panel would report to the Board, and BIC would be eliminated or restructured to have only an oversight role. The panel would determine eligibility, and the Board would authorize investigations on a no-objection basis. In Option B, eligibility would be determined within 26 days from receiving a request for inspection, and an investigation could be authorized within 47 days from receiving a request for inspection.

11. **Option C**, the ombudsman or problem-solver, would be modeled after the International Finance Corporation/Multilateral Investment Guarantee Agency CAO Office and involve the creation of a permanent secretariat with one senior level person responding to specific requests from project-affected people. Eligibility in Option C would be broader, because it would not be linked to policy violations. The ombudsman would be outcome-driven, focusing on finding ways to improve the situation of project-affected people. The ombudsman could be appointed by, and report to, either the Board or the President. The ombudsman would use various methods to assist in solving problems, including consultation, conciliation, mediation, and dispute resolution. The consultation period would last until all parties come to an agreement; the agreement would then be sent to the Board for approval. If the process is not working, any party to the consultation could "walk away" from it. The system would be less formal than a compliance review. Within 35 days from receiving a claim, eligibility would be determined and a consultation plan could be issued.

12. **Option D** would be a two-step sequential approach including a consultation phase with a project counselor followed by (if requested) a compliance review. The claimant would be required first to attempt to resolve the concerns or problems with the project counselor. In this structure, the compliance review would become a last resort. There are five variations to this option that would provide alternative methods for structuring and linking the consultation and compliance review phases. As in Option C, the project counselor could be an ADB senior-level staff member (reporting to the President) or an independent senior-level officer (reporting to the Board). Option D would require the setting up of a permanent office with a full-time secretariat and hiring at least two full-time professionals and an executive secretary. Although functionally separate from each other, the offices could share a secretariat and support staff. In the consultation phase, eligibility would be determined and the consultation plan could be issued within 35 days from the filing of the claim. If the claimant is not satisfied with the consultation process or consultation plan, the claimant could withdraw from the consultation phase and file a
claim for compliance review. In the compliance review phase, eligibility would be determined and investigation could be authorized within 10 and 31 days from the filing of the request for compliance review, respectively.

13. The public consultations reflected broad support in favor of Option D (the two-step approach of consultation and compliance review). There was also support for Option B (the WB model with improvements) and to a lesser degree interest in Option A (revising the existing system) and Option C (the problem-solver only). Some participants at the workshops presented their own models or variations based on one or more of the options.\(^9\)

\(^9\) Some participants at the Phnom Penh and Kathmandu consultations presented their own models (two variations of Option B, and a variation of Option A). These presentations are available on the ADB web site at the following:

INSTITUTIONAL SETUP OF THE NEW ADB ACCOUNTABILITY MECHANISM

President

Vice-Presidents

Operations Departments

Office of the Special Project Facilitator
- 1 full-time special project facilitator
- 1 professional staff
- 2 administrative staff/national officers

Board of Directors

Board Compliance Review Committee

Office of the Compliance Review Panel
- 1 professional staff/secretary compliance review panel
- 1 professional staff
- 3 administrative staff/national officers

Compliance Review Panel
- 3 panel members (1 of whom will be the chair and will be full time for a minimum of 1 year, and 2 of whom will be part time)
SPECIFIC ISSUES ON APPLICATION OF AN ACCOUNTABILITY MECHANISM TO PRIVATE SECTOR OPERATIONS

1. The following specific issues concerning the application of an accountability mechanism to private sector operations were raised during the consultations: (i) protection of business confidentiality, (ii) differences between the private and public sector project cycles in the Asian Development Bank (ADB) lending operations, (iii) concern about potential loss of business as borrowers will seek funding elsewhere, (iv) ADB’s relative lack of leverage over private sector projects, (v) differences in ADB’s role and leverage with respect to private sector projects, (vi) use of the accountability mechanism by business interests to seek competitive advantage, and (vii) liability with respect to private sector operations.

2. **Protection of Business Confidentiality.** ADB’s policy on confidentiality and disclosure of information explicitly recognizes that the public disclosure of information relating to ADB’s private sector projects will be more limited than the disclosure of information relating to ADB’s public sector projects, because of the distinctive nature of private sector projects and the competitive commercial environment in which they operate. The disclosure policy states that:

   In line with the Bank’s General Policy on Disclosure, the Bank adopts a presumption in favor of disclosure for its private sector operations where disclosure would not materially harm the business and competitive interests of Bank clients. It is important to temper openness and transparency with respect to Bank operations and policies where the Bank is dealing with disclosure of information provided by Bank private sector clients regarding their business plans and objectives. Any disclosures by the Bank regarding the business plans and objectives of a private sector client must only be made with the client's consent.¹

3. Any accountability mechanism that is applied to ADB’s private sector operations will take into account ADB’s disclosure policy and the need to protect business information. The type of information that must be protected (i.e., information relating to the business, competitive and financial interests of the project sponsor) is typically not the kind of information central to understanding or responding to project-affected people’s concerns over environmental and social impacts (which will presumably be the subject of most claims). Where such information is necessary for processing the claim, the same confidentiality rules that apply to ADB staff will also apply to the Special Project Facilitator (SPF), the Compliance Review Panel (CRP), and the secretariat staff.

4. This same issue is faced by the Compliance Advisor/Ombudsman (CAO) whose staff members are fully subject to the same rules of information disclosure and confidentiality as the rest of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) staff.² In addition to protecting confidential business information, the CAO must also protect information he/she receives from the complainant or other interested parties during mediation, inspection, or processing the complaint. Where the CAO determines that an agreement, or elements of it, must be kept confidential in order for a satisfactory settlement to be reached, the CAO will negotiate release of the agreement in a form acceptable to the

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parties. This issue does not appear to be significantly different in practice from protecting any other type of confidential information (whether to ensure the safety of a claimant or to protect the integrity of a mediation or compliance review, for example). The experience of both the CAO and the World Bank Inspection Panel (WB panel), on the public sector side, suggests that accountability mechanisms can operate effectively and transparently, while still maintaining information required to be kept confidential for any of a number of reasons, including business confidentiality.

5. A similar approach is adopted in the new ADB accountability mechanism. The SPF, CRP, and all secretariat staff will be subject to ADB's confidentiality and disclosure of information policy, including those provisions aimed at ensuring that confidential business information is not disclosed. Any material or information submitted to the SPF, any CRP member, or the Secretary, CRP on a confidential basis from any party may not be released to any other parties without the consent of the party that submitted it.

6. The relative lack of information available to project-affected people will make it difficult to bring claims sufficiently early in the process to allow for effective remedies. Given concerns of business confidentiality, public disclosure of information with respect to private sector operations is substantially more limited than with respect to public sector operations. The project profile is made available to the public only after Management has determined that the project is likely to be presented to the Board for consideration and the project sponsors have consented to the project profile's release. The project profile provides only a brief factual summary of the main elements of the project, including its sponsors, the project company's shareholders, total project cost, its location, a description of the project and its purpose, and the environmental category and a brief summary of any environmental issues. Under normal circumstances, this project profile is released not later than 30 days prior to consideration of the project by the Board. In addition, the Reports and Recommendations of the President for specific private sector projects are released to the public only with the prior consent of the project sponsor (and no such consent has been given so far).

7. Differences between Private and Public Sector Project Cycles in ADB's Lending Operations. Private sector projects and project cycles at ADB are typically different from their public sector counterparts. Private sector projects often have a shorter development time frame, or at least the projects come to ADB more fully developed and later in the process. ADB may have less influence over the project's early stages and design. Moreover, after the basic parameters of the project are worked out and a term sheet is concluded, a considerable amount of time may lapse before final financing and loan agreements can be concluded. Private sector investors particularly value certainty during this period of negotiation up to the signing of legal agreements. During this period, any changes to the proposed project due to the filing of a request for compliance review could result in significant delays and increased costs of project preparation. Any accountability mechanism applied to the private sector must minimize the potential for unnecessary delays or costs to the project sponsors during this sensitive time period.

8. Concern About Potential Loss of Business as Borrowers Will Seek Funding Elsewhere. There is a concern that there may be a loss of business as increased costs and uncertainty could lead borrowers to seek funding elsewhere. A private sector survey of about 60

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officials in international infrastructure development, lending and finance, and legal firms was carried out by ADB in 2001. Many respondents in the survey indicated that they would participate in projects where there is an inspection mechanism, as long as business confidentiality is strictly assured, they incur no extra costs, and the project is not delayed. The experience thus far at IFC and MIGA suggests that their increased emphasis on policy compliance (including the ombudsman and compliance audit functions at the CAO Office) does not appear to have chased potential business away from the institutions.

9. The consultation phase is similar to the ombudsman function at the CAO Office, which appears to be working well at IFC and MIGA and does not appear to have imposed unwarranted costs or delays on any projects. Under the new ADB accountability mechanism, the filing of a complaint/request for compliance review would not typically lead to any delays in formulation, processing, or implementation of the project. The consultation phase is designed to include the private project sponsor in all aspects of the consultation, or else there is little reason to continue the consultation process. The compliance review phase will look only at noncompliance by ADB with its operational policies and procedures. It is possible that the result of some private sector complaints being processed by the accountability mechanism could identify issues of noncompliance.

10. **ADB’s Relative Lack of Leverage over Private Sector Projects.** ADB finances a relatively small stake in private sector projects. Whereas ADB may finance as much as 80% of a public sector project, the ADB charter prohibits ADB from generally taking a controlling equity interest in any enterprise and ADB policy generally limits its financial assistance of any private sector project to no more than 25% of project costs. In addition, once the contracts are signed, ADB’s ability to make major changes in the project declines, without the voluntary approval of the project sponsor (just as it does in the public sector). ADB’s limited financial role in some projects may ultimately reduce its leverage over the project. Where ADB is a minority shareholder or investor and/or where the funds are drawn down, ADB has even less leverage.

11. **Differences in ADB’s Role and Leverage with Respect to Private Sector Projects.** These differences do not necessarily argue against applying the accountability mechanism, but they do imply that the mechanism may be less effective in making changes to the project. Just as with public sector projects, consultations or compliance reviews that take place later in a project cycle (i.e., after a project is approved) will probably not be as effective in resolving problems for project-affected people.

12. **Use of the Accountability Mechanism by Business Interests to Seek Competitive Advantage.** Business competitors may use an accountability mechanism for their own competitive advantage. Some ADB stakeholders are concerned that business interests may attempt to abuse the accountability mechanism by filing claims solely to delay or obstruct their competitors’ projects or to otherwise seek a competitive advantage. The new ADB accountability mechanism addresses this concern by explicitly prohibiting any claims that are frivolous, malicious, trivial, or generated to gain competitive advantage. The CAO has a similar provision. In addition, under the mechanism, business competitors will not gain much advantage from filing a claim, because there is typically no resulting delay or suspension of the project while the claim is being processed.

13. **Liability with Respect to Private Sector Operations.** Concerns have been raised about liability with respect to private sector operations. The Office of the General Counsel

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OGC) issued a legal opinion concluding that the Inspection Function is an internal review mechanism that does not provide any new causes of action for liability. ADB’s immunity from suit protects it against most claims of liability arising from member governments or affected communities that could be associated with the compliance review, including from delays or disturbances in the project area due to the compliance review. Under the ADB charter, “[t]he Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities…” Nothing in the current Inspection Function changes this immunity nor provides any separate cause of action for either the developing member country or the affected community.

14. The experience at the World Bank (WB) Group is also instructive. The WB’s general counsel reviewed liability issues surrounding the WB panel and concluded that the WB panel’s operations neither circumvent WB’s immunity nor provide a basis for any cause of action. Moreover, after operating for about 10 years and addressing 27 claims, no claims for liability have been brought due to the activities of the WB panel. Similarly, no claim for liability has been brought by any project sponsor or affected community based on any of the 13 claims so far received by the CAO.

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9 In one case, lawyers from the United States have filed a case on behalf of people harmed from a mercury spill in Peru, which also formed the basis of one of the CAO’s first claims. The effort to research and prepare this case appears to have been unrelated (with separate plaintiffs and organizations involved) to the case brought to the CAO Office, although presumably the independent commission report compiled under the auspices of the CAO, which has been publicly released, could be used by both sides in the litigation.
SUGGESTED MODES OF RESPONSE TO COMPLAINTS AND THE DISPUTE SETTLEMENT PROCEDURE

1. This appendix summarizes suggested modes of response to complaints and the dispute settlement procedure, all subject to the consent of the parties concerned.

A. Modes of Response to Complaints

2. Problem solving may take various forms in terms of modes of response to complaints. Which mode of response is best suited to a particular problem depends on who the principal parties are to the problem giving rise to the complaint, the seriousness of the complaint, what kind of remedies are being asked by the complainants, and the urgency required in fashioning appropriate mitigating measures.

3. Irrespective of whether the source of the problem complained of falls within the purview of the Asian Development Bank (ADB), the special project facilitator (SPF) will first adopt the "consultative dialogue" mode described below. If, however, the problem complained of primarily falls within the purview of the executing agency (EA)/developing member country (DMC) government or the private project sponsor (PPS), the SPF may refer the complaint after the initial attempt at consultative dialogue to the adoption of the good offices mode, since ADB is not a direct party to the problem complained of, but is an interested party in the resolution of the problem. The SPF will be, in this case, in a position to facilitate the resolution of the dispute as a third party. Failing the good offices mode, the parties to the dispute may agree to submit the dispute to a more organized dispute settlement procedure like the mediation mode. The SPF will be in a position to assist in establishing the mediation mechanism acceptable to the parties to the dispute. These modes of response to complaints are described in paras. 4-6.

1. Consultative Dialogue

4. The SPF will bring together the complainants for consultative dialogue with a view to generating adequate solutions between the parties. The SPF in coordination with the operations department concerned may invite representatives of the EA/DMC government concerned or the PPS to this consultative dialogue. This part of consultation will focus on the points raised and assessed in the initial investigation in order to create room for a possible mutually acceptable solution to develop between the parties themselves.

2. Good Offices

5. The SPF will employ good offices with a view to facilitating dialogue between the complainant and the EA/DMC government or the PPS for the purpose of determining whether a mutually acceptable solution can be found between them, rather than focusing on identifying fault or apportioning responsibility, and with a view to finding an adequate solution to the problem.

3. Mediation

6. Even though good offices and mediation are part of the informal dispute settlement procedures, mediation is more formal and structured than good offices, in that it involves third party mediators in an effort to resolve the dispute, which is between the complainants, i.e., project-affected people, on the one hand, and the EA/DMC government or the PPS, as the case
may be, on the other. With the consent of all parties to the dispute, the SPF will assist the parties to establish a mediation mechanism acceptable to all, who will select a mediator or mediators (mediator). The mediator will, in consultation with the parties to the dispute, determine a mediation procedure. The mediator may, with the consent of the parties to the dispute, invite any ADB official or any interested party to submit to him/her their views in writing.

B. Dispute Settlement Procedure

7. The major objective of the consultation process as a means to address the problem is to reach a settlement on terms acceptable to the parties to the dispute.

8. The dispute settlement procedure on the suggested modes of response is provided in paras. 9-12.

   1. Consultative Dialogue and Good Offices

9. In the case of settlement through the consultative dialogue mode and the good offices mode, the SPF will prepare a settlement agreement indicating terms of agreement, including future actions such as remedial measures to be adopted by ADB and the EA/DMC government or the PPS.

   2. Mediation

10. In the case of mediation, the mediator will record any agreement reached and, failing agreement, his/her conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as he/she may deem appropriate for an amicable settlement. The report of the mediator, including conclusions or recommendations, will not be binding upon the parties.

11. The mediation proceedings will be terminated when a settlement has been reached, when the parties have accepted, or one party has rejected the recommendations of the mediator's report or no response was received from either party within a period specified in the mediator's report.

12. With the consent of the parties, the mediator will furnish his/her report to the SPF.
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<sup>a</sup> OM = Operations Manual.

<sup>b</sup> Whether these sector policies should be part of the OM is under review.
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