To:
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Dear Ms. del Valle Serrano,

Comments on European Investment Bank's Complaints Mechanism policy
- second draft dated October 2009

1. Thank you for informing us of the second round of public consultations on European Investment Bank (EIB)'s Complaints Mechanism policy second draft dated October 2009 (October 2009 draft CM policy). We appreciate the opportunity to comment on the October 2009 draft CM policy posted on the EIB website.¹

2. We note from the EIB website that the October 2009 draft CM policy "takes into account stakeholder comments and contributions received during the first consultation period" from 18 May to 24 July 2009."²

3. We applaud EIB for providing two rounds of public consultation and also for holding a public consultation meeting in Brussels on 9 November 2009 as part of the review process of EIB's CM policy as well as its Transparency policy. Our views are focused on the October 2009 draft CM policy and we wish to highlight salient aspects for your kind consideration.

Inclusion of compliance review

4. We commend EIB for including compliance review in its October 2009 draft CM policy. We note that EIB's CM policy of June 2008 ³ which was used as the first draft for the first round of public consultations did not expressly provide for a compliance review function while the present October 2009 draft CM policy clearly upfronts in its Scope that "The EIB Complaints Mechanism has both a compliance [review] and a problem solving/mediation function" ⁴.

5. With a dual function of compliance review and problem-solving, the CM policy should provide clarity on the following: (i) whether it is the claimant who can ask for problem-solving and/or compliance review; and (ii) the sequencing of the two functions, that is, which function should commence first, and whether they run parallel. Clarification would be helpful as the October 2009 draft CM policy states that it is the Complaints Office (CO) who after reviewing the admissibility of each complaint "decides which procedures to follow. It shall for each admissible complaint review the EIB's compliance with its policies and regulatory obligations. Furthermore, the CO shall determine for each admissible complaint if beyond the compliance review there is room for problem solving and/or mediation".⁵ This provision suggests that compliance review and problem-solving are triggered by the CO. We are of the view that compliance review and/or problem solving should be triggered by the claimants in pursuit of their rights and their interests in bringing the project to the attention of the EIB. The CO may step in separately if it finds that, if the claim is only for problem-solving, it would also be appropriate to conduct compliance review to improve corporate responsibility and accountability for the Bank's operations.

Maladministration

6. We suggest that the last sentence in the box in paragraph 1.2, Section II "Maladministration may also relate to the environmental or social impacts of the EIB Group activities" be revised as follows:

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⁴ Section II, paragraph 4.3.
⁵ Section III, paragraph 4.1.
"Maladministration may also relate to the environmental or social impacts of the EIB Group activities and to project cycle related policies and other applicable policies of the EIB listed in Annex I". The revised formulation will cover other related policies of the Bank.

Local NGOs

7. We suggest that the reference to "local NGOs" in paragraph 6.2, Section II be changed to "CSOs" as (i) it does not matter whether these groups are local or otherwise and (ii) CSOs is a broader term than NGOs. We note that in paragraph 2.1, Section IV, CSOs are expressly mentioned as a group, in addition to any individual person, who can bring a complaint before the EIB under the CM policy. We suggest that the term CSOs should be used instead of NGOs in the CM policy, for example, in paragraph 6.3, Section III where the term used is "CSOs/NGOs".

Mission

8. The mission of the CM policy is to provide the public with procedures enabling "alternative and pre-emptive resolution of disputes" between the latter and the EIB Group. This reference is also made earlier in the CM policy in paragraph 1.2 of Section I, Background Information. We suggest that "alternative and pre-emptive resolution of disputes" be replaced by "resolution of disputes" as the intended purpose is to ensure problem-solving in a consensual way that will address the concerns of the claimants.

Independence

9. The draft has not yet resolved a structural problem (see paragraph 3.1, Section II) with regard to reporting lines for the CM. If the CO reports to "EIB Management", it cannot be seen as independent for purposes of either problem solving or compliance review. The work of the CO will be to review the decisions of management and staff, and so it cannot report to the same parties. In some mechanisms, it has been considered appropriate for the accountability mechanism to report to the President for problem solving and to the Board of Directors for compliance review. Paragraph 2.2, Section II also underlines the problem by stating that the CO shall be independent of the "services, which are responsible for the activities challenged by the complainant." However, paragraph 2.2, Section III describes a reporting line to the Management Committee, an approach that does not connote independence. That definition of independence is not supported by any other international financial institution with an accountability mechanism.

Head and staffing

10. Paragraph 2.4, Section III provides that the "EIB’s Head of Corporate Responsibility is the Principal of the EIB Complaints Mechanism and responsible for the development, implementation and monitoring of the Complaints Mechanism". We recommend information be provided on the Head’s selection process, reporting line, and the term, and whether there is any post-employment bar (including similar information for the other CO staff) so that the mechanism is seen to be discharging its functions and mission impartially and will be seen as independent.

CO’s responsibilities

11. We suggest that the requirement that CO "closely co-operates with the EIB’s Communications Department, and particularly with the Civil Society Unit" on issues pertaining to civil society and external communication be reconsidered. It would be more appropriate for the CO to conduct its own external communication, outreach, and problem solving and compliance functions, without requiring it to closely cooperate with the Communications Department as this would provide the CO with operational independence to carry out its functions and mandate. This relates, as well, to the perceptions of the various stakeholders with regard to the Complaints Mechanism.

Independent findings of the CO

12. When a complaint concerns an EIB project that also involves other international financial institutions, the CO will collaborate with their institutions’ independent accountability mechanisms under paragraph 6.1. Section III. We suggest that this collaboration be optional – since it may not be possible in all cases to synchronize the timing of separate activities (problem-solving and/or compliance review) – and that the reporting line of the CO

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6 Section III, paragraph 1.1.
7 Section III, paragraph 4.2 [sic; should read 4.8].
be emphasized. We also suggest that the following sentence be added after this paragraph: "The findings of the CO will however be independent."

Complaint

13. We note that a claimant may be in any one of the official languages of the European Union (EU). As the EIB increasingly engages in lending activities in partner countries across the world, consideration should be given to claims being filed in the national or official language of the claimant's country if the claimant is from a non-EU country. This will be consistent with the EIB's mission of affording claimants with the opportunity to effectively voice their concerns in a language that they are familiar with. Provision could be made that such claims would require translation into the English language and that more time would be needed to carry out the translation.

14. The complaint must require "action by the EIB with a view to restoring compliance and adopting a good administrative behaviour" under paragraph 1.1, Section 4. However, the complaint form provided in Annex II does not reflect this requirement as the claimant has to state what it "expect[s] to achieve" by filing the claim. The object of the claim "must be clearly stated as well as the complainant's claims, i.e. what the complainant expects to concretely achieve with the complaint" under paragraph 6.1, Section IV. We suggest review of these two different requirements based on our earlier comments on the inclusion of compliance review and problem-solving functions in the CM policy.

Registry

15. We recommend that a public registry be set up and maintained under the Complaints Mechanism policy with listing on the EIB website. We note that the CO Activity Report 2008 states that in 2008, the CO handled 40 complaints (page 4). With the provision of a registry, the CO can indicate how the claims have been handled (whether eligible, and if so, the steps taken through problem-solving and/or compliance review, including monitoring of outcomes). This will ensure transparency and information dissemination in the CO's operations.

CO website

16. We recommend that the CO have its own separate website as this will enhance the visibility and independence of EIB's complaints mechanism and the CO, with information for possible claimants as well as current information on cases in process. A particularly valuable use of such a website would be provide the information envisioned in paragraph 4.3, Section III with regard to reports on ongoing reviews on a real-time basis rather than waiting to publish such information on a quarterly basis. For the stakeholders following a particular case, it is important that information be timely as well as accurate.

Dealing with a complaint

17. Paragraph 7.7, Section IV states that the CO "will focus on fact-finding and use mediation, conciliation and dialogue facilitation, thus ensuring to give the adequate emphasis to problem solving". If the primary focus of the CO is on problem-solving rather than compliance review, it is suggested that the following be used to provide flexibility: "will focus on fact-finding and use dispute resolution techniques such as mediation, conciliation and dialogue facilitation".

CO finding and proposing appropriate solutions

18. Paragraph 7.8, Section IV states that the CO "will endeavour to find and propose appropriate solutions whilst taking into account the interest of all its internal and external stakeholders." It is suggested that the following be added at the end of the sentence: "and attempt to work out agreements acceptable to all parties". While taking account of the interests of all internal and external stakeholders would be a difficult task, it is important that the solutions reflect the consensual agreement of the parties.

19. Paragraph 7.10, Section IV refers to “agreed corrective actions.” It does not state “who” agrees. It may be that in the case of problem solving, the actions would be set through the dialogue among Management, claimants, and the CO. In the quite different case of compliance review, in most IFIs, Management provides a plan of corrective actions to respond to the findings of the accountability mechanism. It is then considered by the Board of Directors. The two scenarios should be spelled out here to avoid misunderstanding.

Monitoring of outcomes

20. Paragraph 7.11, Section IV provides that the CO will "follow-up on proposed corrective actions and recommendations whenever appropriate". We suggest the following be inserted at the end of this sentence: "Monitoring will be done at least annually until the corrective actions are accomplished or unless decided otherwise by the EIB's Board of Directors". Monitoring should be for both problem-solving and compliance review functions and has become a regular feature in the establishment of an increasing number of multilateral development bank (MDB) accountability mechanisms. Monitoring the implementation of the agreements reached in problem-solving cases and the implementation of the decisions made following investigations in compliance reviews is important as this will enhance the effectiveness of the accountability mechanism for the institution and the claimants.

Draft Conclusions Report

21. Paragraph 7.15, Section IV provides that the CO will submit draft Conclusions Reports in case of complaints regarding impacts of EIB financed projects to stakeholders involved such as complainants for opinion and comments. We suggest that Management or the department(s) concerned on the complaint in question should also be given the opportunity as they are also important stakeholders. We suggest that the complaints in this matter should also cover project cycle related policies which are included in Annex I.

Methods of inquiry

22. Paragraphs 8.1 and 8.2, Section IV refer to the CO's standard "investigatory procedures" in handling complaints. It would be preferable to delete the term "investigatory" as the approach taken in problem-solving is one of fact-finding and not an investigation.

Publication and reporting of complaints

23. With regard to release of information about cases and complainants, the normal course in most IFIs is to post such information on a public website on a real-time basis. Any information would be kept confidential only at the request of complainants. The provision in paragraph 13.1, Section IV is most unusual and would introduce a loss of transparency for the overall operations of the CM. It should be reconsidered.

Budget

24. It is noted that the October 2009 draft policy does not mention budget and operating expenses of the CO. It should be expressly stated in the policy that adequate budgetary support will be provided by EIB to the CO so that the accountability mechanism can be effective and independent in carrying out various activities in a timely manner without the need to have prior approval from other departments within the Bank. The CO's annual report of 2008 does not indicate the operating expenses for the running of the CO and the implementation of the policy. It would be useful if this information is provided as this would give an indication to all stakeholders the operating costs of the accountability mechanism.

You have our best wishes in launching this mechanism, an important addition to the global network of accountability mechanisms.

Yours sincerely,

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