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# GOVERNANCE AND ACCOUNTABILITY: THE REGIONAL DEVELOPMENT BANKS

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## ABSTRACT

*Good governance has become a mantra of the movement seeking to make multilateral financial institutions more accountable to their stakeholders while improving institutional governance. Although much of the visible criticism has been directed at the World Bank and International Monetary Fund, the “regional” development banks share many of the same governance and accountability problems. Important issues relating to governance and accountability include the banks’ heavily unequal voting power based on capital contributions, limited transparency and disclosure requirements, questionable efficacy of monitoring programs on the impact of the banks’ projects, and limited scope of the banks’ private complaint mechanisms. This Article undertakes a thorough survey of the current state of governance and accountability at the African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, and the Inter-American Development Bank. Understanding the banks’ structures and policies relating to governance and accountability is crucial to evaluating critics’ charges that the banks are ineffective, undemocratic, secretive, and even facilitate human rights violations and environmental destruction.*

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I. INTRODUCTION

Since the mid-1990s, the mantra of good governance, transparency, and accountability has been invoked not only with respect to reform efforts in developing countries,<sup>1</sup> but also to calls for reform among multilateral financial institutions, particularly the International Monetary Fund (IMF) and the World Bank. These two institutions have been subject to a pleth-

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<sup>1</sup> See generally SALADIN AL-JURF, *Good Governance & Transparency: Their Impact on Development*, in E-BOOK ON INTERNATIONAL FINANCE & DEVELOPMENT (E. Carrasco ed., 2008), <http://www.uiowa.edu/ifdebook/ebook2/contents/part2-V.shtml>.

ora of criticisms,<sup>2</sup> ranging from inequitable voting structures that skew institutional power in favor of the rich countries - giving rise to the so-called “democratic deficit”<sup>3</sup> - to opacity in their operations,<sup>4</sup> to unaccountability for human rights violations.<sup>5</sup>

The mantra has also been applied to the so-called “regional development banks” (RDBs): the African Development Bank (AfDB); the Asian Development Bank (ADB); the European Bank for Reconstruction and Development (EBRD); and the Inter-American Development Bank (IDB).<sup>6</sup> The academic literature relating to the governance and account-

<sup>2</sup> For a listing of various criticisms, see JOHN W. HEAD, *THE FUTURE OF THE GLOBAL ECONOMIC ORGANIZATIONS: AN EVALUATION OF CRITICISMS LEVELED AT THE IMF, THE MULTILATERAL DEVELOPMENT BANKS, AND THE WTO* 7-9 (2005).

<sup>3</sup> *Id.* at 7-9. See, e.g., JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 18-22 (2002); JOSEPH S. NYE, JR. ET AL., *THE “DEMOCRACY DEFICIT” IN THE GLOBAL ECONOMY: ENHANCING THE LEGITIMACY AND ACCOUNTABILITY OF GLOBAL INSTITUTIONS* 66-75 (2003); David P. Rapkin & Jonathan R. Strand, *Reforming the IMF’s Weighted Voting System*, 29 *THE WORLD ECONOMY* 305-24 (2006); Guillermo Le Fort V, *Issues on IMF Governance and Representation: An Evaluation of Alternative Options*, in *REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK* 107, 107-48 (Ariel Buira ed., 2005); Murilo Portugal, *Improving IMF Governance and Increasing the Influence of Developing Countries in IMF Decision-Making*, in *REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK* 75, 75-106 (Ariel Buira ed., 2005).

<sup>4</sup> HEAD, *supra* note 2, at 7-9. See, e.g., LEO VAN HOUTVEN, *GOVERNANCE OF THE IMF: DECISION MAKING, INSTITUTIONAL OVERSIGHT, TRANSPARENCY, AND ACCOUNTABILITY* (2002); J. Nolan McWilliams, *Tug of War: The World Bank’s New Governance and Anticorruption Efforts*, 17 *KAN J.L. & PUB. POL’Y* 1, 7-8 (2007); Daniel Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 *GEO. J. INT’L L.* 403, 407-10 (2005); Ngaire Woods, *Making the IMF and the World Bank More Accountable*, in *REFORMING THE GOVERNANCE OF THE IMF AND THE WORLD BANK* 149, 149-70 (Ariel Buira ed., 2005).

<sup>5</sup> HEAD, *supra* note 2, at 7-9. See, e.g., MAC DARROW, *BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW* (2003); SIGRUN SKOGLY, *THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (2001); Namita Wahi, *Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of Horizontal Accountability*, 12 *U.C. DAVIS J. INT’L L. & POL’Y* 331, 352 (2006); Dana Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 *HARV. HUM. RTS. J.* 205, 218 (2002); Fergus MacKay, *Universal Rights or a Universe Unto Itself? Indigenous Peoples’ Human Rights and the World Bank’s Draft Operational Policy 4.10 on Indigenous People*, 17 *AM. U. INT’L L. REV.* 527, 529-30 (2002); John D. Ciorciari, *The Lawful Scope of Human Rights Criteria in World Bank Credit Decisions: An Interpretive Analysis of the IBRD and IDA Articles of Agreement*, 33 *CORNELL INT’L L.J.* 331, 332-35 (2001).

<sup>6</sup> We will not address the Islamic Development Bank. Briefly, the Islamic Development Bank was created in 1973 to “foster social and economic development

ability of the RDBs, however, is sparse compared to what has been produced relating to the IMF and the World Bank.<sup>7</sup>

This article presents an updated survey of the RDBs with respect to governance and accountability issues. In so doing, we examine the basic organizational structure of each RDB, including a comparison of the voting power and obligations of the Banks' member countries. The RDBs often draw most of their finances from their developed-country member states. Many wealthy non-regional countries were allowed to join the RDBs because of their contributions, and their money has provided a substantial portion of funds for the RDBs. Consequently, the voting structures (based on distributed shares) of the RDBs are often designed to allow the wealthy donors (such as the United States and other Western countries) to dominate their decision-making processes. Even in the midst of much institutional change in the voting structure over the past few decades, critics have continued to argue that RDB policies and voting structures do not reflect new economic and development realities. The practice of weighted voting in some of the RDBs has been considered undemocratic, as it allows the donors to control the RDB.

We will also review the information disclosure policies of the RDBs. Most RDB policies have been based on decisions made in private by its Board of Directors or Executive Board. Additionally, the RDBs usually do not disclose internal documents. Because RDBs are not subject to traditional democratic processes or external controls, weak disclosure

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of it's [sic] member countries and Muslim communities world-wide." Islamic Development Bank, <http://www.isdb.org>. (last visited Jan. 28, 2009).

<sup>7</sup> See HEAD, *supra* note 2, at 3, 7–10, 111–66 (identifying and evaluating criticisms of the regional development banks as well as the International Bank for Reconstruction and Development, which he labels collectively as the “multilateral development banks”); John H. Head, *For Richer or For Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*, 52 U. KAN. L. REV. 241 (2004); Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177, 207 (2005) (examining accountability mechanisms of multilateral development banks (MDBs) that allow private parties to bring claims against MDBs for failure to follow their own policies and procedures); Herbert V. Morais, *Testing the Frontiers of Their Mandates: The Experience of the Multilateral Development Banks*, 98 AM. SOC'Y INT'L L. PROC. 64, 67 (2004) (arguing that multilateral development banks “must undertake a major realignment of their internal governance structures to reflect the new financial, economic, and development realities”); Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 403 (2005) (conducting a comparison of existing independent inspection entities including those of the regional development banks); Gunter Handl, *The Legal Mandates of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 AM. J. INT'L L. 642 (1998) (addressing the legal obligations of multilateral development banks relating to sustainable development).

policies threaten to make these institutions less accountable to their stakeholders, which include member states, non-governmental organizations, and individuals. In addition, lack of disclosure prevents non-governmental organizations (NGOs) and civil society members from acquiring the knowledge required to give meaningful input, feedback, and criticism to the RDBs. A true presumption of disclosure, which would allow civil society to scrutinize the Banks' policies and proposals, may change the behavior of RDB management to reflect the needs and concerns of a broader range of stakeholders.

We next discuss three issues with respect to the RDBs which are typically associated with accountability. First, we address internal accountability and oversight. RDBs generally are not parties to international treaties or other instruments that invite outside regulation. As a result, internal indicators of performance and self-evaluations for RDB projects are crucial to ensuring their effectiveness and efficiency. Internal indicators are also crucial for measuring both the positive and negative impacts the RDB projects have on the environment and human rights of affected individuals. In general, the NGOs have been critical of the RDBs for their lack of consideration in these two areas. Each RDB's anti-corruption policy also guarantees the efficacy of RDB projects. It provides important disciplinary measures against any misconduct related to RDB activities, especially since RDB staff members are often immune from legal suits within the laws of the RDB member states.

Second, we address the independent review mechanisms (IRMs). These measures allow individuals or groups directly affected by RDB projects to express their grievances to the RDB. While the IRMs give complainants direct access to the RDBs, their structure significantly limits their ability to police the RDBs. Third, we look at the role of civil society. NGOs and civil society in general have led the way in monitoring, assessing, and criticizing the RDBs. The RDBs have been criticized for paying too little attention to NGOs, as well as individuals and groups that are directly affected by the Banks' development projects.

Part II of this article addresses all of these issues with respect to the AfDB. Part III turns to the ADB. Part IV examines the IDB, followed by an examination of the EBRD in Part V. In Part VI we conclude by providing a number of observations and recommendations relating to the governance and accountability of the RDBs.

## II. THE AFRICAN DEVELOPMENT BANK

The African Development Bank (AfDB) came into existence on September 10, 1964.<sup>8</sup> The AfDB was founded as part of the pan-African

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<sup>8</sup> The African Development Bank, Main Events, [http://www.afdb.org/portal/page?\\_pageid=473,968654&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968654&_dad=portal&_schema=PORTAL) (last visited Jan. 29, 2009) [hereinafter Main Events].

movement at the beginning of decolonization in the mid-twentieth century.<sup>9</sup> Initially headquartered in Abidjan, Côte d'Ivoire,<sup>10</sup> the AfDB was created to “contribute to the development and unity of Africa.”<sup>11</sup>

Like the World Bank, the AfDB is a “Group” that consists of three independent yet interrelated institutions, or lending windows.<sup>12</sup> The African Development Bank provides non-concessional loans at or near-market rates to middle-income countries (MICs) - fifteen at the moment - and non-sovereign entities.<sup>13</sup> The African Development Fund provides concessional loans and grants generally to countries that cannot borrow from the African Development Bank.<sup>14</sup> These include thirty-eight low-income countries, as well as two “blend” countries, i.e., countries that are able to borrow from both the Bank and the Fund’s lending windows.<sup>15</sup> The Nigeria Trust Fund was established by an agreement between the African Development Bank Group and the Nigerian government in 1976 to provide concessional funding for low-income borrowing countries.<sup>16</sup> The Fund expired in 2006, and has been inactive despite a two-year extension.<sup>17</sup> After a year-long assessment of the Fund in 2007, the Nigerian government has agreed to extend the life of the Fund for an addi-

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<sup>9</sup> The African Development Bank, *Evolution of the Group*, [http://www.afdb.org/portal/page?\\_pageid=473,968651&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968651&_dad=portal&_schema=PORTAL) (last visited Jan. 29, 2009) [hereinafter *Evolution*].

<sup>10</sup> The African Development Bank, *Group Entities*, [http://www.afdb.org/portal/page?\\_pageid=473,968629&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968629&_dad=portal&_schema=PORTAL) (last visited Jan. 30, 2009). Today, the African Development Bank operates from its temporary headquarters in Tunis, Tunisia. The Bank moved from Côte d'Ivoire in February 2003 to avoid the political turmoil in that country. *Id.*

<sup>11</sup> *Evolution*, *supra* note 9.

<sup>12</sup> *See, e.g., AFRICAN DEVELOPMENT BANK [AfDB], REPORT BY THE DIRECTORS OF THE AFRICAN DEVELOPMENT BANK AND THE AFRICAN DEVELOPMENT FUND COVERING THE PERIOD JANUARY 1 TO DECEMBER 31, 2007, ABD-ADF/BG/AR/2007 xix-xx (2008) (referring to the three institutions of the African Development Bank as “windows”), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/30726071-EN-ENGLISH-ANNUAL-REPORT-2007.PDF> [hereinafter *AFDB ANNUAL REPORT*].*

<sup>13</sup> *Id.* at 40 (the 15 borrowers here consist of “13 creditworthy [regional member countries] and 2 blend countries, namely Nigeria and Zimbabwe. The latter also have access to [African Development Fund] funds . . . .”); THE HIGH LEVEL PANEL FOR THE AFRICAN DEVELOPMENT BANK, *INVESTING IN AFRICA’S FUTURE: THE ADB IN THE 21ST CENTURY 28 (2007)*, available at [http://www.cgdev.org/doc/events/3.27.08/HLP\\_Report\\_Investing\\_in\\_Africa.pdf](http://www.cgdev.org/doc/events/3.27.08/HLP_Report_Investing_in_Africa.pdf) [hereinafter *AFDB HIGH LEVEL PANEL REPORT*].

<sup>14</sup> *AFDB ANNUAL REPORT*, *supra* note 12, at 44; *AFDB HIGH LEVEL PANEL REPORT*, *supra* note 13, at 28.

<sup>15</sup> *See AFDB ANNUAL REPORT*, *supra* note 12, at 40.

<sup>16</sup> *Id.* at xx.

<sup>17</sup> *Id.*

tional ten years.<sup>18</sup> The Bank Group plans to use the Fund as its third lending window starting in 2008.<sup>19</sup>

Like the other RDBs addressed in this article, the AfDB is in the midst of reforms to improve its effectiveness and relevance in the region.<sup>20</sup> To this end, the President of the AfDB Group, Donald Kaberuka, appointed a High Level Panel to assess the future of the AfDB.<sup>21</sup> In January 2008, the Panel released its report, the basic thrust of which is that the AfDB “should become the recognized authority on African development, the hub of a network for African policy and research, building understanding of what works in Africa and why. . . .”<sup>22</sup> While the Report mainly concentrates on improving aid effectiveness, it does address an important aspect of governance, as noted below.

## A. Governance

### 1. Basic Structure of the AfDB

The Board of Governors is the highest-ranking decision-making body at the AfDB.<sup>23</sup> Each Governor and an Alternative represent an AfDB

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Strategic Plan of the African Development Bank Group for 2003-2007 embodied the Bank’s vision to improve its development effectiveness and results. The Plan focused on selective core activities by country, where its operations would produce “tangible development results in support of poverty reduction” in member countries. African Development Bank Group, Main Program Strategic Plan, <http://www.afdb.org/en/news-events/article/independent-high-level-panel-report-on-the-afdb-in-the-21st-century-to-be-launched-in-tunis-2577/> (last visited Jan. 29, 2009). Accordingly, the Bank pledged to give priority in allocating its resources to agricultural and sustainable rural development, and to human capital formation via primary education and health services. *Id.* The Bank also pledged to support essential infrastructure relating to rural development and economic integration, and to promote good governance, environmental protection, gender issues, assistance to post-conflict countries, and prevention of communicable diseases. The Plan also supported private sector development with the aim of bringing the benefits of globalization to all regional member countries. *Id.* As to institutional reforms, the Plan pledged to improve the quality of its project implementation. *Id.* Moreover, the Bank’s Annual Project Performance Review would be improved to achieve better results-based development. *Id.*

<sup>21</sup> AFDB HIGH LEVEL PANEL REPORT, *supra* note 13, at v.

<sup>22</sup> *Id.* at 4. In so doing, the Report calls upon the AfDB to focus on: (i) investing in infrastructure, (ii) building capable states, (iii) promoting the private sector, and (iv) developing skills. *Id.* at 2.

<sup>23</sup> The African Development Bank, Board of Governors, [www.afdb.org/portal/page?\\_pageid=473,968700&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968700&_dad=portal&_schema=PORTAL) (last visited Jan. 31, 2009) [hereinafter Board of Governors].

member state.<sup>24</sup> Governors and Alternatives are most often senior officials from the finance or economic ministries of the member states that they represent.<sup>25</sup> Indeed, they serve on the Board at the discretion of the member state that appointed them.<sup>26</sup>

The Board of Governors has the exclusive power to (1) admit new members, (2) increase the capital stock, (3) amend the Articles of Agreement, and (4) elect the Board of Directors and the President.<sup>27</sup> The Board of Governors is responsible for holding annual meetings, as well as others that it or the Board of Directors deems necessary.<sup>28</sup>

While the Board of Governors meets occasionally throughout a given year to make decisions on the broader policy goals of the AfDB,<sup>29</sup> the Board of Directors has the power to manage the AfDB's daily operations.<sup>30</sup> There are two Boards of Directors at the AfDB Group: one for the African Development Bank, and another for the African Development Fund.<sup>31</sup>

The AfDB's Board of Directors consists of eighteen individuals, twelve of whom are selected by the regional (i.e., African) member states of the AfDB.<sup>32</sup> The remaining six Directors are selected by the AfDB's non-regional member states, such as the United States, United Kingdom, and Germany.<sup>33</sup> As Professor Head has noted, wealthy non-regional countries have an incentive to join RDBs because membership allows them to bid on contracts for goods and services involved in the RDBs' projects.<sup>34</sup>

Individuals elected to serve on the AfDB's Board of Directors cannot also hold a position on the Board of Governors.<sup>35</sup> The AfDB Directors are elected for a three-year term, and are eligible to serve a maximum of

<sup>24</sup> *Id.*; BANK INFORMATION CENTER, EXAMINING THE AFRICAN DEVELOPMENT BANK: A PRIMER FOR NGOS 14 (2007), available at <http://www.bicusa.org/en/Article.3320.aspx> [hereinafter PRIMER].

<sup>25</sup> PRIMER, *supra* note 24, at 14; Board of Governors, *supra* note 23.

<sup>26</sup> Board of Governors, *supra* note 23.

<sup>27</sup> *Id.*

<sup>28</sup> Agreement Establishing the African Development Bank, art. 31, Aug. 4, 1963, 510 U.N.T.S. 3, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Legal-Documents/30718627-EN-AGREEMENT-ESTABLISHING-THE-AFRICAN-DEVELOPMENT-BANK-6TH-EDITION.PDF> [hereinafter AfDB Agreement].

<sup>29</sup> PRIMER, *supra* note 24, at 14.

<sup>30</sup> The African Development Bank, Board of Directors, [http://www.afdb.org/portal/page?\\_pageid=473,968705&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968705&_dad=portal&_schema=PORTAL) (last visited Apr. 2, 2009) [hereinafter Board of Directors]; PRIMER, *supra* note 24, at 14.

<sup>31</sup> Board of Directors, *supra* note 30; PRIMER, *supra* note 24, at 14–15.

<sup>32</sup> Board of Directors, *supra* note 30; PRIMER, *supra* note 24, at 15.

<sup>33</sup> Board of Directors, *supra* note 30; PRIMER, *supra* note 24, at 15.

<sup>34</sup> HEAD, *supra* note 2, at 40.

<sup>35</sup> Board of Directors, *supra* note 30.



two terms.<sup>36</sup> Like the Board of Governors, the AfDB's Board of Directors also allows for Alternates. Alternate Directors are selected by the Directors, provided that they are not of the same nationality (except for the American Director and his or her Alternate).<sup>37</sup>

The Fund has twelve Directors on its Board, all of whom also serve on the AfDB's Board. The Fund's Board is comprised of: (1) the six Directors of the AfDB's Board that were selected by the non-regional (that is, non-African) member states; and (2) half of the remaining twelve Directors on the AfDB's Board.<sup>38</sup> The regional Directors of the AfDB's Board select amongst themselves the six Directors that will serve on the Fund's Board.<sup>39</sup> The AfDB President serves as the Chairman for both Boards of Directors.<sup>40</sup>

## 2. Voting Power of Member Countries

The AfDB Articles of Agreement require a two-thirds majority vote for decisions by the Board of Governors and the AfDB's Board of Directors.<sup>41</sup> Should a member country believe an issue presented to either of the Boards to be of great importance to it, the Agreement allows the member to request that the decision require a 70% majority vote.<sup>42</sup> These voting rules appear to empower the regional member countries. As in other RDBs, regional member countries receive economic assistance from the AfDB, while the non-regional member countries contribute the funds that allow the AfDB to give assistance in the first place. The AfDB voting rules are designed to allow regional member countries to shape the assistance they receive from the AfDB to fit their interests and needs, rather than those of the non-regional donor countries. The regional member countries hold two-thirds of the voting power in both the Board of Governors and the AfDB's Board of Directors.<sup>43</sup> The rules also require non-regional member countries to cooperate with the regional member countries in order to influence decisions at the AfDB.<sup>44</sup> Additionally, the rules enable regional member countries to unite against an unfavorable proposal by a non-regional member country.<sup>45</sup>

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> PRIMER, *supra* note 24, at 15; Board of Directors, *supra* note 30.

<sup>39</sup> Board of Directors, *supra* note 30; PRIMER, *supra* note 24, at 15.

<sup>40</sup> The African Development Bank, President, [http://www.afdb.org/portal/page?\\_pageid=473,968715&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,968715&_dad=portal&_schema=PORTAL) [hereinafter President].

<sup>41</sup> AfDB Agreement, *supra* note 28, art. 35(2)–(3).

<sup>42</sup> *Id.*

<sup>43</sup> The African Development Bank, Distribution of Voting Power by Executive Director, *available at* [www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/2009-vp-eng-January.pdf](http://www.afdb.org/fileadmin/uploads/afdb/Documents/Boards-Documents/2009-vp-eng-January.pdf) [hereinafter AfDB Voting Statement].

<sup>44</sup> PRIMER, *supra* note 24, at 17.

<sup>45</sup> *Id.*

Moreover, the voting scheme at the AfDB is in line with its “African character”<sup>46</sup>: Nigeria wields the greatest voting power at 8.739%, while the United States comes in second with 6.366%.<sup>47</sup> In the least, this distribution of voting power symbolizes Africa’s ownership of development assistance from the AfDB.<sup>48</sup> Vote allocation at the AfDB is also unique because it is designed to prevent a single Governor or Director from controlling the outcome of the decision-making process.<sup>49</sup> Put differently, the AfDB voting arrangement differs from that of the World Bank. There, the recipient countries appear to have less ownership of development assistance: the United States holds 16.41% of the voting power, followed by Japan at 7.87%, Germany at 4.49%, and France and United Kingdom at 4.31%.<sup>50</sup> Despite the fact that non-regional member states are the minority shareholders of the AfDB, they nevertheless hold considerable influence over AfDB activities.<sup>51</sup> Not only do they make the key capital contributions as donors, as developed countries they often have greater capacity to collect more information on AfDB projects than the representatives of the regional, developing member states on the three Boards.<sup>52</sup>

The AfDB continues its attempts to balance the decision-making power between the regional and non-regional member countries. One of the most significant recommendations of the High Level Panel Report is that the Boards of Directors for the AfDB and the Fund should be merged. The Report notes that only fifteen countries are eligible for the AfDB’s non-concessional loans, whereas thirty-eight countries rely solely on the Fund’s limited concessional loan window.<sup>53</sup> The Report states further:

Currently, the ADF is the point of reference for the majority of the continent, but its board is dominated by the non-African members that give most to the Fund. The Bank needs one board where all shareholders are represented and important decisions are made together. This would reinforce African representation and avoid marginalization of the African voice of the Bank.<sup>54</sup>

The recommendation to merge the Boards reflects the AfDB’s desire to maintain African ownership over the direction of the socio-economic development supported by Bank funds. This proposal, among others, is

<sup>46</sup> PRIMER, *supra* note 24, at 7.

<sup>47</sup> AfDB Voting Statement, *supra* note 43.

<sup>48</sup> PRIMER, *supra* note 24, at 7.

<sup>49</sup> *Id.* at 16.

<sup>50</sup> WORLD BANK, A GUIDE TO THE WORLD BANK 9, 216 (2d ed. 2007).

<sup>51</sup> PRIMER, *supra* note 24, at 17.

<sup>52</sup> *Id.*

<sup>53</sup> AfDB HIGH LEVEL PANEL REPORT, *supra* note 13, at 28. The report notes “the ADF is small and represents less than 5% of total ODA flows to Africa.” *Id.* at 28.

<sup>54</sup> *Id.* at 37.

currently under review that also advocate for institutional reform at the AfDB Group.<sup>55</sup>

### 3. Transparency and Information Disclosure

The current information disclosure policy (the policy) at the AfDB is the broadest in its history. It was last amended in 2005 in response to demands for greater transparency in the AfDB decision-making processes and an ongoing effort among the international financial institutions to work towards a uniform standard for disclosure.<sup>56</sup>

In general, the policy obliges the AfDB to disclose all information except when compelling reasons exist otherwise.<sup>57</sup> The AfDB has invoked two reasons to withhold information under this rule. First, it has classified certain types of information to ensure the effective functioning of the Bank Group.<sup>58</sup> Specifically, it has withheld: (1) information on the Boards of Directors, including information on their internal administrative and deliberative processes; (2) internal financial information; (3) privileged information; (4) pre-qualification information for certain procurement processes; (5) credit information on a member country; and (6) other documents and categories of information not specifically disclosed under this policy.<sup>59</sup> Second, the AfDB allows its Boards of Directors to prevent disclosure of information, even if the policy specifically provides for that type of information to be made public.<sup>60</sup>

The latest amendments to the disclosure policy have been designed to allow a wider range of stakeholders to participate in the AfDB's decision-making processes earlier than they have been able to before. In its 2005 version, the disclosure policy provided for a wide distribution of the Country Strategy Papers<sup>61</sup>—even in their draft stages—to various stakeholders who would be affected by the development projects that the AfDB and the recipient-country government were planning to pursue.<sup>62</sup>

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<sup>55</sup> AfDB ANNUAL REPORT, *supra* note 12, at 10.

<sup>56</sup> THE AFRICAN DEVELOPMENT BANK, THE AFRICAN DEVELOPMENT BANK GROUP POLICY ON DISCLOSURE OF INFORMATION 1 (Oct. 2005), available at <http://www.afdb.org/pls/portal/url/ITEM/18605BE4282F0594E040C00A0C3D1115> [hereinafter AfDB DISCLOSURE POLICY].

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 16.

<sup>59</sup> *Id.* at 16-17, Annex I at 3.

<sup>60</sup> *Id.* at 17, Annex I at 1-4.

<sup>61</sup> Country strategy papers are documents that basically outline a borrowing strategy for a regional member country, tailored to the particular circumstances that it faces in its quest for development. African Development Bank, AfDB Project Information Available to the Public, <http://www.bicusa.org/en/Institution.Information.1.aspx#1> (last visited Jan. 29, 2009).

<sup>62</sup> Toby McIntosh, *African Development Bank Issues New Disclosure Policy*, IFTI Watch, Apr. 13, 2004, <http://www.freedominfo.org/ifti/20040413a.htm> (last visited Jan. 29, 2009); AfDB DISCLOSURE POLICY, *supra* note 56, at 6.

In effect, this would allow civil society to participate in drafting the Country Strategy Papers, which contain assessments of the recipient country's interests and needs.<sup>63</sup> The 2005 version of the disclosure policy also provided for an annual release of Country Performance Assessments, a group of indicators measuring the fitness of a recipient country's governance.<sup>64</sup>

Despite the AfDB's efforts to increase transparency, the 2005 version of the policy has been roundly criticized. Civil society has noted that the disclosure-policy provisions have become meaningless because the AfDB has not yet disclosed the information it has decided to make public under the policy, nor disseminated the disclosed information.<sup>65</sup> Additionally, the AfDB is behind in conducting an assessment of the disclosure policy, even though it had stated in the 2005 version that the policy would be reviewed two years after its implementation.<sup>66</sup> The AfDB is also behind schedule in creating an AfDB staff manual on the disclosure policy.<sup>67</sup> Even if all of the information the AfDB has agreed to disclose were readily available to the public, it would not promote the effective inclusion of non-state stakeholders - such as non-governmental organizations and individuals—in its decision-making processes. In most cases, the AfDB only releases information under the disclosure policy after its Boards have received it first.<sup>68</sup> Even in the case of the Country Strategy Papers, information deemed confidential by the AfDB and the recipient-country government is not disclosed to non-government stakeholders.<sup>69</sup>

## B. *Accountability*

### 1. Internal Accountability and Oversight

Within the AfDB, the Anti-Corruption and Fraud Division (ACFD) of the Office of the Auditor General is responsible for ensuring the integrity of all AfDB activities. To further this goal, the ACFD is responsible for (1) investigating allegations of corruption, fraud, or staff misconduct in AfDB activities, and (2) promoting a professional culture denouncing these practices amongst the AfDB staff and the regional member countries.<sup>70</sup> Through its investigation, the ACFD seeks to determine the

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<sup>63</sup> *Id.*; AfDB DISCLOSURE POLICY, *supra* note 56, at 6.

<sup>64</sup> Toby McIntosh, *African Development Bank Behind on Disclosure Policy Review*, IFTI Watch, Apr. 19, 2007, <http://www.freedominfo.org/ifti/20070419c.htm> (last visited Jan. 29, 2009); AfDB DISCLOSURE POLICY, *supra* note 56, at 7-8.

<sup>65</sup> PRIMER, *supra* note 24, at 17.

<sup>66</sup> McIntosh, *supra* note 64; AfDB DISCLOSURE POLICY, *supra* note 56, at 17.

<sup>67</sup> *Id.*

<sup>68</sup> AfDB DISCLOSURE POLICY, *supra* note 56, at 5-6, Annex I at 1-4.

<sup>69</sup> *Id.* at 6.

<sup>70</sup> The African Development Bank, Anti-Corruption and Fraud Investigation, [http://www.afdb.org/portal/page?\\_pageid=473,18222259&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,18222259&_dad=portal&_schema=PORTAL).

validity of the claim by asking whether it was “more probable than not” that the party in question committed the illicit conduct.<sup>71</sup> The ACFD reports its findings to the President, who ultimately decides whether the investigation confirms the claim(s) filed.<sup>72</sup> Should the President conclude that the party in question did engage in corruption, fraud, or other misconduct, the AfDB: (1) will halt the project involving the guilty party and may ask it to return any loans granted to it; (2) will institute internal proceedings against any guilty staff of the Bank; (3) may place a guilty contractor on a “black list”; and (4) may refer any and all guilty parties to the law-enforcement authorities of the relevant member state(s).<sup>73</sup> In 2007, only four of the twenty-seven complaints filed reached the investigatory stage.<sup>74</sup> Together with the three cases which were carried over from its load in 2006, the ACFD had seven cases total in 2007, only three of which have been completed.<sup>75</sup>

In an effort to establish a comprehensive regime against corruption, fraud, and misconduct in its activities, the AfDB introduced the Whistle-blowing and Complaints Handling Policy in 2007. The policy offers anonymity to anyone who, based on his or her personal knowledge or good faith belief in the occurrence of the conduct in question, reports or desires to report suspicious activities to the ACFD.<sup>76</sup> The policy encourages voluntary reporting by complainants not affiliated with the AfDB and serves to complement the duty of AfDB staff to report any instances of illicit conduct within seven days of acquiring actual knowledge of its occurrence.<sup>77</sup>

Despite its lofty goal and well-placed incentives, the Whistle-blowing and Complaints Handling Policy has several weaknesses. First, the Auditor General of the AfDB is limited in the scope of anonymity he or she is able to grant to the whistle blower or complainant.<sup>78</sup> Depending on the facts of each case, the protection offered by the Auditor General may not be sufficient for the potential whistle-blower or a non-AfDB-staff complainant to report the illicit activities. Second, the AfDB cannot fully enforce the policy in favor of non-AfDB-staff complainants. While the policy defines retaliation to be “any act direct or indirect, recommended,

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<sup>71</sup> The African Development Bank, Investigations, [http://www.afdb.org/portal/page?\\_pageid=473,18222303&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,18222303&_dad=portal&_schema=PORTAL) [hereinafter ACFD Investigations].

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> AfDB ANNUAL REPORT, *supra* note 13, at 14.

<sup>75</sup> *Id.*

<sup>76</sup> THE AFRICAN DEVELOPMENT BANK, WHISTLE BLOWING AND COMPLAINTS HANDLING POLICY 1, 4, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/18136242-EN-WHISTLE-BLOWING-POLICY-FINAL-FINAL-WKF.PDF> (last visited Apr. 2, 2009) [hereinafter WBCH Policy].

<sup>77</sup> *Id.* at 3, 7.

<sup>78</sup> *Id.* at 4.

threatened or taken against a whistle-blower or complainant by any person,” the policy only allows the AfDB to provide remedies against retaliations taken by the AfDB<sup>79</sup> against the employment of whistle-blowers or complainants.<sup>80</sup> In other words, the AfDB cannot provide a remedy to non-AfDB-staff complainants for retaliatory measures not taken by the AfDB.

## 2. Independent Review Mechanism

At first blush, the AfDB’s Independent Review Mechanism (IRM) may be difficult to distinguish from the internal proceedings the AfDB takes against its staff with regards to corruption, fraud, and misconduct. Although they are related processes, they are different because they cover different types of grievances that AfDB stakeholders may file against the institution.<sup>81</sup>

The IRM allows individuals, groups, and other civil-society stakeholders harmed by AfDB projects to allege that the institution failed to comply with its own policies and procedures in pursuing a particular development project.<sup>82</sup> Designed to provide mediation and compliance-review services to stakeholders regarding AfDB projects in both the public and private sectors, the IRM came into existence on June 30, 2004.<sup>83</sup> The IRM consists of two sections: the Compliance Review Mediation Unit (CRMU) and the Roster of Experts.<sup>84</sup>

The IRM is triggered when an AfDB stakeholder files a request for mediation or compliance review. Requests may be filed by (1) any group of two or more people, located in a country where the Bank is pursuing the allegedly harmful project, (2) any organization of the people harmed or likely to be harmed by the Bank’s project, or (3) a local representative of the concerned population.<sup>85</sup> The CRMU Director serves as the gatekeeper for the entire review process. She or he receives the requests first and determines whether they should be subject to mediation or compli-

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<sup>79</sup> These remedies include, but are not limited to, (1) reinstatement, (2) back pay and benefits, (3) compensatory damages, (4) adjudication expenses, (5) intra-AfDB transfer for whistle-blowers, (6) intangible benefits—public recognition of the whistle-blower, and (7) any other relief recommended by the Auditor General. *Id.* at 5.

<sup>80</sup> *Id.* at 4.

<sup>81</sup> COMPLAINT REVIEW AND MEDIATION UNIT OF THE INDEPENDENT REVIEW MECHANISM, THE AFRICAN DEVELOPMENT BANK, OPERATING RULES AND PROCEDURES, available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/05854541-EN-OPERATING-RULES-AND-PROCEDURES.PDF> [hereinafter AfDB IRM].

<sup>82</sup> *Id.* at 2.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.* at 2.

<sup>85</sup> *Id.* at 3-4.

ance review.<sup>86</sup> The Requestor may also ask its complaint to be heard under either of these processes.<sup>87</sup>

If the Requestor asks for mediation or the CRMU Director has determined that mediation would suffice in resolving the issue underlying the complaint, the CRMU Director serves as the mediator.<sup>88</sup> The CRMU Director has three months to resolve the conflict between the Requestors and other parties through mediation.<sup>89</sup> If the CRMU Director succeeds in resolving the underlying issue, he must complete a report within thirty days of the end of the mediation.<sup>90</sup> However, if the conflict remains unresolved by the end of this time period, then the CRMU Director must report the failure of mediation to the Boards of Directors, the President, and the AfDB Management, in addition to the Requestor and all other parties involved in the mediation.<sup>91</sup> At this time, the CRMU Director may recommend the complaint to be considered for compliance review.<sup>92</sup>

Regardless of whether the Requestor asked for it, compliance review is only available after the CRMU Director has determined that it is necessary to resolve the conflict underlying the complaint.<sup>93</sup> The CRMU Director must submit a recommendation for compliance review to the Boards of Directors or to the President if the Requestor is challenging a project that has yet to be approved by the appropriate Board of Directors.<sup>94</sup> In the recommendation, the CRMU Director must include (1) a term of reference, (2) a list of two individuals to serve on the compliance review panel from the Roster of Experts, and (3) a budget for the review process.<sup>95</sup>

The IRM adopts different levels of inquiry for public- and private-sector projects. More specifically, the IRM may only review the AfDB's compliance with its social and environmental policies for the institution's private-sector projects.<sup>96</sup> The IRM may hold the institution to a higher standard for public-sector projects by challenging its adherence to all of its policies and procedures applicable to the project in question.<sup>97</sup> The AfDB requires the disclosure of (1) the registration of request, (2) the CRMU mediation reports, (3) the CRMU eligibility reports for compliance review, (4) compliance review panels report, and (5) decisions by the Boards of Directors or the AfDB President in response to reports (2)-

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<sup>86</sup> *Id.* at 7.

<sup>87</sup> See Bradlow, *supra* note 4, at 446.

<sup>88</sup> AfDB IRM, *supra* note 81, at 1.

<sup>89</sup> *Id.* at 11.

<sup>90</sup> *Id.* at 10.

<sup>91</sup> *Id.* at 11.

<sup>92</sup> *Id.*

<sup>93</sup> See *id.*

<sup>94</sup> See Bradlow, *supra* note 4, at 446; AfDB IRM, *supra* note 81, at 11.

<sup>95</sup> AfDB IRM, *supra* note 81, at 12.

<sup>96</sup> *Id.* at 1.

<sup>97</sup> *Id.*

(4).<sup>98</sup> The CRMU Director has discretion to decide whether to grant any request by the Requestor to keep the information contained in these documents confidential.<sup>99</sup>

It is difficult to assess the benefits and costs specific to the AfDB's IRM because it has been used only once.<sup>100</sup> However, civil society has been quick to mention that the IRM, like its counterparts in other international financial institutions, does not always provide the remedy sought.<sup>101</sup> More specifically, the IRM is not designed to stop the allegedly harmful project(s) even after the concerned people(s) or their representative(s) have filed a request.<sup>102</sup> The IRM does not provide traditional remedies that arise from lawsuits because the AfDB's charter provides it with immunity from suit in municipal courts.<sup>103</sup> The most that the complainants may hope to obtain from the IRM is that the AfDB agree to change the problematic aspect of the project in question to comply with AfDB rules.<sup>104</sup>

### 3. The Role of Civil Society

Unlike the other RDBs, the AfDB does not have an extensive history of engaging civil-society stakeholders.<sup>105</sup> Although the AfDB has proposed a comprehensive policy for integrating individuals, groups, and NGOs into the various aspects of the AfDB operations,<sup>106</sup> no discernable actions have been taken as of yet.<sup>107</sup> In 2007, the AfDB invited civil soci-

<sup>98</sup> *Id.* at 13-14.

<sup>99</sup> *Id.* at 4-5.

<sup>100</sup> The African Development Bank, Register of Requests, [http://www.afdb.org/portal/page?\\_pageid=473,19836271&\\_dad=portal&\\_schema=PORTAL](http://www.afdb.org/portal/page?_pageid=473,19836271&_dad=portal&_schema=PORTAL) (last visited Jan. 30, 2009).

<sup>101</sup> PRIMER, *supra* note 24, at 33-34.

<sup>102</sup> *Id.*

<sup>103</sup> Compare AfDB Agreement, *supra* note 28, at art. 52(1) ("The Bank shall enjoy immunity from every form of legal process."), and art. 56 (guaranteeing personal immunities and privileges for "[a]ll governors, directors, alternates, officers and employees of the [AfDB] and exerts and consultants performing missions for the [AfDB]"), with art. 52(1) (AfDB may be sued in limited jurisdictions when "cases aris[e] out of the exercise of [the AfDB's] borrowing powers"), and art. 59 (Board of Directors have discretion to waive immunities and exemptions provided in the Agreement so long as it would be in the AfDB's interest; furthermore, the AfDB President is duty-bound to waive personal immunity of Bank staff in the interest of justice given that it would not damage the Bank's interest). See also Suzuki & Nanwani, *supra* note 7, at 206.

<sup>104</sup> See generally AfDB IRM, *supra* note 81.

<sup>105</sup> PRIMER, *supra* note 24, at 23.

<sup>106</sup> THE AFRICAN DEVELOPMENT BANK, COOPERATION WITH CIVIL SOCIETY ORGANIZATIONS: POLICY AND GUIDELINES 23-45 (Aug. 2000).

<sup>107</sup> PRIMER, *supra* note 24, at 23.



ety to participate in seminars held at its Annual Meeting.<sup>108</sup> The Bank also contacted civil society organizations to publicize its Independent Review Mechanism. However, the High Level Report does not make any recommendations to the AfDB on expanding the role of civil society in Bank operations.

### III. ASIAN DEVELOPMENT BANK

The Asian Development Bank (ADB) was founded in 1966<sup>109</sup> to promote economic growth and fight absolute poverty, particularly amongst its developing member countries.<sup>110</sup> In the 1980s and 1990s, the region enjoyed significant economic growth: real per capita gross domestic product (GDP) rose more than six percent annually in East Asia and three percent annually in South Asia.<sup>111</sup> After the Asian financial crisis that began in 1997, the ADB adopted a long-term strategic framework for 2001-2015 that focused on combating the rise in absolute poverty that resulted from the crisis.<sup>112</sup> Given the unexpectedly robust post-crisis economic growth in the region - between 1999 and 2006 GDP growth average six percent per year<sup>113</sup> - the ADB was forced to rethink its role in the region or face obsolescence.<sup>114</sup> Accordingly, in April 2008, it issued "Strategy 2020," a revised strategic framework for 2008-2020, which focuses on inclusive economic growth, environmentally sustainable growth, and regional integration.<sup>115</sup> Its adoption by the ADB's Board

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<sup>108</sup> AfDB ANNUAL REPORT, *supra* note 12, at 4.

<sup>109</sup> The Asian Development Bank, Members, <http://www.adb.org/About/members.asp> (last visited Jan. 30, 2009) [hereinafter ADB Members].

<sup>110</sup> Agreement Establishing the Asian Development Bank, art. 1, *available at* <http://www.adb.org/documents/reports/charter/charter.pdf> [hereinafter ADB Agreement].

<sup>111</sup> ASIAN DEVELOPMENT BANK, STRATEGY 2020: THE LONG-TERM STRATEGIC FRAMEWORK OF THE ASIAN DEVELOPMENT BANK 2008-2020 at 2 (2008), *available at* <http://www.adb.org/documents/policies/strategy2020/strategy2020.pdf> [hereinafter STRATEGY 2020].

<sup>112</sup> ASIAN DEVELOPMENT BANK, MOVING THE POVERTY REDUCTION AGENDA FORWARD: THE LONG-TERM STRATEGIC FRAMEWORK OF THE ASIAN DEVELOPMENT BANK (2001-2015) (2001), *available at* <http://www.adb.org/documents/policies/ltsf/ltsf.pdf>.

<sup>113</sup> STRATEGY 2020, *supra* note 111, at 2.

<sup>114</sup> Daniel Woolls, *U.S. Says Asian Development Bank Runs Risk of Obsolescence*, ASSOCIATED PRESS, May 6, 2008.

<sup>115</sup> STRATEGY 2020, *supra* note 111, at 8. The ADB will focus on "five drivers of change: (i) private sector development and private sector operations, (ii) good governance and capacity development, (iii) gender equity, (iv) knowledge solutions, and (v) partnerships." *Id.* at 9. Moreover, it will focus its operations in five core areas: infrastructure, environment, regional cooperation and integration, finance sector development, and education. *Id.* at 13. Under the framework, the Bank's lending portfolio will change. By 2012, 80% of its loans will be dedicated to the five core areas. *Id.* at 17. By 2020, 50% of its loans will go to private sector development

was marked by controversy. The United States, a key member of the ADB, voted against it,<sup>116</sup> arguing, among other things, that the revised strategic framework lacked a budget and a clear plan for the evolution of future investment projects.<sup>117</sup> While Strategy 2020 mainly focuses on improving the ADB's effectiveness - and relevance - as a multilateral development bank for the region,<sup>118</sup> it touches upon issues of governance and accountability, as noted below.

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and private operations. *Id.* And by 2020, at least 30% of the Bank's lending will be devoted to increased regional cooperation and integration. *Id.* The revised framework of the ADB to increase its capital may encounter some resistance, particularly from the U.S. and the U.K. Raphael Minder, *ADB Eyes Capital Boost*, FIN. TIMES, May 7, 2008, at 12.

<sup>116</sup> The U.K. and Switzerland abstained. Greg Rushford, *ADB Jumps to Corporate Welfare*, FAR E. ECON. REV., June 2008, at 42. Australia and India voted in favor of the strategic framework, but expressed concerns over how it would be funded. *Id.*

<sup>117</sup> Woolls, *supra* note 114. The United States also argued that the ADB had to revise its approach to middle-income countries in the regions, such as India and China. *Id.* U.S. Assistant Secretary for International Affairs Clay Lowery suggested that for such countries the ADB should consider providing fee-based consulting rather than loans. *Id.* Lowery also criticized the Bank for hiring personnel based on nationality rather than merit. *Id.*

NGOs also voiced criticism of Strategy 2020. A press release issued by the NGO Forum on ADB stated that “[c]ivil society groups criticized the new strategic framework of the Asian Development Bank, saying it is moving towards private sector-led development, which is anti-poor and vulnerable to corruption.” Press Release, NGO Forum on ADB, *ADB's 2020 Strategy Confirms Corporate Bias* (Apr. 10, 2008), available at <http://www.forum-adb.org/pdf/PDF-LTSF/LTSF%20PR-final.pdf>. It stated further that “increasing private sector's leverage in development projects would be dangerous due to their profit-oriented activities and strong disregard of the existing Bank's policies safeguarding local communities and the environment from disastrous impacts.” *Id.*

<sup>118</sup> See *supra* note 117 and accompanying text. In this regard, Strategy 2020 states: “Partnering with its [developing member countries] and other development agencies, ADB will share responsibilities in a defined, transparent, harmonized, and mutually accountable manner to improve aid effectiveness.” STRATEGY 2020, *supra* note 111, at 18. In order to accomplish this goal, the ADB pledged its participation in the Annual Common Performance Assessment System (COMPAS). See AFRICAN DEVELOPMENT BANK ET AL., MULTILATERAL DEVELOPMENT BANKS' COMMON PERFORMANCE ASSESSMENT SYSTEM, 2007 REP. (Mar. 2008), Launched in 2005, COMPAS seeks to provide information on the progress that six multilateral development banks, including the ADB, have made in adopting a “managing for results” approach in their operations. *Id.* It does so by focusing on eight performance indicators: (i) country capacity to manage for development results, (ii) country strategies, (iii) allocation of concessional resources, (iv) projects, (v) institutional learning from operational experience, (vi) results-focused human resources, (vii) harmonization among development agencies, and (viii) private sector operations. *Id.* at 1. The ADB also pledged to report its operational and institutional performance in

## A. Governance

### 1. Basic Structure of the ADB

We begin our discussion of issues relating to the ADB's governance by setting forth the ADB's basic structure. The Board of Governors holds all powers of the Bank.<sup>119</sup> Each Governor and his alternate represent the member country that selected them for their respective posts.<sup>120</sup> These individuals are usually high-ranking officials from the economic or finance ministries, or central banks, of their appointing member country.<sup>121</sup> The Governors attend an Annual Meeting held by the Board to exercise their decision-making powers.<sup>122</sup> The Board of Governors possesses a wide range of non-delegable powers. It is the only authoritative body of the ADB allowed: (1) to decide on matters of membership and capital stock; (2) to review the interpretations or applications of the ADB's charter by the Board of Directors and consider any amendments to that document; (3) to enter into agreements with other international

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the Global Monitoring Report, an annual report issued jointly by the World Bank and the International Monetary Fund that assesses the global development agenda. *See THE WORLD BANK, GLOBAL MONITORING REP. 2008: MDGs AND THE ENVIRONMENT: AGENDA FOR INCLUSIVE AND SUSTAINABLE DEVELOPMENT (2008)* (assessing progress being made toward the Millennium Development Goals as well as toward inclusive and sustainable development), *available at* [http://siteresources.worldbank.org/INTGLOMONREP2008/Resources/4737994-1207342962709/8944\\_Web\\_PDF](http://siteresources.worldbank.org/INTGLOMONREP2008/Resources/4737994-1207342962709/8944_Web_PDF). Moreover, the Bank pledged to meet all of the major commitments under the Paris Declaration on Aid Effectiveness by the agreement's target of 2012 (the Paris Declaration's target date, as set forth in the Declaration itself, is 2010). Paris Declaration on Aid Effectiveness: Ownership, Harmonization, Alignment, Results and Mutual Accountability, ¶ 1 (Mar. 2005) *available at* <http://www.oecd.org/dataoecd/11/41/34428351.pdf>. Issued in March 2005, the Declaration is a pledge by Ministers of participating developed and developing countries responsible for development and by participating multilateral and bilateral development institutions "to take far-reaching and monitorable actions to reform the ways we deliver and manage aid." *Id.* The Declaration's participants "commit to accelerate the pace of change by implementing" various "Partnership Commitments," such as Ownership, whereby "Partner Countries exercise effective leadership over their development policies and strategies and coordinate development actions." *Id.* at 3. The participants also commit to measure progress in improving aid effectiveness against 12 indicators, such as Mutual Accountability, which focuses on the "[n]umber of partner countries that undertake mutual assessments of progress in implementing agreed commitments on aid effectiveness including those in this Declaration." *Id.* at 10.

<sup>119</sup> ADB Agreement, *supra* note 110, at art. 28(1).

<sup>120</sup> *Id.* at art. 27(1).

<sup>121</sup> BANK INFORMATION CENTER, UNPACKING THE ADB: UNDERSTANDING THE ASIAN DEVELOPMENT BANK 7 (2005), *available at* <http://www.bicusa.org/bicusa/issues/1-35%20adb%20blue.pdf>.

<sup>122</sup> The Asian Development Bank, Board of Governors, <http://www.adb.org/GOV/default.asp> (last visited Jan.30, 2009); ADB Agreement, *supra* note 110, at art. 27.

organizations on behalf of the ADB; (4) to elect Directors and the President, and determine the terms of their employment; and (5) to manage the ADB's finances.<sup>123</sup>

The Board of Directors is the second-highest authority at the ADB.<sup>124</sup> Stationed at the ADB headquarters in Manila, Philippines, the Board oversees the day-to-day workings of the ADB.<sup>125</sup> The Board consists of twelve Directors, eight of whom are elected by the Governors of the regional member countries.<sup>126</sup> The remaining four Directors are selected by the Governors of the non-regional member countries.<sup>127</sup> Each Director is allowed to select an alternate, provided that they are nationals of different member countries.<sup>128</sup>

The ADB President chairs the Board of Directors.<sup>129</sup> The President is the highest-ranking member of the ADB's Management Team, and serves as the ADB's legal representative.<sup>130</sup> Like the Directors, the President is elected by the Board of Governors.<sup>131</sup> The President's main responsibility is to ensure that the ADB follows the decisions of the Board of Directors in its operations.<sup>132</sup> Four Vice-Presidents and one Managing Director-General assist the President on the Management Team.<sup>133</sup>

## 2. Voting Power of Member Countries

As is the case in all RDBs, the ADB consists of both regional and non-regional member countries. Non-regional countries, such as the United States, the United Kingdom, France, and Germany, are nonetheless members of the ADB because they make capital contributions to the ADB. Like the AfDB, the regional member countries at the ADB hold clear majorities in number, and in voting power, in both the Board of Governors and the Board of Directors. The Board of Governors consists of forty-eight regional-member-country Governors who hold 65.040% of the total voting power in that body.<sup>134</sup> Of all the sixty-seven member

<sup>123</sup> ADB Agreement, *supra* note 110, at art. 28(2).

<sup>124</sup> The Asian Development Bank, Organizational Structure, [http://www.adb.org/About/ADB\\_Organization\\_Chart.pdf](http://www.adb.org/About/ADB_Organization_Chart.pdf) (last visited Jan. 30, 2009).

<sup>125</sup> The Asian Development Bank, Board of Directors, <http://www.adb.org/BOD/default.asp> (last visited Apr. 2, 2009) [hereinafter Board of Directors].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> ADB Agreement, *supra* note 110, at art. 30(2).

<sup>129</sup> *Id.* at art. 34(3).

<sup>130</sup> *Id.*; The Asian Development Bank, Directory of the Management's Offices and their Senior Staff, <http://www.adb.org/About/adb-management.asp> [hereinafter Management and Senior Staff] (last visited Jan. 30, 2009).

<sup>131</sup> ADB Agreement, *supra* note 110, at art. 31.

<sup>132</sup> *Id.* at art. 31(5).

<sup>133</sup> Management and Senior Staff, *supra* note 130.

<sup>134</sup> ADB Members, *supra* note 109.

countries of the ADB, Japan, a regional member country, holds the greatest voting power at 12.756%.<sup>135</sup> The People's Republic of China, another regional member country, comes in second at 5.442%.<sup>136</sup> The United States has the largest share of votes among the non-regional member countries, tying Japan at 12.756%.<sup>137</sup> The regional member countries possess 75% of the total voting power within the Board of Directors, as they select eight of the twelve members of that body.<sup>138</sup>

However, these majorities do not necessarily favor the regional member countries. At the ADB, the voting rules for both Boards simply require "a majority of the voting power represented at a meeting" for a decision to be made, which weakens the impact that regional member countries have in the Boards of Governors and Directors.<sup>139</sup> In other words, non-regional members may pass decisions in meetings where they constitute a majority. Absolute majorities in the Board of Governors may matter under two limited circumstances. When the Board decides to identify a member country as "developed" or "developing," it needs a vote of two-thirds of the total number of Governors, representing not less than three-fourths of the total voting power of the members.<sup>140</sup> Additionally, electing the ADB President requires a vote of a majority of the total number of Governors, representing not less than a majority of the total voting power of the members.<sup>141</sup> The majority requirements for the ADB's Presidential election do not allow regional member countries to vote meaningfully as a majority block. Notably, the ADB President has always been from Japan,<sup>142</sup> though the ADB's charter allows the President to be a national from any regional member country.<sup>143</sup>

### 3. Transparency and Information Disclosure

The ADB last revised its information disclosure policy in 2005.<sup>144</sup> That version of the policy reflects many of the suggestions made by NGOs in their consultations with the ADB.<sup>145</sup> The policy now expressly requires the ADB to disclose all information when confidentiality cannot be justi-

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Board of Directors, *supra* note 125.

<sup>139</sup> ADB Agreement, *supra* note 110, at art. 33(2)-(3).

<sup>140</sup> *Id.* at art. 28(4).

<sup>141</sup> *Id.* at art. 34(1).

<sup>142</sup> The Asian Development Bank, Frequently Asked Questions, <http://www.adb.org/About/faqs-membership.asp#OPR> (last visited Jan. 30, 2009).

<sup>143</sup> *Id.*; ADB Agreement, *supra* note 110, at art. 34(1).

<sup>144</sup> BANK INFORMATION CENTER, ADB PUBLIC COMMUNICATIONS POLICY: A SUMMARY OF CSO RECOMMENDATIONS 1 (July 18, 2005), available at <http://www.bicusa.org/en/Article.229.aspx> (follow "PCP Summary Table" hyperlink) [hereinafter RECOMMENDATIONS SUMMARY].

<sup>145</sup> *Id.* at 1, 6-7.

fied by a compelling reason.<sup>146</sup> The ADB is required to honor all inquiries for information falling within the presumption in favor of disclosure.<sup>147</sup> Consequently, the ADB must disclose information even if such disclosure portrays it in an unfavorable light.<sup>148</sup>

The policy also enumerates the types of information that the ADB will not make public. Explaining that legal and practical considerations do not allow for complete disclosure, the ADB assures its stakeholders that the undisclosed information is miniscule when compared to all the information the ADB plans to make public.<sup>149</sup> However, the actual list of protected information appears quite sizeable. It includes nineteen categories of “current information,” or information on current ADB activities, many of which pertain to the decision-making processes of the Board of Directors.<sup>150</sup> The list also contains ten categories of “historical information,” or information on past ADB activities.<sup>151</sup>

These protective measures are mitigated by the “public interest override” and the ADB policy on “historical information.” First, the policy requires ADB to disclose two categories of “current information” - namely, (1) internal documents, memoranda, and other similar communications to and from the Board of Directors, the Management, and ADB staff and consultants,<sup>152</sup> and (2) communications between the ADB and its member states - as well as all ten categories of “historical information,”<sup>153</sup> upon request by a member country or the ADB’s own determination that the benefit to the public interest from the disclosure will be greater than the harms arising from it.<sup>154</sup> Despite its potential for broad application, the “public interest override” is subject to legal constraints on the ADB.<sup>155</sup> Specifically, the ADB cannot divulge information without the informed consent of the party to whom it made a legally binding promise of confidentiality.<sup>156</sup> Also, the ADB cannot make disclosures that may be against any applicable law.<sup>157</sup> Second, the ADB must honor

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<sup>146</sup> ASIAN DEVELOPMENT BANK, THE PUBLIC COMMUNICATIONS POLICY OF THE ASIAN DEVELOPMENT BANK: DISCLOSURE AND EXCHANGE OF INFORMATION 6 (Mar. 2005), available at <http://www.adb.org/Documents/Policies/PCP/PCP-R-Paper.pdf> [hereinafter ADB PCP].

<sup>147</sup> *Id.* at 6.

<sup>148</sup> *Id.* at 7.

<sup>149</sup> ADB PCP, *supra* note 146, at 7.

<sup>150</sup> *Id.* at 22-23.

<sup>151</sup> *Id.* at 23-24.

<sup>152</sup> *Id.* at 22.

<sup>153</sup> *Id.* at 23-24.

<sup>154</sup> *Id.* at 24.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

requests for “historical information” if these requests are for documents issued twenty or more years before the date of request.<sup>158</sup>

Since implementing the 2005 version of its disclosure policy, the ADB has been recognized by civil society as a leader in promoting openness among the other international financial institutions. The ADB ranked high in all categories of the IFI Transparency Indicators in late 2005.<sup>159</sup> The IFI Transparency Indicators highlighted the unique characteristics of the ADB’s new disclosure policy. First, the ADB was found to provide the greatest amount of detail about its projects through the Project Information Documents (PIDs).<sup>160</sup> What is more, the ADB policy advocates for early disclosures of key documents to the public to encourage participation from non-state stakeholders.<sup>161</sup> More specifically, the ADB policy seeks to distribute documents on country strategies to these non-state stakeholders before their consultations with the ADB on potential projects in their country.<sup>162</sup> The “public interest override” allows ADB to make more information available to the public than other international financial institutions.<sup>163</sup> Lastly, the ADB was found to be the only RDB to provide written responses to requests for information.<sup>164</sup>

Despite acknowledging the ADB’s relatively liberal disclosure policy,<sup>165</sup> civil society has continually pressed for a greater volume and a wider scope of disclosures from the ADB. Critics have called on the ADB to disclose all board documents and information pertaining to private-sector development,<sup>166</sup> much of which the ADB has determined to fall outside the presumption of disclosure.<sup>167</sup> Critics have also urged the ADB to translate its documents into more languages so that they may be understood by a wider audience.<sup>168</sup>

The ADB conducted its own evaluation of the implementation of its new disclosure policy from September 2005 to August 2006 and reported the results in March 2007.<sup>169</sup> The ADB reported its shortcomings in com-

<sup>158</sup> ADB PCP, *supra* note 146, at 23.

<sup>159</sup> Toby McIntosh, *Best Practices on Transparency Among IFIs*, IFTI WATCH, Sept. 12, 2005, <http://www.freedominfo.org/ifti/20050912.htm>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> See HEAD, *supra* note 2, at 146 (noting multilateral development banks, including the ADB, “have adopted and implemented document disclosure policies that make vastly more information available about MDBs now than even [sic] a decade ago”).

<sup>166</sup> UNPACKING THE ADB, *supra* note 120, at 47.

<sup>167</sup> ADB PCP, *supra* note 146, at 22-23.

<sup>168</sup> UNPACKING THE ADB, *supra* note 120, at 47.

<sup>169</sup> Toby McIntosh, *ADB Assesses Positives and Negatives of New Disclosure Policy*, IFTI WATCH, May 21, 2007, <http://www.freedominfo.org/ifti/20070521.htm>.

plying fully with the disclosure policy, most of which involved delays in disclosures.<sup>170</sup> Following the report, the ADB established deadlines for improving its compliance with the disclosure deadlines in the 2005 policy.<sup>171</sup> The ADB conducted a second self-evaluation of the 2005 disclosure policy in early 2008<sup>172</sup> and released its report in March 2008.<sup>173</sup>

The March 2008 report lists the progress ADB has made towards fully implementing its disclosure policy. The ADB has expanded its outreach to both donors and recipient countries by (1) devoting more resources to train and inform its staff to better respond to the needs of its stakeholders, (2) updating its website, and (3) continuing to translate information about the ADB into the languages of the communities in the borrowing countries whose lives are directly affected by ADB projects.<sup>174</sup> The ADB has increased public access to ADB documents by posting more of them on its website.<sup>175</sup> These documents include those that the Board of Directors uses in making project-related decisions.<sup>176</sup> While the ADB has shared more documents with the public, it has been behind schedule in doing so.<sup>177</sup> Additionally, the ADB has continued to disappoint civil society despite the fact that they honored almost 2000 requests for information from the public from September 2006 to December 2007.<sup>178</sup> Specifically, the ADB continues to limit the documents it releases mainly to those that were (1) created before the 2005 disclosure policy and (2) fall into one of the categories of documents that the Bank may share with the public under the current disclosure policy.<sup>179</sup>

Recently, tensions between civil society and the ADB erupted over the latter's disclosure policy. First, NGOs comprising the Central Asia and Caucasus Working Group on the ADB (the Working Group) complained that the ADB failed to act in accordance with its own disclosure policy by denying the Working Group's request for information on the Power and District Heating Rehabilitation Project in Kyrgyzstan.<sup>180</sup> The Working Group requested certain documents related to the Project in April 2008

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> THE ASIAN DEVELOPMENT BANK, ASSESSMENT OF THE IMPLEMENTATION OF THE PUBLIC COMMUNICATIONS POLICY, SEPTEMBER 2006-DECEMBER 2007 (March 2008), available at <http://www.adb.org/documents/reports/pcp-annual-reports/annual-report-2007.pdf> [hereinafter ADB MARCH 2008 REPORT].

<sup>174</sup> ADB MARCH 2008 REPORT, *supra* note 173, at i.

<sup>175</sup> *Id.* at ii.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Press Release, NGO Forum on ADB, CSOs Hit ADB Communication Policy on Bishkek Heating Plant (June 19, 2008), <http://www.forum-ADB.org/Press-Releases/20080619-CA.htm>.



to find out why the ADB and the Kyrgyz government took eleven years to complete the project.<sup>181</sup> The ADB InfoUnit denied the request, and the ADB Public Disclosure Advisory Committee (PDAC) affirmed InfoUnit's decision on the Working Group's appeal.<sup>182</sup> According to the Working Group, the ADB refused to share the requested documents even though it acknowledged that the documents clearly fell within those that the ADB may release to the public.<sup>183</sup> Additionally, the Working Group expressed disappointment that the PDAC did not function as a neutral arbiter between the ADB and the civil-society complainants.<sup>184</sup>

Second, the ADB held off disclosing the so-called "R-Papers" (i.e., restricted papers) on a new multi-tranche financing facility, which many in civil society believe to be a dramatic departure from the ADB's previous lending policy.<sup>185</sup> Here, the civil society complained that the ADB should have categorized the "R-Papers" as documents pertaining to safeguard measures, which would allow civil society to receive the documents in their draft stages.<sup>186</sup>

## B. *Accountability*

### 1. Internal Accountability and Oversight

Among the RDBs, the ADB has been a pioneer in developing and implementing policies for internal accountability.<sup>187</sup> It adopted its first Governance Policy in 1995<sup>188</sup> and has operated under the Second Governance and Anticorruption Action Plan (GACAP II) since July 2006.<sup>189</sup>

At the ADB, the Integrity Division of the Office of the Auditor General (OAGI) is responsible for processing allegations of corruption or fraud through its investigatory framework.<sup>190</sup> First, the OAGI receives complaints against contractors (either individuals or firms) or ADB staff

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Toby McIntosh, *ADB Denials Frustrate Civil Society Groups; Annual Report Suggests Gaps in Routine Disclosure*, IFTI WATCH, July 17, 2008, <http://www.freedominfo.org/ifti/20080717.htm>.

<sup>186</sup> *Id.*

<sup>187</sup> Asian Development Bank, *Anticorruption and Integrity – Frequently Asked Questions*, <http://www.adb.org/Integrity/faqs.asp> (last visited Feb. 2, 2009) [hereinafter *Integrity FAQ*].

<sup>188</sup> *Id.*

<sup>189</sup> Asian Development Bank, *Anticorruption and Integrity*, <http://www.adb.org/Integrity> (last visited Feb. 2, 2009).

<sup>190</sup> Asian Development Bank, *Terms of Office: Integrity Division, Office of the Auditor General*, <http://www.adb.org/Integrity/term-office.asp> (last visited Feb. 2, 2009).

involved in an ADB project.<sup>191</sup> These complaints may be filed by anyone, and anonymously if the complainant so desires.<sup>192</sup> However, anonymous filings are not necessary according to the OAGI, as it promises to protect the complainant's identity throughout the investigatory process.<sup>193</sup> The OAGI screens the complaints to identify and recommend meritorious ones to the investigatory stage.<sup>194</sup> Once the OAGI has determined that a complaint has merit, then it proceeds to investigate the claims therein, allowing the alleged wrongdoer to respond to them in writing.<sup>195</sup> The OAGI submits this writing, together with the findings of its investigation, to the Integrity Oversight Committee.<sup>196</sup> The Committee examines the facts to determine whether the alleged wrongdoer should be penalized.<sup>197</sup> Penalties include sanctions for contractors, and internal reprimand for ADB staff.<sup>198</sup> Contractors found guilty by the Integrity Oversight Committee may appeal once to the Sanctions Appeals Committee.<sup>199</sup>

In 2007, the OAGI received 211 new complaints, and 33 carried over from 2006.<sup>200</sup> More complaints were filed in 2007 than in 2006.<sup>201</sup> The ADB attributed this rise to (1) the success of its campaign to make reporting, and information on the reporting process, more accessible to the public, and (2) the reputation of its anti-corruption policy.<sup>202</sup>

The ADB opened many more cases than it closed. Of the 211 new complaints filed in 2007, the OAGI opened 95 that passed the initial screening stage.<sup>203</sup> Of these 95 cases, 66 were ongoing as of the end of 2007, and 23 were dismissed for lack of evidentiary support.<sup>204</sup> The ADB conducted 17 investigatory missions in 2007.<sup>205</sup> It sanctioned 61 firms and

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<sup>191</sup> Asian Development Bank, OAGI's Investigative Process, <http://www.adb.org/Integrity/investigative-process.asp> (last visited Feb. 2, 2009) [hereinafter OAGI's Investigative Process].

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*; The Asian Development Bank, Anticorruption and Integrity - Sanctions, <http://www.adb.org/Integrity/sanctions.asp> (last visited Feb. 2, 2009).

<sup>199</sup> OAGI's Investigative Process, *supra* note 191.

<sup>200</sup> THE OFFICE OF THE AUDITOR GENERAL INTEGRITY DIVISION, THE ASIAN DEVELOPMENT BANK, 2007 ANNUAL REPORT 7 (2008) [hereinafter OAGI 2007 ANNUAL REPORT].

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> OAGI 2007 ANNUAL REPORT, *supra* note 200, at 7-8.

<sup>205</sup> *Id.* at 9.

48 individuals and reprimanded 1 firm and 7 individuals. It also reinstated 13 firms and 6 individuals.<sup>206</sup>

The ADB claims that it has not been able to properly handle all of the complaints because of a shortage in resources; it strongly suggests that there are not enough staff trained for enforcing the anti-corruption policy, especially given the highly sophisticated nature of today's complaints.<sup>207</sup> The resource shortage appears to have contributed to a time lag between the opening and closing of cases. For instance, cases opened in 2004 all closed, finally, in 2007.<sup>208</sup>

In spite of its detailed procedures designed to ensure internal accountability, the ADB still falls short of fully implementing its anti-corruption policy. In March 2008, the ADB accepted a revised version of an external audit performed on four of its Technical Assistance projects in Afghanistan.<sup>209</sup> Initially, the ADB had prevented its external auditors from interacting with an external management consultant, who sought to reveal information that (1) the project monies were diverted to cover overhead costs, while progress on the projects themselves were falsely reported to donors, and (2) the projects were implemented so as to benefit certain sub-groups within the affected population.<sup>210</sup>

Additionally, the anti-corruption policy has not addressed all concerns regarding internal accountability at the ADB. The ADB has been under attack for tolerating a governance arrangement which has allegedly weakened internal accountability at the Bank.<sup>211</sup> Since mid-January 2008, the United States and other non-regional members of the ADB have criticized the Bank for allowing Japan to have a significant influence over the selection of high-ranking ADB officials.<sup>212</sup> Japan has always appointed the ADB president and the Director-General of the Budget, Personnel, and Management Systems Department—a position unique to the ADB.<sup>213</sup>

As a part of their comprehensive reform plan for the ADB, two former U.S. Directors of the ADB have called the Bank to (1) divide the budget and personnel elements of the Budget, Personnel and Management Systems Department; (2) minimize Japanese control over key posts at the ADB; (3) provide more staff and funds for implementing the ADB's anti-

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<sup>206</sup> *Id.* at 13.

<sup>207</sup> *Id.* at 8.

<sup>208</sup> *Id.* at 9.

<sup>209</sup> Press Release, Government Accountability Project, Asian Development Bank Audit Reveals Fraud in Afghanistan Projects (May 1, 2008), [http://www.whistleblower.org/content/press\\_detail.cfm?press\\_id=1362](http://www.whistleblower.org/content/press_detail.cfm?press_id=1362).

<sup>210</sup> *Id.*

<sup>211</sup> Raphael Minder, *Testing Times for ADB Head*, FIN. TIMES, Jan. 16, 2008, at 1, available at <http://www.ft.com/cms/s/0/5a675572-c45b-11dc-a474-0000779fd2ac.html>.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

corruption policy, and select an auditor based on his or her skills (that is, not based on his or her nationality) and have him or her report to the Board of Directors, and not to the President; and (4) promote a culture of openness in debates and discussions among senior Bank officials.<sup>214</sup> The debate on ADB reform continues, as another former ADB staffer has suggested the ADB's Board of Directors to play a greater role in upholding accountability at the ADB, and to have both Japan and the United States—the two largest shareholders of the ADB—back away from appointing their nationals to key positions.<sup>215</sup> Traditionally, the United States has always appointed the ADB General Counsel.<sup>216</sup>

The ADB's Strategy 2020 seeks to address some of the criticisms noted above. Under the revised strategic framework, the ADB will:

shift its operational course and modify its institutional character, guided by a set of corporate-wide core values . . . [including] (iii) adherence to the highest professional and ethical standards for the organization, and in its programs and stakeholder relations . . . [and] (vi) accountability and focus on results by defining clear objectives, and organizing work and resources to achieve them.<sup>217</sup>

Moreover, as part of its institutional transformation, the ADB is introducing “[m]ore flexible recruitment practices . . . including the use of differentiated terms and conditions and simultaneous internal and external advertising for appointment of all staff, including senior staff.”<sup>218</sup>

## 2. ADB Accountability Mechanism

The ADB established the current Accountability Mechanism in 2003 to allow outside stakeholders harmed by Bank projects to launch complaints against the Bank for failing to comply with its own policies and procedures.<sup>219</sup>

The ADB Accountability Mechanism (the Mechanism) consists of (1) the consultation phase, and (2) the compliance-review phase.<sup>220</sup> Anyone who wishes to invoke the Mechanism must first file a complaint for con-

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<sup>214</sup> Paul Speltz and Linda Tsao Yang, Comment & Analysis, *Five Ways to Reform Asia's Regional Bank*, FIN. TIMES, Jan. 28, 2008, at 1, available at <http://www.ft.com/cms/s/0/2bf3d2b0-cdc0-11dc-9e4e-000077b07658.html>.

<sup>215</sup> Eisuke Suzuki, Letters, *How to Lift Tattered Morale at the ADB*, FIN. TIMES, Feb. 1, 2008, at 8, available at [http://www.ft.com/cms/s/0/cdae656c-d067-11dc-9309-0000779fd2ac.html?nclick\\_check=1](http://www.ft.com/cms/s/0/cdae656c-d067-11dc-9309-0000779fd2ac.html?nclick_check=1).

<sup>216</sup> *Id.*

<sup>217</sup> STRATEGY 2020, *supra* note 111, ¶ 54.

<sup>218</sup> *Id.* ¶ 63.

<sup>219</sup> The Asian Development Bank, Accountability Mechanism, <http://www.adb.org/Accountability-Mechanism/default.asp> (last visited Jan. 30, 2009).

<sup>220</sup> *Id.*

sultation with the Special Project Facilitator (SPF).<sup>221</sup> This requirement provides outside stakeholders with more avenues for voicing their complaints. Should the SPF determine the complaint to be valid, the Bank is required to provide consultation services even if it did comply with its operational policies or procedures.<sup>222</sup> Outside stakeholders eligible for filing complaints include (1) two or more individuals in the member country where the Bank project is found; or (2) representative(s) of the group harmed by the project.<sup>223</sup> While the SPF rejects all anonymous complaints, they honor requests to protect the identity of the complainant.<sup>224</sup> The consultation phase appears to favor the Bank over outside stakeholders because the complaint does not halt the Bank project in question unless the ADB and the member country or the “private project sponsor” agrees to it.<sup>225</sup>

The compliance-review phase kicks in only after the outside stakeholder has filed a complaint with the SPF for consultation first.<sup>226</sup> The purpose of this phase is to determine whether the ADB has “directly, materially, and adversely” affected outside stakeholders by deviating from its own policies and procedures in developing and implementing the project in question.<sup>227</sup> Outside stakeholders become eligible to request compliance review when their complaint to the SPF is rejected.<sup>228</sup> They are also free to file for compliance review at any stage in the consultation process after “review and assessment.”<sup>229</sup> Requests are to be filed with

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<sup>221</sup> See ASIAN DEVELOPMENT BANK, ACCOUNTABILITY MECHANISM: LISTENING TO COMMUNITIES AFFECTED BY ADB-ASSISTED PROJECTS AND ENHANCING DEVELOPMENT EFFECTIVENESS (2004), available at <http://lnadbg4.adb.org/dir0035p.nsf?Open> [hereinafter AM BROCHURE].

<sup>222</sup> The Asian Development Bank, Office of the Special Project Facilitator, Relationship between Consultation Phase and Compliance Review Phase, <http://www.adb.org/SPF/relationship.asp> (last visited Jan. 30, 2009).

<sup>223</sup> The Asian Development Bank, Office of the Special Project Facilitator, Who Can File a Complaint?, <http://www.adb.org/SPF/who.asp> [hereinafter Who Can File a Complaint?] (last visited Jan. 30, 2009); AM BROCHURE, *supra* note 221.

<sup>224</sup> Who Can File a Complaint?, *supra* note 223.

<sup>225</sup> *Id.*

<sup>226</sup> AM BROCHURE, *supra* note 224; ASIAN DEVELOPMENT BANK, REVIEW OF THE INSPECTION FUNCTION: ESTABLISHMENT OF A NEW ADB ACCOUNTABILITY MECHANISM (2003), available at [http://psekp.ugm.ac.id/mirror/www.adb.org/www.adb.org/Documents/Policies/ADB\\_Accountability\\_Mechanism/ADB\\_accountability\\_mechanism.pdf](http://psekp.ugm.ac.id/mirror/www.adb.org/www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/ADB_accountability_mechanism.pdf) [hereinafter CRP INFORMATION].

<sup>227</sup> CRP INFORMATION, *supra* note 226, at 23.

<sup>228</sup> The Asian Development Bank, Office of the Special Project Facilitator, Consultation Process, [http://www.adb.org/SPF/consultation\\_process.asp](http://www.adb.org/SPF/consultation_process.asp) (last visited Jan. 30, 2009).

<sup>229</sup> *See id.*

the Compliance Review Panel (CRP).<sup>230</sup> Unlike the SPF, the CRP reports to the ADB Board of Directors.<sup>231</sup>

As is the case for all RDBs, complainants cannot sue the ADB.<sup>232</sup> The ADB Articles of Agreement provide it with broad immunity from legal proceedings.<sup>233</sup> The ADB may be taken to court only when a complaint against it arises from “[the ADB’s] powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities. . . .”<sup>234</sup> The ADB’s member states cannot sue it to obtain relief; rather, they must make use of their arrangements with the ADB, or the remedial procedures found within the ADB.<sup>235</sup> In general, complainants must settle for the Bank taking it upon itself to correct the non-compliant aspect of the project challenged by the complainant.<sup>236</sup>

In 2007, the SPF received two new requests for consultation, whereas the CRP did not receive any new requests for review.<sup>237</sup> Instead, the Panel continued to supervise the enforcement of remedies in the Chashma Right Bank Irrigation Project (Stage III) in Pakistan, and in the Southern Transport Development Project in Sri Lanka.<sup>238</sup> The Panel also worked to expand its outreach to civil society.<sup>239</sup>

### 3. The Role of Civil Society

The ADB constantly seeks to build stronger relationships with NGOs. The Bank’s current policy on cooperation with NGOs is a 1998 revision of the original policy formulated in 1987.<sup>240</sup> The ADB wants to incorporate NGOs into its activities because it views them as a source of much “experience, knowledge, and expertise” that would be helpful to the

<sup>230</sup> See CRP INFORMATION, *supra* note 226, at 22-23.

<sup>231</sup> *Id.* at 23.

<sup>232</sup> Suzuki & Nanwani, *supra* note 7, at 206.

<sup>233</sup> ADB Agreement, *supra* note 110, at art. 50(1).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at art. 50(2) (limiting remedies for member states to “such special procedures for the settlement of controversies between the Bank and its members as may be prescribed in this Agreement, in the by-laws and regulations of the Bank, or in contracts entered into with the Bank”).

<sup>236</sup> Suzuki & Nanwani, *supra* note 7, at 206, 224.

<sup>237</sup> COMPLIANCE REVIEW PANEL, THE ASIAN DEVELOPMENT BANK, ACCOUNTABILITY MECHANISM 2007 ANNUAL REPORT 1-2 (2008), available at [http://www.compliance.adb.org/dir0035p.nsf/attachments/CRPAR2007.pdf/\\$FILE/CRPAR2007.pdf](http://www.compliance.adb.org/dir0035p.nsf/attachments/CRPAR2007.pdf/$FILE/CRPAR2007.pdf).

<sup>238</sup> *Id.* at 2.

<sup>239</sup> *Id.*

<sup>240</sup> Asian Development Bank, Cooperation Between ADB and NGOs, [http://www.adb.org/Documents/Policies/Cooperation\\_with\\_NGOs/default.asp?p=coopngos](http://www.adb.org/Documents/Policies/Cooperation_with_NGOs/default.asp?p=coopngos) (last visited Jan. 30, 2009).

Bank in achieving its development objectives.<sup>241</sup> The Bank has operated its NGO Center since 2001, and has established an NGO Cooperation Network to ensure the presence of civil-society specialists throughout the organizational structure of the Bank.<sup>242</sup>

The Bank works with NGOs to disseminate technical assistance to member countries,<sup>243</sup> and holds two to five consultations in a given year with the NGOs to discuss developing, implementing, and assessing Bank activities.<sup>244</sup> The ADB also provides resources for development efforts led by civil society itself.<sup>245</sup> The Bank has funded some NGO activity,<sup>246</sup> and has supported partnerships between NGOs and private-sector entities.<sup>247</sup>

Some in civil society have criticized the Bank for limiting itself to superficial measures when trying to reach out to the NGOs. Previously, concerns about the Bank's NGO outreach efforts were expressed by the NGO Forum on ADB.<sup>248</sup> This group feared that the overarching framework for ADB interaction with the NGOs would be nothing more than an effort by the Bank to weaken complaints from outside stakeholders.<sup>249</sup> However, the group also noted the importance of communicating with the ADB and has pushed to develop relations with it.<sup>250</sup> In doing so, it has urged the ADB to rename its outreach effort so that non-NGOs would not shy away from participation.<sup>251</sup> Additionally, the NGO Forum on the ADB has demanded that the NGO Center facilitate communications between civil society and the ADB, instead of serving as the only contact civil society may have with the Bank.<sup>252</sup> The group asked for

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<sup>241</sup> The Asian Development Bank, *Nongovernment Organizations and Civil Society*, Frequently Asked Questions, available at <http://www.adb.org/NGOs/FAQ.asp>; see also The Asian Development Bank, How NGOs can Work with ADB, <http://www.adb.org/NGOs/contactpoints.asp> (last visited Jan. 31, 2009) [hereinafter How to Work with ADB].

<sup>242</sup> Asian Development Bank, NGO and Civil Society Center, <http://www.adb.org/NGOs/ngocenter.asp> (last visited Jan. 30, 2009) [hereinafter *NGO Center*].

<sup>243</sup> How to Work with ADB, *supra* note 241.

<sup>244</sup> See Asian Development Bank, Consultations with CSOs, <http://www.adb.org/NGOs/consultations.asp> (last visited Jan. 31, 2009).

<sup>245</sup> The Asian Development Bank, Funding and Support Resources for NGOs, <http://www.adb.org/NGOs/funding.asp> (last visited Jan. 31, 2009).

<sup>246</sup> *Id.*

<sup>247</sup> The Asian Development Bank, NGO-Private Sector Partnerships, <http://www.adb.org/NGOs/private-sector.asp> (last visited Jan. 31, 2009).

<sup>248</sup> VIOLETA Q. PEREZ-CORRAL, FORUM BRIEFER 01-17: NEW 'NGO CENTER' AT THE ADB 2 (2001), available at <http://www.forum-adb.org/pdf/Briefers/0117.pdf>.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 3.

<sup>252</sup> *Id.*

quality in staff and services provided by the NGO Center.<sup>253</sup> Most importantly, it has called the NGO Center to make ADB's IRM central to the Center's operations.<sup>254</sup>

The ADB's Strategy 2020 recognizes the importance of engaging with NGOs as it seeks to redefine its mission in the region. In order to promote inclusive growth, economically sustainable growth, and regional integration, the ADB's new strategic framework pledges to engage "in partnerships with a more diverse group of institutions . . . [including] nongovernment organizations (NGOs) [and] community-based organizations."<sup>255</sup>

#### IV. INTER-AMERICAN DEVELOPMENT BANK

The Inter-American Development Bank (IDB) was chartered in 1959 with the purpose of contributing to the "acceleration of the process of economic development" in Latin American and Caribbean countries.<sup>256</sup> Although the IDB traditionally has used loans to member countries as the means of fulfilling its purpose of economic development, its loan portfolio has recently dropped and the IDB is exploring new ways to assist the economic development of its member countries.<sup>257</sup>

Like the AfDB and the ADB, the IDB has recently sought to adjust its mission to maintain its institutional relevance in the region. At the Annual Meeting of the Board of Governors in March 2007, IDB President Luis Moreno announced that realignment of the IDB was essential for the organization to "become a vital cog in the wheel of progress in the Americas."<sup>258</sup> The realignment was put into place in July 2007, and the process "seeks to enhance the strategic capacity of the Bank" so that it can "better respond to new demands . . . in Latin America . . ."<sup>259</sup> The new realignment seeks to strengthen the IDB's strategic capacity, strengthen leadership, increase transparency, and make its monitoring activities more efficient.<sup>260</sup> In keeping with the effort of all multilateral

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> STRATEGY 2020, *supra* note 113, ¶ 37.

<sup>256</sup> Agreement Establishing the Inter-American Development Bank, art. 1, Apr. 8, 1959, 10.3 U.S.T. 3029 [hereinafter IDB charter].

<sup>257</sup> Bob Davis, *Development Bank Rethinks Role*, WALL ST. J., June 27, 2007, at A7.

<sup>258</sup> INTER-AMERICAN DEVELOPMENT BANK, FORTY-EIGHTH ANNUAL MEETING OF THE BOARD OF GOVERNORS OF THE INTER-AMERICAN DEVELOPMENT BANK ¶ 2.29 (2007) [hereinafter MEETING].

<sup>259</sup> Inter-American Development Bank, About the IDB: Realignment, July 2007, <http://www.iadb.org/aboutus/iv/realignment.cfm?language=english> (last visited Jan. 31, 2009).

<sup>260</sup> *Id.*



development banks to improve aid effectiveness,<sup>261</sup> part of the realignment includes a shift toward results-based evaluation and a “results mandate” that will require “performance-based budgeting.”<sup>262</sup> The realignment will also place a greater emphasis on the IDB’s private sector lending by raising the maximum loan amount and permitting private loans to go toward a greater diversity of projects.<sup>263</sup>

The Bank Information Center (BIC), a watchdog group, notes critically that the stated realignment initiatives do not mention strengthening social or environmental safeguards.<sup>264</sup> In addition, increased private sector lending could make it more difficult for the IDB to monitor the environmental and human rights aspects of the projects.

## A. Governance

### 1. Basic Structure of the IDB

The Board of Governors is the highest authority in the IDB and all powers not delegated remain with that body.<sup>265</sup> Each member country appoints one member of the Board of Governors for a five-year term.<sup>266</sup> The Board of Executive Directors is responsible for the day-to-day conduct and operations of the IDB, and the Board of Governors may delegate nearly all powers to the Executive Directors.<sup>267</sup> The President of the IDB, under the guidance of the Executive Directors, conducts the ordinary affairs of the IDB and is the IDB chief of staff.<sup>268</sup> The President’s term is five years, and the President is elected by the Board of Governors.<sup>269</sup> There are also vice presidents and various offices that coordinate certain sectors within the IDB.<sup>270</sup>

The IDB currently employs about 2,000 staff members, including 120 managers.<sup>271</sup> However, the IDB estimates that some staff members might quit or be fired because of the new realignment strategy, which

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<sup>261</sup> See STRATEGY 2020, *supra* note 111, ¶ 37.

<sup>262</sup> INTER-AMERICAN DEVELOPMENT BANK, 2006 DEVELOPMENT EFFECTIVENESS OVERVIEW ii (2007), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1003882> [hereinafter DEO].

<sup>263</sup> Bank Information Center, IDB Restructuring: What Does it Mean?, <http://www.bicusa.org/en/Article.3096.aspx> (last visited Jan. 31, 2009).

<sup>264</sup> *Id.*

<sup>265</sup> IDB charter, *supra* note 256, at art. VIII, § 2.

<sup>266</sup> *Id.* §§ 2-3.

<sup>267</sup> *Id.* § 3.

<sup>268</sup> *Id.* § 5.

<sup>269</sup> *Id.*

<sup>270</sup> Inter-American Development Bank, Basic Organization Chart (2007), <http://www.iadb.org/aboutus/iv/organizational.cfm?language=english> (last visited Jan. 31, 2009).

<sup>271</sup> Davis, *supra* note 257.

puts less emphasis on seniority and nationality indicators.<sup>272</sup> The IDB also will be offering buyouts for some veteran managers as the organization seeks to fashion the proper personnel for its new initiatives.<sup>273</sup> On June 6, 2007, the Employees Association of the IDB called a special Assembly to respond to the IDB's realignment initiative.<sup>274</sup> The Assembly responded with general approval of the realignment, but it noted that the process in which the realignment was taking place was "erratic, non-participatory, and obscure" and that the IDB's employees' lack of information did not enable them to make sound judgments about the merits of the realignment.<sup>275</sup> Notwithstanding complaints about the process in which the realignment was taking place, the employees expressed support for the realignment's strengthening of merit, transparency, and competitiveness involved in the processes of selection, promotion, and retention of IDB personnel.<sup>276</sup>

The employees' support for the new employment philosophy represents dissatisfaction with the IDB's previous lack of emphasis on merit in the hiring and promotion process. The IDB's 2006 Development Effectiveness Overview states that, as part of the realignment, there will be a focus on performance incentives and accountability and that these changes will be initiated as part of the IDB's greater emphasis on results-based effectiveness.<sup>277</sup>

## 2. Member Country Voting Power and Symmetry in Obligations

An important facet of governance is the level of control over the IDB exercised by its various member countries. The amount of shares a member country possesses determines a country's voting power with regard to many important functions of the IDB.<sup>278</sup> The amount of shares belonging to each country was established by the 1959 Agreement creating the IDB and is based on contributions.<sup>279</sup> Although the precise amounts of capital stock have changed since that time, the overall percentages remain similar.<sup>280</sup>

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<sup>272</sup> *See id.*

<sup>273</sup> *Id.*

<sup>274</sup> Bank Information Center, Tensions Rise Within the Inter-American Development Bank, June 22, 2007, <http://www.bicusa.org/en/Article.3413.aspx> (trans. Bank Information Center).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> DEO, *supra* note 262, at iii.

<sup>278</sup> IDB charter, *supra* note 256, at art. VIII, § 4.

<sup>279</sup> *Id.* at Annex A.

<sup>280</sup> *Compare id. with* Inter-American Development Bank, Capital Stock and Voting Power (2005), [http://www.iadb.org/aboutus/IV/go\\_voting.cfm?language=english](http://www.iadb.org/aboutus/IV/go_voting.cfm?language=english) (last visited Jan 31, 2009).

The borrowing member group of the IDB is made up of the countries of Latin America and the Caribbean.<sup>281</sup> These countries are the targets and recipients of IDB projects and loans, and they are required by the IDB charter to hold over fifty percent of the voting power of the IDB.<sup>282</sup> The borrowing-member majority at the IDB contrasts, for example, the EBRD, where non-borrowing members hold a substantial voting majority.<sup>283</sup> At the IDB, in the borrowing member group, Argentina (10.7%), Brazil (10.7%), Mexico (6.9%), and Venezuela (5.7%) hold the largest percentages of voting power.<sup>284</sup>

Otherwise, the United States holds roughly 30% of voting power, while Japan holds 5% and Canada 4%.<sup>285</sup> Most of the twenty-one non-borrowing members are from Europe.<sup>286</sup> Italy's voting power, for example, is around 1.9% of the total.<sup>287</sup> This is greater than borrowing members Paraguay, Panama, Nicaragua, and Honduras combined.<sup>288</sup> Non-regional members have relatively large stakes in the IDB because they are the biggest contributors and therefore provide the IDB with much of its capital.<sup>289</sup>

Although the borrowing members hold over one-half of the voting power, the IDB's voting rules set forth in the charter often require more than a simple majority of stock.<sup>290</sup> Many voting rules require an absolute majority of member countries but also require a higher percentage of total voting power.<sup>291</sup> This skews power toward those members holding higher percentages of voting power, principally toward the U.S. as holding thirty percent of total voting power.<sup>292</sup> Therefore, important action within the IDB is often controlled by the United States as the largest shareholder.<sup>293</sup> In any case, important action cannot be undertaken solely by the borrowing members of the IDB. For instance, a quorum for

<sup>281</sup> IDB charter, *supra* note 256, at Annex A.

<sup>282</sup> *Id.* at art. VIII, § 4(a)(b).

<sup>283</sup> *See infra* Part V(A)(2).

<sup>284</sup> Inter-American Development Bank, *Capital Stock and Voting Power* (2005), [http://www.iadb.org/aboutus/IV/go\\_voting.cfm?language=english](http://www.iadb.org/aboutus/IV/go_voting.cfm?language=english) (last visited Jan 31, 2009).

<sup>285</sup> *Id.*

<sup>286</sup> *See id.*

<sup>287</sup> *Id.*

<sup>288</sup> *See id.*

<sup>289</sup> Stephen D. Krasner, *Power Structures and Regional Development Banks*, 35 INT'L ORGANIZATION 303, 306–07 (1981).

<sup>290</sup> *See* IDB charter, *supra* note 256, art. VIII, secs. 2(e), 3(b), 3(f).

<sup>291</sup> *See, e.g., id.*

<sup>292</sup> Jonathan R. Strand, *Measuring Voting Power in an Institution: The United States and the Inter-American Development Bank*, 4 ECONOMICS OF GOVERNANCE 19 (2003).

<sup>293</sup> *See generally id.* (examining how strict numerical voting power is misleading and how the United States wields disproportionate power within the IDB).

a meeting of the Board of Governors is an absolute majority of the total number of governors, representing no less than two-thirds of the total voting power.<sup>294</sup> Amending the IDB's charter requires two-thirds of the total number of governors but also three-fourths of the total voting power.<sup>295</sup>

The United States' influence over the IDB is evident. The IDB is headquartered in Washington, D.C.<sup>296</sup> As the largest shareholding member, the United States automatically appoints one member of the Board of Directors, while the other members are appointed by the Board of Governors.<sup>297</sup> Moreover, the President is elected by a majority of the members' voting power as well as a majority of member country approval.<sup>298</sup> Current President Moreno was the candidate supported by the United States when he was elected in 2005.<sup>299</sup> Moreno was Colombia's former ambassador to the United States and was a leading proponent of the United States free trade agreement with Colombia.<sup>300</sup>

One outgrowth of criticism of the IDB and other international financial institutions is the recent establishment of the Bank of the South. The Bank of the South was created in reaction to the International Monetary Fund, World Bank, IDB, and the power that Western countries (such as the U.S.) exercise in those institutions.<sup>301</sup> The Bank of the South's stated goals are to lend money for infrastructure projects, encourage regional integration, and provide an alternative to existing international monetary institutions like the IDB.<sup>302</sup> The Bank of the South will start with an initial capital fund of US \$10 billion and will be comprised of Venezuela, Argentina, Bolivia, Ecuador, Brazil, Paraguay, and Uruguay.<sup>303</sup> The Venezuelan Finance Minister stated that the Bank of the South will be unique because no one member will have disproportionate power.<sup>304</sup>

<sup>294</sup> IDB charter, *supra* note 256, at art. VIII, § 2(e).

<sup>295</sup> *E.g., id.* at art. II, §1(b) (providing for amendment of the IDB's general rules).

<sup>296</sup> IDB Contacts and Locations, <http://www.iadb.org/contact.cfm> (last visited Jan. 29, 2009).

<sup>297</sup> See IDB charter, *supra* note 256, at art. VIII, § 3(b)(ii).

<sup>298</sup> *Id.* at art. VIII, §5(a).

<sup>299</sup> Larry Rohter, *As Did O.A.S., Bank Resists A Candidate Backed by U.S.*, N.Y. TIMES, July 27, 2005, at A3.

<sup>300</sup> Inter-American Development Bank, Biographies, Luis Alberto Moreno (2007), [http://www.iadb.org/aboutus/iv/ma\\_moreno.cfm?language=english](http://www.iadb.org/aboutus/iv/ma_moreno.cfm?language=english) (last visited Jan. 31, 2009).

<sup>301</sup> Bank Information Center, Bank of the South, <http://www.bicusa.org/en/Institution.Policies.21.aspx> (last visited Jan. 22, 2009).

<sup>302</sup> *Id.*; Alexei Barrionuevo, *Chavez's Plan for Development Bank Moves Ahead*, N.Y. TIMES, Oct. 22, 2007, at A3.

<sup>303</sup> *Bank of the South Announces \$10 Billion Fund for Regional Development in South America*, INT'L HERALD TRIB., June 28, 2008.

<sup>304</sup> Bank of the South, *supra* note 303.

In sum, there is a potential for inequity within the IDB because those receiving IDB funding, and complying with the conditionality attached to that funding, hold a bare majority of overall voting power and on many important decisions need the support of the United States or another non-Latin American member. The United States, Canada, and Japan control a sizable portion of voting power within the IDB, but are not subject to the IDB's conditionality requirements for lending because they are non-borrowing members. Further, the voting power percentages are roughly the same today (with the exception of the entrance of Canada and Japan into the IDB) as they were when the IDB was formed in 1959.

### 3. Transparency and Information Disclosure Policies

The IDB has recently broadened and liberalized its disclosure of IDB documents. In the IDB's Disclosure of Information Policy, the IDB commits itself to transparency and accountability, recognizing the importance of a liberal information disclosure policy.<sup>305</sup> The Policy states that "[i]nformation concerning the Bank and its activities will be available to the public in the absence of a compelling reason for confidentiality."<sup>306</sup> Much of the IDB's disclosed information can be accessed through the IDB's Public Information Services on its website.<sup>307</sup>

First, the IDB promises to disclose operational and sector policies, which explain the IDB's operational policies within a given operation or economic sector.<sup>308</sup> Information contained in these policies that is deemed confidential by the IDB or identified as sensitive by the member country, however, will not be released.<sup>309</sup> Project documents prepared for private sector operations will likewise not be disclosed.<sup>310</sup> Other documents will not be disclosed if the borrowing country member objects.<sup>311</sup> Second, the IDB promises to disclose its audited financial statements on an annual or quarterly basis, which include balance sheets, statements of income, cash flows, loan summaries, and capital stock of the various member countries.<sup>312</sup> Finally, the IDB promises to disclose institutional information.<sup>313</sup> This includes information such as summaries of the

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<sup>305</sup> BOARD OF EXECUTIVE DIRECTORS, INTER-AMERICAN DEVELOPMENT BANK, DISCLOSURE OF INFORMATION POLICY (2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=784916> [hereinafter IDB Disclosure Policy].

<sup>306</sup> *Id.* at 1.

<sup>307</sup> See Inter-American Development Bank, Public Information Center, <http://www.iadb.org/exr/pic/index.cfm> (detailing the Public Information Center and the IDB's disclosable documents) (last accessed Jan. 22, 2009).

<sup>308</sup> IDB Disclosure Policy, *supra* note 305, at 1.

<sup>309</sup> *Id.* at 10.

<sup>310</sup> *Id.* at 11.

<sup>311</sup> Inter-American Development Bank, Office of Evaluation and Oversight: About Us, <http://www.iadb.org/ove/> (last visited Jan. 22, 2009).

<sup>312</sup> IDB Disclosure Policy, *supra* note 309, at 7.

<sup>313</sup> *Id.* at 8.

Board of Governors' annual meetings, agendas of meetings of the Executive Directors, as well as the Annual Report that lists the Board's composition as well as country voting power.<sup>314</sup> General information on the IDB's employment structure, as well as the IDB's legal information (charter, bylaws, and other regulations) will be disclosed.<sup>315</sup> Some documents related to the IDB's Independent Investigation Mechanism (IIM) will be made available if confidentiality issues are not raised.<sup>316</sup> Otherwise, a summary version will be released.<sup>317</sup>

Despite the IDB's liberalized disclosure policy and default disclosure rules, a significant number of restrictions on disclosure remain.<sup>318</sup> The IDB claims that these restrictions on disclosure are necessary to allow effective functioning of the IDB as well as protect the privacy interests of the IDB's clients.<sup>319</sup> Some of the basic restrictions include: (1) information identified as confidential or sensitive by a Bank client or the Bank itself, or information to which a concerned Bank member objects; (2) information concerning the Bank's internal processes or dialogue that is essential to the "integrity of the deliberative process," such as proceedings of the Executive Directors and Board of Governors; (3) other information prepared for internal Bank processes; (4) IDB internal financial information that affects the Bank's activity in capital markets; and (5) information pertaining to disciplinary investigations, except information related to the IIM.<sup>320</sup>

The IDB's new maxim that "information will be made available in the absence of a compelling reason for confidentiality" puts the onus on IDB officials to prevent disclosure.<sup>321</sup> The exceptions contained in the Policy, however, give the IDB a substantial amount of discretion to prevent the release of any information deemed private (or objected to by a member country) or interfering with the IDB's deliberative processes. The BIC has criticized the IDB's information disclosure policy for not providing an appeals procedure to adjudicate disputes over disclosure requests.<sup>322</sup> It recommends that any individual should be able to file a complaint alleg-

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<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 9.

<sup>316</sup> *Id.* at 10.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 10.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 13.

<sup>322</sup> Bank Information Center, Memo to the IDB President Moreno: CCRM Shortcomings, Mar. 2006, <http://www.biceca.org/en/Article.32.aspx> (last visited Jan. 22, 2009).

ing a lack of compliance with disclosure policies, and that such a complaint process would allow true “presumption of disclosure.”<sup>323</sup>

## B. *Accountability*

### 1. Internal Accountability and Oversight

This section discusses internal policies that relate to IDB project oversight and auditing for performance optimization and efficiency as well as addressing corruption and fraud within the IDB.

The IDB has several committees and offices in place to oversee project implementation.<sup>324</sup> In the project approval process, the Management Review Committee and the Loan Committee review project information and serve as checkpoints in the project approval process.<sup>325</sup> The Management Review Committee reviews the documents pertaining to a particular project and signs off for review by the Loan Committee.<sup>326</sup> The Procurement Committee is in charge of continually reviewing the IDB’s procurement policies, the bidding process, and any possible deviations from a competitive bidding process.<sup>327</sup> The IDB also has in place environmental and social review mechanisms that focus on (1) the project’s protection of the environment and socio-cultural preservation; (2) the rights of indigenous peoples related to the project; (3) any involuntary settlement issues; and (4) gender and occupational health considerations.<sup>328</sup>

A major part of the IDB’s new realignment program emphasizes performance and outcomes. The IDB began publishing a Development Effectiveness Overview in 2006 with the goal of taking a big-picture look at the IDB’s development goals, assessing whether the desired outcomes were being achieved, and ensuring results-based management.<sup>329</sup> The Office of Evaluation and Oversight (OVE) was created in 1999 to implement Country Program Evaluations (CPEs),<sup>330</sup> develop IDB strategy,

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<sup>323</sup> *Id.*; Jorge Daneri, Bank Information Center, Report on the IDB’s Consultation Process in Rio de Janeiro, February 15, 2005 (2005), <http://www.bicusa.org/en/Article.1937.aspx>

<sup>324</sup> Inter-American Development Bank, About the IDB: Audit and Oversight, <http://iadb.org/aboutus/III/audit.cfm?language=english> (last visited Apr. 2, 2009).

<sup>325</sup> *Id.*; see Summary of Project Development Cycle for IDB Projects under the Global Environmental Facility (GEF), <http://www.iadb.org/IDBDocs.cfm?docnum=445522>.

<sup>326</sup> Inter-American Development Bank, About the IDB: Audit and Oversight, <http://iadb.org/aboutus/III/audit.cfm?language=english>.

<sup>327</sup> *Id.*; InterAmerican Development Bank, International Competitive Bidding, [http://www.iadb.org/aboutus/pi/op\\_502.cfm](http://www.iadb.org/aboutus/pi/op_502.cfm) (last visited Jan. 29, 2009).

<sup>328</sup> *Id.*

<sup>329</sup> DEO, *supra* note 262, at i.

<sup>330</sup> Office of Evaluation and Oversight, Country program Evaluations (CPE), <http://www.iadb.org/ove/Default.aspx?Action=WUCHtmlContent@CPE> (last visited

and oversee the IDB's internal monitoring and evaluation system.<sup>331</sup> The OVE is independent of IDB management, reports directly to the Executive Directors, and claims to be "free from external pressure and conflicts of interest."<sup>332</sup>

The IDB has been criticized for not including certain factors in its internal assessments of projects, such as environmental and human rights-related effects. In 2002, the IDB provided loans for the Camisea project, an oil pipeline project in the Peruvian rainforest.<sup>333</sup> Critics claim Camisea has caused environmental destruction and threatened the living environment of isolated Amazon tribes.<sup>334</sup> The IDB commissioned an assessment report on Camisea in 2006 that NGOs characterized as not fully independent.<sup>335</sup> In addition, NGOs criticized the report for only considering IDB "management indicators" and not making concrete findings on the extent of environmental harm caused by Camisea.<sup>336</sup> With regard to human rights indicators, the IDB's Environmental and Social Unit chief admitted that the report did not examine possible human rights violations.<sup>337</sup> Another IDB project, the Madeira dam, has been criticized for displacing several thousand people in Brazil, accelerating deforestation, and possibly affecting endangered animal species.<sup>338</sup> Critics have argued that the IDB's realignment initiative has pushed out environmental and indigenous peoples' concerns, despite a recently convened Blue Ribbon Panel on the environment that recommended greater environmental safeguards within the IDB.<sup>339</sup> Brazil's Environment Minister

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Jan. 22, 2009). CPEs are macro-level analyses that examine the IDB's recent historical experience with individual countries. *Id.* CPEs evaluate progress toward achieving country objectives, assess the results of Bank-funded projects in that country, and receive feedback from the borrowing country in order to guide future project implementation. *Id.*

<sup>331</sup> Inter-American Development Bank, OVE: About Us, <http://www.iadb.org/ove/> (last visited Jan. 22, 2009).

<sup>332</sup> *Id.*

<sup>333</sup> Inter-American Development Bank, Camisea Project, [http://www.iadb.org/pro\\_sites/camisea/about.cfm?language=EN&parid=2&item1id=2](http://www.iadb.org/pro_sites/camisea/about.cfm?language=EN&parid=2&item1id=2) (last visited Jan. 22, 2009).

<sup>334</sup> Tom Griffiths, AMAZON WATCH, Holding the IDB and IFC to Account on Camisea II 2 (2007), [http://www.amazonwatch.org/documents/camiseaII\\_sept2007\\_web.pdf](http://www.amazonwatch.org/documents/camiseaII_sept2007_web.pdf).

<sup>335</sup> *Id.*

<sup>336</sup> Bank Information Center, Environmental and Social Impact Assessment of the IDB Omits Damages to People and the Environment, June 2007, <http://www.bicusa.org/en/Article.3393.aspx>.

<sup>337</sup> *Id.*

<sup>338</sup> *Unaccountable and Unsustainable, IDB Champions Corporate Interests at Expense of Citizens*, BANK INFORMATION CENTER, Apr. 3, 2008, available at <http://www.bicusa.org/en/Article.3715.aspx>.

<sup>339</sup> *Id.*



resigned in May 2008, with some arguing that her departure was linked to her opposition to the Madeira dam project and its potential environment effects.<sup>340</sup>

The other important component of internal accountability relates to fraud and corruption within the IDB. Internal mechanisms are necessary for accountability because the IDB's charter establishes that all governors, directors, and other employees of the IDB are immune from legal process if their acts are performed in their official capacity.<sup>341</sup> The IDB has established an Oversight Committee on Fraud and Corruption (OCFC) to investigate "suspected acts of fraud or corruption."<sup>342</sup> The OCFC is composed of several IDB Vice Presidents as well as the General Counsel and Auditor General.<sup>343</sup> The OCFC is empowered to: (1) "review allegations of fraud and corruption received by" the Office of Institutional Integrity (OII), (2) review the results of OII's investigations, (3) decide whether a sanctions proceeding should be started, and (4) make recommendations to the President on the proper action to be taken in the matter.<sup>344</sup> The OII is responsible for preventing incidents of fraud and corruption.<sup>345</sup> The OII also conducts investigations regarding possible incidents and reports to the OCFC when the allegations are related to fraud or corruption, or to the Ethics Committee or Conduct Review Committee if the allegations relate to harassment or discrimination.<sup>346</sup> While the OVE is independent of IDB management,<sup>347</sup> and can conceivably objectively evaluate and assess project effectiveness, the OCFC (responsible for determining the outcome of a complaint of fraud or cor-

<sup>340</sup> *Brazil's Environment Minister Quits in Protest*, BANK INFORMATION CENTER, May 14, 2008, available at <http://www.bicusa.org/en/Article.3766.aspx>.

<sup>341</sup> IDB charter, *supra* note 256, at art. XI, § 8.

<sup>342</sup> INTER-AMERICAN DEVELOPMENT BANK, OPERATING GUIDELINES AND REGULATIONS FOR THE OVERSIGHT COMMITTEE ON FRAUD AND CORRUPTION 1, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1156281>.

<sup>343</sup> *Id.* at 2.

<sup>344</sup> *Id.* at 3.

<sup>345</sup> Inter-American Development Bank, About the Office of Institutional Integrity (OII), <http://www.iadb.org/integrity/oii.cfm?language=EN&parid=3&item1id=3> (last visited Jan. 24, 2009).

<sup>346</sup> INTER-AMERICAN DEVELOPMENT BANK, OFFICE OF INSTITUTIONAL INTEGRITY, 2004 ANNUAL REPORT 12 (2004), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=515258> [hereinafter *2004 Annual Report*]. In 2007, the OII received 136 new allegations of misconduct. INTER-AMERICAN DEVELOPMENT BANK, OFFICE OF INSTITUTIONAL INTEGRITY, 2007 ANNUAL REPORT (2007), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1379126>. Only about sixteen percent of these allegations involved internal IDB staff. *Id.* The OII investigated and determined that around thirty percent of these allegations were substantiated, with the remainder being either unsubstantiated or unfounded, or not involving IDB operations. *Id.*

<sup>347</sup> Inter-American Development Bank, OVE: About Us, *supra* note 331.

ruption) is comprised of internal officers within the IDB.<sup>348</sup> This structure raises questions about the impartiality of the OCFC and its willingness to indict superiors.

## 2. Independent Inspection Mechanism

The IDB's Independent Inspection Mechanism was developed in 1994 and re-evaluated in 2001 and 2005.<sup>349</sup> In February 2005, the IDB management began a public consultation process to revise the IIM.<sup>350</sup> As of this writing, the IDB is still considering the draft proposal to change the IIM (which is renamed the Consultation and Compliance Review Policy in the draft) as well as the public comments received following the draft proposal's publication.<sup>351</sup>

The IIM allows "affected parties" to make complaints of material harm that allegedly resulted from the IDB's failure to follow its own operational policies or norms.<sup>352</sup> If the Coordinator of the IIM believes the complaint to be substantive, the Coordinator appoints someone from a roster of investigators, who then forwards the complaint to the Board of Executive Directors, President, and IDB management.<sup>353</sup> IDB management then either approves the complaint or sends it back to the chosen investigator from the roster.<sup>354</sup> The investigator then prepares a formal recommendation about whether to conduct an investigation, which is then put to the Executive Board for a decision.<sup>355</sup> If the Executive Board decides to authorize an investigation, it will appoint a panel of at least three persons from the roster of investigators.<sup>356</sup> The panel then conducts its investigation, with access to all relevant records and staff, and visitations to the territory of the member state if consent is obtained.<sup>357</sup> Finally, when the panel concludes its investigation, it will submit a written report containing all findings and recommendations to the President and

<sup>348</sup> 2004 ANNUAL REPORT, *supra* note 346.

<sup>349</sup> Bradlow, *supra* note 4, at 420; INTER-AMERICAN DEVELOPMENT BANK, PROPOSAL FOR ENHANCEMENTS TO THE INDEPENDENT INSPECTION MECHANISM: DRAFT CONSULTATION AND COMPLIANCE REVIEW POLICY, Feb. 3, 2005, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=474362> [hereinafter *Proposal for Enhancements*]; Inter-American Development Bank, Enhancements to the IIM Policy, [http://www.iadb.org/aboutus/iii/independent\\_invest/iim\\_policy.cfm?language=english](http://www.iadb.org/aboutus/iii/independent_invest/iim_policy.cfm?language=english) (last visited Jan. 24, 2009).

<sup>350</sup> INTER-AMERICAN DEVELOPMENT BANK, INDEPENDENT INVESTIGATION MECHANISM 2007 REPORT 3-4 (2008), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1365735> [hereinafter *IIM 2007 Report*].

<sup>351</sup> *Id.*

<sup>352</sup> Bradlow, *supra* note 4, at 421.

<sup>353</sup> *Id.*

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 423.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

the Executive Board.<sup>358</sup> The Board then makes a decision on what action should be taken with regard to the complaint.<sup>359</sup> Notably, the panel can only include findings of fact in its report and is not allowed to propose solutions or remedies.<sup>360</sup>

Several limitations of the IIM should be noted. First, the investigation panels for the IIM are not composed of full-time staff nor are there full-time offices devoted to the IIM—rather, there is a roster of potential panelists who are occasionally chosen to conduct IIM investigations.<sup>361</sup> Second, the IIM requires that the complainant go through the Executive Board and IDB management prior to an investigation being carried out.<sup>362</sup> Third, the IIM only allows the investigators to make fact-findings and recommendations to the Executive Board.<sup>363</sup> The responsibility to take action in response to an investigation—the crucial decision-making point in the IIM—lies with IDB management.<sup>364</sup> Fourth, the mechanism cannot be used after 95% of the loan proceeds have been disbursed.<sup>365</sup>

The 2005 proposals for revision of the IIM address some of these limitations.<sup>366</sup> One proposal includes a Consultation phase that would encourage greater dialogue between the complainant and the IDB as well as allow the IDB to strategize about a wide variety of potential solutions to the complainant's problem.<sup>367</sup> Another proposal is to create a permanent office within the IDB devoted to the IIM process and a permanent three-person roster of investigators rather than the rotating ad hoc process of investigator selection currently in place.<sup>368</sup> Finally, other proposals seek to put time limits on the specific phases of the IIM process.<sup>369</sup> For instance, presently there is no time frame within which the Executive Board must either authorize or deny a formal investigation under the IIM.

Critics complain that the eligibility determination for an investigation should rest with the IIM Coordinator or panel rather than with the Executive Board.<sup>370</sup> Currently IDB management, potential target of complaints, is involved in the complaint process, which presents a conflict of interest problem.<sup>371</sup> Critics also note the lack of mechanisms to monitor

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<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *See id.* at 460.

<sup>361</sup> *Id.* at 454-55.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.* at Appendix.

<sup>366</sup> Proposal For Enhancements, *supra* note 349, at 3.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> Memo to the IDB President Moreno, *supra* note 322.

<sup>371</sup> *Id.*

implementation of any measures taken after the complaint process.<sup>372</sup> Finally, another critic disagrees with the 95% disbursal cutoff for filing complaints and believes that complaint eligibility should continue after the completion of a project.<sup>373</sup>

The use of the IIM has thus far been limited. The 2007 Annual IIM Report notes that as of March 2008, there were no pending cases before the IIM.<sup>374</sup> Three cases were considered during 2007, using only \$4,770 of the nearly \$260,000 budgeted for the year.<sup>375</sup> Likewise, in the 2006 IIM Report, the IDB reported on just two new complaints received in 2006 and noted that it “continued to monitor” two complaints received in 2004 and 2005.<sup>376</sup> The lack of use of the IIM raises questions about its perceived effectiveness and accessibility, especially as the overall IDB loan portfolio rose to an all-time high of \$9.6 billion in 2007.<sup>377</sup>

### 3. Role of Civil Society

The IDB defines participation as “the set of processes whereby citizens, via their governments or directly, can influence the decision-making process relating to these activities and objectives.”<sup>378</sup> The IDB lists four areas of citizen participation that the IDB has been developing.<sup>379</sup> First, the IDB has encouraged citizen input into development policies.<sup>380</sup> Second, the IDB has encouraged citizen input into sector and country strategy development.<sup>381</sup> The IDB states that it has been “steadily opening up” its country strategies in order to consult with civil society groups when developing strategies tailored to each country.<sup>382</sup> The IDB firmly maintains, however, that it does not actually negotiate with these civil society groups when determining its policies, even though it states that it

<sup>372</sup> *Id.*

<sup>373</sup> MAARTJE VAN PUTTEN, *Accountability Mechanisms in Other Multilateral Financial Institutions*, in POLICING THE BANKS: ACCOUNTABILITY MECHANISMS FOR THE FINANCIAL SECTOR (2008), available at [http://www.bankwatch.org/right\\_to\\_appeal/presentations/MvanPutten\\_final.pdf](http://www.bankwatch.org/right_to_appeal/presentations/MvanPutten_final.pdf).

<sup>374</sup> IIM 2007 REPORT, *supra* note 351, at 2.

<sup>375</sup> *Id.* at 2-4.

<sup>376</sup> INDEPENDENT INVESTIGATION MECHANISM, INTER-AMERICAN DEVELOPMENT BANK, 2006 ANNUAL REPORT 3 (2007), available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=970608>.

<sup>377</sup> Press Release, Bank Information Center, Record 2007 IDB Lending Comes at Expense of Environment, Communities (Apr. 7, 2008), available at <http://www.bicusa.org/en/Article.3723.aspx>.

<sup>378</sup> INTER-AMERICAN DEVELOPMENT BANK, STRATEGY FOR PROMOTING CITIZEN PARTICIPATION 2, § 1.7 (2004), available at <http://grupobid.org/sds/doc/SGC-GN-22-32-5-E.pdf>.

<sup>379</sup> *Id.* at 8, § 4.1.

<sup>380</sup> *Id.* at 9.

<sup>381</sup> *Id.* at 10, § 4.9.

<sup>382</sup> *Id.*

listens to civil society perspectives.<sup>383</sup> Third, the IDB has involved citizens more actively in project preparation and implementation.<sup>384</sup> Although the IDB notes that “[n]egotiating the terms and conditions of loans to the public sector is the exclusive responsibility of the respective government entity,” the IDB commonly solicits opinions from stakeholders for those projects with a significant environmental or social impact.<sup>385</sup> Finally, the IDB states that more groups are involved in the evaluation of IDB activities.<sup>386</sup>

Despite its promotion of public participation, the IDB notes that final responsibility for encouraging public participation lies mainly with the governments and the agencies executing the projects.<sup>387</sup> The IDB states that the Bank’s role is to provide for participatory processes in the project design, while the onus for carrying out the participatory mechanisms lies with the countries themselves.<sup>388</sup> The greatest role for public participation involving the IDB will be in project strategy and development planning.

The IDB held its 2007 Civil Society meeting in Costa Rica. The meeting was criticized by some who attended for being insufficiently flexible and “focus[ing] more on broad aspirations or broad hypothetical claims rather than clear performance indicators.”<sup>389</sup> Some also criticized the insufficient (one day) length of the meeting, arguing at least two days were needed for serious discussion.<sup>390</sup> Others have claimed that civil society engagement with the IDB has worsened during President Moreno’s tenure.<sup>391</sup> A group of NGOs sent a letter to President Moreno in July 2008 arguing for a greater NGO role in planning and executing the annual Civil Society meeting.<sup>392</sup>

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<sup>383</sup> *Id.* at 10, § 4.10.

<sup>384</sup> *Id.* at 11, § 4.13.

<sup>385</sup> *Id.* at 11, § 4.12-4.13

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at 15.

<sup>388</sup> *Id.*

<sup>389</sup> Vince McElhinny, *IDB 2007 Civil Society Meeting in San Jose, Costa Rica – a Step Backwards?*, BANK INFORMATION CENTER, Feb. 14, 2007, <http://www.bicusa.org/en/Article.3151.aspx>.

<sup>390</sup> *Id.*

<sup>391</sup> IDB WATCH, CIVIL SOCIETY PARTICIPATION 1 (2008), available at <http://www.bicusa.org/proxy/Document.11044.aspx>.

<sup>392</sup> *Civil Society Groups Propose Change in Annual IDB-Civil Society Meeting*, BANK INFORMATION CENTER, July 3, 2008, <http://www.bicusa.org/en/Article.3838.aspx>.

## V. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

The European Bank for Reconstruction and Development (EBRD) was established in 1991.<sup>393</sup> Representing what Professor Head calls a “third generation in the evolution of the MDBs [multilateral development banks],”<sup>394</sup> the EBRD was created during the disintegration of the Soviet Union, and its mission was directly related to the USSR’s demise. Unlike the other RDBs discussed above, whose charters prohibit consideration of political factors existing in member countries,<sup>395</sup> the EBRD’s charter expressly adopts a political mandate requiring the member countries in which it operates to commit to multiparty democracy and pluralism.<sup>396</sup> Moreover, unlike the other RDBs’ charters, the EBRD’s states that it shall “foster the transition towards open market-oriented economies and . . . promote private and entrepreneurial initiative in the Central and Eastern European countries”<sup>397</sup> as well as “promote in the full range of its activities environmentally sound and sustainable development.”<sup>398</sup>

Like the other RDBs, the EBRD’s future is currently being debated.<sup>399</sup> The Bank was established with the understanding that it would close once

<sup>393</sup> European Bank for Reconstruction and Development, About the EBRD, <http://www.ebrd.com/about/index.htm> (last visited Mar. 29, 2009).

<sup>394</sup> HEAD, *supra* note 2, at 45. Professor Head believes the regional banks discussed in this article as well as the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA) “should be viewed as ‘generational’ in character, with three generations now having run their course, or nearly so.” *Id.* at 44. The first generation is represented by the IBRD, a post World War II institution that soon after its founding shifted its focus from reconstruction of war-torn Europe to promoting development in non-European member countries. *Id.* The second generation of multilateral development is represented by the IDA, the IDB, the AfDB, and the ADB. These institutions were created in the late 1950s and 1960s following the emergence of less developed countries during the period of decolonization in the 1940s and 1950s. *Id.* at 45.

<sup>395</sup> Agreement Establishing the African Development Bank art. 31, Aug. 4, 1963, 510 U.N.T.S. 3, available at [http://www.afdb.org/pls/portal/docs/PAGE/ADB\\_ADMIN\\_PG/DOCUMENTS/LEGALINFORMATION/AGREEMENT\\_ESTABLISHING\\_ADB\\_JULY2002\\_EN.DOC](http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/LEGALINFORMATION/AGREEMENT_ESTABLISHING_ADB_JULY2002_EN.DOC); ADB Agreement *supra* note 110, art. 36; IDB charter, *supra* note 256, art. VIII, sec. 5(f).

<sup>396</sup> Agreement Establishing the European Bank for Reconstruction and Development, art. 1, May 29, 1990, 29 ILM 1083 [hereinafter EBRD charter].

<sup>397</sup> *Id.*

<sup>398</sup> *Id.* at art. 2, ¶ 1 (vii). Professor Head states: “The establishment of the EBRD was a blatant manifestation of a trend that had already begun in the other MDBs. It was a trend toward using the MDBs as instruments of global policy guidance or influence—or what I would call global policy regulation.” HEAD, *supra* note 2, at 45.

<sup>399</sup> Friction arose over the appointment of a successor to Jean Lemierre, the EBRD’s president since 2000. Stefan Wagstyl, *Succession Row Casts Shadow Over EBRD*, FIN. TIMES, Mar. 19, 2008, at 4, available at [http://www.ft.com/cms/s/0/72adb782-f540-11dc-a21b-000077b07658,dwp\\_uuid=D355f29c-d238-11db-a7c0-000b5df10621,stream=FTSynd.html](http://www.ft.com/cms/s/0/72adb782-f540-11dc-a21b-000077b07658,dwp_uuid=D355f29c-d238-11db-a7c0-000b5df10621,stream=FTSynd.html) [hereinafter *Succession Row*]. By custom, France and Germany

the post-communist member countries had completed their transition to democratic, market-oriented states.<sup>400</sup> The transition has occurred more quickly than anticipated. In 2007, the Czech Republic graduated from the EBRD's country of operations. It is expected that other EU 8 countries<sup>401</sup> will graduate by 2010.<sup>402</sup> In 2000, approximately 40% of the Bank's annual business volume was related to its operations in Central and Eastern Europe.<sup>403</sup> In 2007, however, that figure decreased to less than 10%.<sup>404</sup> This has led the EBRD to shift its operations to the east and south of the region where member countries remain in earlier phases of the transition to market-based economies.<sup>405</sup> Once the EBRD has achieved its mandates, it may either close or merge with the European Investment Bank, the EU's development bank.<sup>406</sup> It is in this context that we discuss issues of governance and accountability below.

## A. Governance

### 1. Basic Structure of the EBRD

All powers in the EBRD are vested in the Board of Governors, and each member country of the EBRD appoints one Governor.<sup>407</sup> The Board of Governors can delegate all but a few tasks to the Board of Directors,<sup>408</sup> and the Board of Directors functions as the principal

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share the opportunity to appoint the EBRD's president. *Id.* There have been four presidents since the inception of the EBRD—three French. Predictably, a majority of EU states nominated a German, Thomas Mirow, Germany's deputy finance minister, to succeed Lemierre. *Id.* The nomination of Mirow, who has little experience in post-communist countries, prompted protests from smaller EU countries, including Sweden, Iceland, and Hungary. *Id.* Mirow assumed the EBRD presidency on July 3, 2008. Stefan Wagstyl, *New EBRD Head Promises Review*, FIN. TIMES, May 20, 2008, at 6, available at <http://www.ft.com/cms/s/0/0944986c-25f9-11dd-b510-000077b07658.html>.

<sup>400</sup> *Succession Row*, *supra* note 399; Otohiko Endo, Senior Vice Minister of Finance of Japan, Statement at the Seventeenth Annual Meeting of the European Bank for Reconstruction and Development (May 18, 2008), <http://www.mof.go.jp/english/if/ebird080518.htm> [hereinafter Endo Statement].

<sup>401</sup> The EU 8 is comprised of Poland, Czech Republic, Slovakia, Hungary, Estonia, Latvia, Lithuania, and Slovenia.

<sup>402</sup> Endo Statement, *supra* note 400.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

<sup>405</sup> *Id.*

<sup>406</sup> *Succession Row*, *supra* note 399. The fate of the EBRD will not be considered formally until its next capital review in 2010. *EBRD Options: The Bank Needs a Strong President at a Crucial Time*, FIN. TIMES, March 18, 2008, at 8, available at [http://www.ft.com/cms/s/0/b8f07990-f51e-11dc-a21b-000077b07658,dwp\\_uuid=D355f29c-d238-11db-a7c0-000b5df10621,stream=FTSynd.html?nclick\\_check=1](http://www.ft.com/cms/s/0/b8f07990-f51e-11dc-a21b-000077b07658,dwp_uuid=D355f29c-d238-11db-a7c0-000b5df10621,stream=FTSynd.html?nclick_check=1).

<sup>407</sup> EBRD charter, *supra* note 396, at arts. 23-24.

<sup>408</sup> *Id.* at art. 24.

“office” of the EBRD and is in charge of the day-to-day decisions.<sup>409</sup> The President, elected by the Board of Governors to a four-year term, is the legal representative of the EBRD and conducts the current business of the EBRD under the guidance of the Board of Directors.<sup>410</sup> The President also has the ability to recommend Vice Presidents to the Board of Directors for appointment.<sup>411</sup>

The EBRD employs around 1300 people, 1000 of which are based out of the London headquarters.<sup>412</sup> In 2006, the EBRD released a new human resources strategy that outlined several priorities for bank staffing.<sup>413</sup> While the strategy promotes placing a stronger emphasis on staff performance and rewarding staff according to achievement, the strategy also notes that “international diversity among employees remains a key component of achieving the bank’s mission.”<sup>414</sup> These goals have been noted by critics as perhaps inconsistent because performance-based promotions may be hampered by nationality requirements or quotas.<sup>415</sup> With regard to staff representation, the EBRD has a Staff Council, whose goal is to promote the rights of staff as well as develop problem-solving mechanisms.<sup>416</sup> The EBRD also developed a new Grievance and Appeals Procedure for staff in 2006, with the final stage of appeal at the EBRD Administrative Tribunal (which consists of judges external to the EBRD).<sup>417</sup>

## 2. Member Country Voting Power and Symmetry in Obligations

Membership of the EBRD is comprised of mostly European and Central Asian countries as well as a small number of non-European countries.<sup>418</sup> Similar to other regional development banks, voting power in the EBRD is proportionate to the number of shares held by the member country.<sup>419</sup> The largest shareholders in the EBRD are the United States

<sup>409</sup> *Id.* at art. 28.

<sup>410</sup> *Id.* at art. 30.

<sup>411</sup> *Id.* at art. 31.

<sup>412</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, EBRD SUSTAINABILITY REPORT 2006 69 (2006), <http://www.corporateregister.com/a10723/ebrd06-sus-uk.pdf> [hereinafter Sustainability Report 2006].

<sup>413</sup> *Id.* at 71.

<sup>414</sup> *Id.*

<sup>415</sup> See Michael Kooymans, *Governance of the International Financial Institutions: The Case for Merit-Based Selection of Agency Heads* (Treasury Working Paper, 2007—03), available at [http://www.treasury.gov.au/documents/1264/RTF/Tsy\\_Working\\_Paper%202007-04\\_IFI\\_appointments.rtf](http://www.treasury.gov.au/documents/1264/RTF/Tsy_Working_Paper%202007-04_IFI_appointments.rtf).

<sup>416</sup> Sustainability Report 2006, *supra* note 412, at 73.

<sup>417</sup> *Id.*

<sup>418</sup> See European Bank for Reconstruction and Development, About the EBRD: Members/shareholders, <http://www.ebrd.com/about/basics/members.htm>.

<sup>419</sup> European Bank for Reconstruction and Development, About the EBRD: Ownership and Funding, <http://www.ebrd.com/about/basics/funding.htm>.



(10% of voting power), the United Kingdom (8.5%), Italy (8.5%), Japan (8.5%), France (8.5%), and Germany (8.5%).<sup>420</sup> Russia, Spain, and Canada also have large subscriptions.<sup>421</sup> The membership of the United States and other non-regional members, as some of the biggest contributors to the EBRD, are crucial to the EBRD's operations and financial mission.

Although there is no explicit distinction between borrowing and non-borrowing countries in the EBRD, the voting power held by the de facto non-borrowing countries (Western Europe and non-European) far outweighs the voting power held by the borrowing countries (Eastern European and Central Asian).<sup>422</sup> Although the EBRD's charter allows additional capital stock to be authorized and issued, the charter requires a majority of stock—and therefore voting power—to belong to countries that are members of the European Economic Community (mostly Western Europe).<sup>423</sup> This provision was included because of the desire for the EBRD to be a fundamentally “European” bank.<sup>424</sup> Further, while the Board of Governors elects the President and Board of Directors of the EBRD, the EBRD charter explicitly grants Western European and non-European countries majority representation on the Board of Directors.<sup>425</sup> Thus, decision-making power remains firmly in the hands of the non-borrowing members of the EBRD. This is in contrast to organizations like the Inter-American Development Bank (IDB), where borrowing members hold a 51% voting power majority over non-borrowing members.<sup>426</sup>

Further, many of the voting requirements in the EBRD's charter favor the EBRD's non-borrowing members. For example, certain operational decisions require two-thirds of the Board of Governors' vote but three-fourths of the total voting power of the members.<sup>427</sup> The President must be elected by a majority of the Board of Governors, but also a majority of the total voting power.<sup>428</sup> There is also an informal agreement at the EBRD that the President will either be from France or Germany.<sup>429</sup> Since the Bank was formed in 1990, there have been three French Presidents. This arrangement has recently been opposed by several of the EBRD's borrowing member countries.<sup>430</sup> Nevertheless, in a controversial

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<sup>420</sup> About the EBRD: Members/shareholders, *supra* note 418.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> EBRD charter, *supra* note 396, at arts. 4-5.

<sup>424</sup> Stephen D. Roper & Lilian A. Barria, *Policy Preferences Among Multinational Banks* 20 (Studies in Post-Communism Occasional Paper, No. 5, 2003), <http://www.stfx.ca/pinstitutes/cpcs/studies-in-post-communism/Roper-Barria2003.pdf>.

<sup>425</sup> EBRD charter, *supra* note 396, at art. 26.

<sup>426</sup> *See id.* § IV(A)(2).

<sup>427</sup> *Id.* at art. 8.

<sup>428</sup> *Id.* at art. 30.

<sup>429</sup> *Succession Row*, *supra* note 399.

<sup>430</sup> *Id.*

move the Western European countries met privately in March 2008 and decided to support Thomas Mirow of Germany as successor to President Jean Lemierre.<sup>431</sup>

Clearly, the power within the EBRD to make important policy decisions rests in the hands of its non-borrowing members. Although these non-borrowing members control the voting power of the EBRD, make project decisions, and determine the loan conditions, they are not subject to any of the terms of the EBRD's loans. Hence there is a democracy deficit to the extent that the borrowing member countries have comparatively less power to control the EBRD's policies.

### 3. Transparency and Information Disclosure Policies

The EBRD approved a new Information Disclosure Policy (PIP) in May 2008.<sup>432</sup> The EBRD states that its information disclosure policy is guided by a "presumption that, whenever possible, information concerning the Bank's operational and institutional activities will be made available to the public in the absence of a compelling reason for confidentiality."<sup>433</sup> However, the EBRD also stresses that it will "safeguard" the EBRD's business approach by keeping confidential certain information involving its business dealings with clients.<sup>434</sup>

The new PIP emphasizes four interrelated categories of information that the Bank may disclose: "(1) institutional information, (2) information on strategies and policies, (3) project-related information, and (4) accountability and governance-related information."<sup>435</sup> The EBRD now discloses minutes of the meetings of the EBRD's Board of Directors.<sup>436</sup> The minutes are general summaries but include the amount and type of loans approved for specific projects.<sup>437</sup>

Another concern of the EBRD has been providing EBRD documents in the languages of its member countries. This is important because most of the members of the EBRD have and use their own unique languages. The EBRD now, for example, discloses its Environmental Impact Assess-

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<sup>431</sup> *See id.*

<sup>432</sup> European Bank for Reconstruction and Development, About the EBRD: Public Information Policy, <http://www.ebrd.com/about/policies/pip/index.htm> (last visited Apr. 2, 2009).

<sup>433</sup> PUBLIC INFORMATION POLICY, EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT Sept. 2008, s C, <http://www.ebrd.com/about/policies/pip/pip.pdf> [hereinafter EBRD PUBLIC INFORMATION POLICY].

<sup>434</sup> *Id.*

<sup>435</sup> *Id.* at D(1).

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*; *See generally* EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, MINUTES OF THE BOARD MEETING OF 12 MAY 2008 (2008), <http://www.ebrd.com/about/strategy/minutes/080512.pdf>.

ments in thirteen languages and its Country Strategies in the national language of each of its member countries.<sup>438</sup>

The EBRD publishes its Country Strategies—strategic investment plans that set out the economic and political conditions of each country—and invites comments on each strategy.<sup>439</sup> The comments are then publicly posted in summary form along with the Final Country Strategy.<sup>440</sup> The EBRD also has begun disclosing Project Summary Documents (PSDs), which disclose the goals of a project, the financial details, and potential environmental and social issues.<sup>441</sup> The PSDs are to be disclosed at least thirty days prior to the project’s discussion by the Board of Directors.<sup>442</sup> The EBRD reserves the right, however, to delay publication of the PSD if there exist “legitimate sponsor concerns” about confidentiality or a substantial likelihood of significant project changes.<sup>443</sup> For example, the EBRD reports that 181 PSDs were published in 2006, with ten PSDs being delayed due to confidentiality concerns.<sup>444</sup> Most of the PSDs delayed were private sector projects.<sup>445</sup> Environmental and Social Impact Assessments are to be made available for certain categories of projects at least sixty days prior to Board consideration.<sup>446</sup>

Despite the EBRD’s increasing disclosure and more liberal information policies, critics still note the ease with which documents can be withheld. Global Transparency Initiative (GTI) criticizes the EBRD’s exceptions to disclosure as being overly broad and states that the absence of a harm requirement (i.e., that disclosure would concretely harm EBRD interests) makes it easy for the Bank to potentially withhold all information from the public.<sup>447</sup> The EBRD also has identified a narrow range of situations where documents not to be disclosed under the PIP may in fact be disclosed. This exception is triggered when disclosure “would be likely to avert imminent and serious harm to public health or safety, and/or imminent and significant adverse impacts on the environment.”<sup>448</sup> GTI gives this “public interest” override provision qualified

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<sup>438</sup> European Bank for Reconstruction and Development, About the EBRD: Strategies and Policies, <http://www.ebrd.org/about/strategy/index.htm> (last visited Apr. 2, 2009).

<sup>439</sup> EBRD PUBLIC INFORMATION POLICY, *supra* note 433, at D(2).

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at D(3).

<sup>442</sup> *Id.*

<sup>443</sup> *Id.*

<sup>444</sup> Sustainability Report 2006, *supra* note 412, at 63.

<sup>445</sup> *Id.*

<sup>446</sup> EBRD PUBLIC INFORMATION POLICY, *supra* note 433, at D(3).

<sup>447</sup> GLOBAL TRANSPARENCY INITIATIVE & CEE BANKWATCH NETWORK, INITIAL COMMENTS ON THE EBRD PUBLIC INFORMATION POLICY REVIEW (2007), [http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/EBRD\\_comments\\_Dec07.pdf](http://www.ifitransparency.org/uploads/7f12423bd48c10f788a1abf37ccfae2b/EBRD_comments_Dec07.pdf) [hereinafter INITIAL COMMENTS].

<sup>448</sup> EBRD PUBLIC INFORMATION POLICY, *supra* note 433, at art. E(3).

praise, but criticizes the provision as too narrow and only usable in very limited situations.<sup>449</sup>

## B. Accountability

### 1. Internal Accountability and Oversight

This section includes EBRD internal oversight policies that seek to optimize performance and efficiency as well as policies designed to address instances of corruption and fraud within the EBRD. Internal accountability and evaluation are important because, according to the EBRD's charter, no legal claims can be brought against the EBRD by its member countries or those deriving claims from a member country in a national court.<sup>450</sup>

The Evaluation Department within the EBRD operates independently of the EBRD's banking operations and evaluates how well the Bank's projects complied with the planned objectives.<sup>451</sup> However, only selected projects are evaluated. The Evaluation Department has evaluated 574 projects since 1996, with 55% of these projects achieving a good or excellent rating and 23% achieving a satisfactory rating.<sup>452</sup> In 2007, 59% of those projects assessed had a good or excellent rating, 25% had a satisfactory rating, while 16% were rated marginal or unsatisfactory.<sup>453</sup>

The EBRD approved a new Environmental and Social Policy in May 2008.<sup>454</sup> The Policy contains the strategies the EBRD will follow for its environmental and social appraisals as part of its project evaluations.<sup>455</sup> CEE Bankwatch Network (Bankwatch), a monitoring group, had criticized the previous Environmental policy because the EBRD did not include routine human rights impact assessments in its overall project assessments.<sup>456</sup> Human rights monitoring is especially important because many of the EBRD's projects are carried out in the Caucasus and Central Asian region, one that is "unfortunately well known for a widespread

<sup>449</sup> INITIAL COMMENTS, *supra* note 447.

<sup>450</sup> EBRD charter, *supra* note 396, at art. 46.

<sup>451</sup> SUSTAINABILITY REPORT 2006, *supra* note 412, at 61.

<sup>452</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, SUSTAINABILITY REPORT 2007 53 (2007), <http://www.ebrd.com/pubs/general/sus07.pdf> [hereinafter SUSTAINABILITY REPORT 2007].

<sup>453</sup> *Id.*

<sup>454</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, EBRD ENVIRONMENTAL AND SOCIAL POLICY (2008), <http://www.ebrd.com/about/policies/enviro/policy/2008policy.pdf> [hereinafter EBRD ENVIRONMENTAL AND SOCIAL POLICY].

<sup>455</sup> SUSTAINABILITY REPORT 2007, *supra* note 452, at 48.

<sup>456</sup> *Working for People—Reshaping the EBRD Environmental Policy*, NGOs ISSUE PAPER: EBRD ANNUAL MEETING, LONDON, MAY 2006 (CEE Bankwatch Network, Prague, Czech Republic), May 2006, available at [http://bankwatch.org/documents/EBRD\\_2006\\_Social\\_IP\\_FINAL\\_2.pdf](http://bankwatch.org/documents/EBRD_2006_Social_IP_FINAL_2.pdf).

poor human rights record.”<sup>457</sup> Bankwatch had also called on the EBRD to take special consideration of the impact of its projects on women, who it claimed “disproportionately suffer the adverse impacts of financed projects.”<sup>458</sup>

The EBRD’s new Environmental and Social Policy addresses these concerns. The policy declares that all EBRD-financed projects will undergo substantial environmental and social evaluation in what the EBRD calls the “mainstreaming of environmental and social considerations into all of its activities.”<sup>459</sup> Through the new Policy, the EBRD has incorporated specific Performance Requirements (PRs) into its project evaluations.<sup>460</sup> Some examples of these PRs include Labor and Working Conditions, Pollution Prevention and Abatement, Involuntary Resettlement and Economic Displacement, Biodiversity, Indigenous Peoples, and Cultural Heritage.<sup>461</sup>

The EBRD charter grants legal immunity to EBRD employees with respect to acts performed in their official capacity.<sup>462</sup> Internal corruption and malfeasance mechanisms are therefore important to maintaining the accountability of EBRD officials. The Office of the Chief Compliance Officer (OCCO) is responsible for enforcing the EBRD’s anti-corruption measures.<sup>463</sup> Two codes of conduct were adopted in 2006 to regulate the behavior of EBRD employees and Directors.<sup>464</sup> The Code of Conduct for Officials of the Board of Directors lays out specific rules of ethics that govern a spectrum of activities, from the accepting of gifts to the rules regarding lectures or talks that Directors may give.<sup>465</sup>

The EBRD also emphasizes all staff members’ duty to report suspected misconduct.<sup>466</sup> Misconduct includes “‘intentional or negligent failure’ by a [ ] [Bank] employee to observe the rules of conduct or standards of behaviour prescribed by the EBRD.”<sup>467</sup> Whistleblowers are to be pro-

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> EBRD ENVIRONMENTAL AND SOCIAL POLICY, *supra* note 454, § A.

<sup>460</sup> *Id.* § B.

<sup>461</sup> *Id.* §§ PR1-PR8.

<sup>462</sup> EBRD charter, *supra* note 396, at art. 51.

<sup>463</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, ANTI-CORRUPTION REPORT 9 (2006), <http://www.ebrd.com/about/integrity/report.pdf> [hereinafter ANTI-CORRUPTION REPORT].

<sup>464</sup> *Id.* at 15.

<sup>465</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, CODE OF CONDUCT FOR OFFICIALS OF THE BOARD OF DIRECTORS OF THE EBRD (2006), <http://www.ebrd.com/about/strategy/general/code1.pdf>.

<sup>466</sup> European Bank for Reconstruction and Development, Whistleblower Protection at the EBRD, <http://www.ebrd.org/about/strategy/general/whistle.htm> (last visited Feb. 2, 2009).

<sup>467</sup> *Id.*

tected against reprisals or retaliation.<sup>468</sup> The EBRD conducts mandatory ethics training called “Integrity Matters!” that has been attended by 1150 of the EBRD’s Board of Directors and other staff members.<sup>469</sup> The EBRD’s Anti-Corruption Report noted that since the implementation of the current corruption reporting and investigation system in 2002, there have been forty-five allegations of misconduct by staff members, but none involved staff member corruption.<sup>470</sup> The Report notes that several staff members have been terminated since 2002 for serious misconduct and a variety of less serious punishments have been meted out for other staff members.<sup>471</sup>

Although the EBRD has been accused of avoiding public accountability,<sup>472</sup> the EBRD appears to have increased emphasis on evaluating its projects and publicizing information obtained from that process. However, as critics note, the EBRD does not always take all social factors into account when evaluating its projects.

## 2. Independent Recourse Mechanism

The EBRD adopted its Independent Recourse Mechanism (IRM) in 2003, later than the other RDBs and after much criticism directed at the lack of such a mechanism.<sup>473</sup> The IRM has two parts: (1) a compliance review function, which assesses whether the EBRD has complied with its operational policies (namely, the Environmental Policy and the Public Information Policy); and (2) a problem-solving function, with a goal to resolve the underlying issues that led to the complaint.<sup>474</sup> This second part of the IRM attempts to overcome a frequent criticism of complaint mechanisms in place at the RDBs—that the mechanisms are too limited because they only address whether the banks have complied with their own policies and do not allow parties to challenge the policies themselves. Importantly, however, the IRM does not allow complaints regarding fraud or corruption.<sup>475</sup>

<sup>468</sup> *Id.*

<sup>469</sup> ANTI-CORRUPTION REPORT, *supra* note 463, at 15.

<sup>470</sup> *Id.* at 17.

<sup>471</sup> *Id.* at 18.

<sup>472</sup> Petr Hlobil, *Bank Accountability Redux*, MULTINATIONAL MONITOR, May 2002, at 17, 19.

<sup>473</sup> Bradlow, *supra* note 4, at 438-39.

<sup>474</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, THE INDEPENDENT RECOURSE MECHANISM: ANNUAL REPORT FOR 2006 (2006), <http://www.ebrd.com/about/integrity/irm/about/report06.pdf> [hereinafter 2006 IRM Report].

<sup>475</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, INDEPENDENT RECOURSE MECHANISM: RULES OF PROCEDURE 4.19 (2004), <http://www.ebrd.com/about/integrity/irm/about/procedur.pdf>.

The IRM accepts complaints within twelve months of the completion of a project or final disbursement of a loan.<sup>476</sup> Any two persons who claim to be “directly and adversely” affected by an EBRD project can file a complaint, but they must describe what steps they have taken to resolve the problem with the EBRD prior to filing under the IRM.<sup>477</sup> The Chief Compliance Officer (CCO) receives the complaint and has five days to determine whether the complaint is manifestly ineligible.<sup>478</sup> If not ineligible, the CCO passes along the complaint to an Eligibility Assessment Expert chosen from a special roster of individuals appointed by the Board of Directors.<sup>479</sup> The CCO and the Eligibility Expert then determine within thirty days whether the complaint is eligible.<sup>480</sup> At that time the CCO also considers potential problem-solving techniques that might be used to resolve the dispute.<sup>481</sup> If the complaint is determined to be eligible or ineligible, that recommendation is forwarded to either the President or Board of Directors (depending on whether the project has already been approved).<sup>482</sup> The CCO can also recommend immediate fast-tracked action or the suspension of the project if there is a possibility of irreparable harm.<sup>483</sup> The Board of Directors or President then decides whether to accept the eligibility recommendation of the CCO and Eligibility Expert, and either approves an investigation or dismisses the complaint.<sup>484</sup> An investigation report is submitted to the President or Board of Directors, where they decide on whether to take action.<sup>485</sup> The report of the investigation is also made available to the public once a decision has been made.<sup>486</sup> The Eligibility Expert can also make remedial recommendations, such as a proposal for EBRD internal changes to ensure future compliance or a proposal for a change in the implementation of the project involved.<sup>487</sup> The CCO has the ability to monitor the implementation of any recommendations that arise out of the IRM process.<sup>488</sup>

Use of the IRM has been limited. In 2007, the EBRD received four complaints under the IRM; two were declared manifestly ineligible by the

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<sup>476</sup> Bradlow, *supra* note 4, at 439.

<sup>477</sup> *Id.* at 440-41.

<sup>478</sup> *Id.* at 441.

<sup>479</sup> *Id.*

<sup>480</sup> *Id.*

<sup>481</sup> *Id.* at 442.

<sup>482</sup> *Id.* at 443.

<sup>483</sup> *Id.*

<sup>484</sup> *Id.*

<sup>485</sup> *Id.* at 444.

<sup>486</sup> *Id.*

<sup>487</sup> *Id.* at 443-44.

<sup>488</sup> *Id.* at 444.

CCO and the other two were submitted for further processing.<sup>489</sup> The IRM is five years old and has only processed several complaints. Nonetheless, the EBRD is conducting a comprehensive review of the IRM in 2008 and 2009 to determine how the mechanism can be made more effective.<sup>490</sup> NGOs and others have criticized the structure of the IRM. Bankwatch claims that the IRM was “established to prevent NGO participation” because its complaint eligibility is restricted to “affected groups” and does not include general civil society organizations.<sup>491</sup> Bankwatch also criticizes the impartiality and lack of independence of the IRM because the Chief Compliance Officer and Eligibility Expert can only make *recommendations* about the eligibility of a complaint or remedial actions the Bank should undertake as a result of an IRM complaint.<sup>492</sup> Bankwatch recommends that complaint eligibility determinations be made without the need for Board approval.<sup>493</sup> Bankwatch also recommends that the EBRD separate the compliance-review and problem-solving parts of the IRM.<sup>494</sup>

### 3. Role of Civil Society

The EBRD has held many consultations and implemented programs that allow for dialogue with local NGOs and citizens. These opportunities for citizen and NGO involvement might be a response to past criticisms of the EBRD’s lack of formal channels and mechanisms for gauging the response of local communities to EBRD projects and loans.<sup>495</sup> Former EBRD ties with authoritarian governments—such as having the EBRD’s annual meeting in Uzbekistan—have also led some commentators to call the EBRD the “European Bank for Repression and Dictatorship.”<sup>496</sup> The EBRD suffered embarrassment and some questioned its political mandate when, at the 2003 Annual Meeting in Uzbekistan, despite assurances, Uzbek President Karimov refused to condemn torture.<sup>497</sup> However, in a recent interview, former EBRD President Jean

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<sup>489</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, INDEPENDENT RECOURSE MECHANISM: ANNUAL REPORT FOR 2007 2 (2007), <http://www.ebrd.com/about/integrity/irm/about/report07.pdf> [hereinafter 2007 IRM REPORT].

<sup>490</sup> EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, *Review of IRM*, <http://www.ebrd.com/about/integrity/irm/review>.

<sup>491</sup> CEE BANKWATCH NETWORK, *THE INDEPENDENT RECOURSE MECHANISM, THREE YEARS ON QUESTIONS REMAIN AND WHO IS IT FOR – THE EBRD OR THOSE AFFECTED BY EBRD PROJECTS?* 3 (2007), [http://bankwatch.org/documents/IRM\\_three\\_years\\_06\\_07.pdf](http://bankwatch.org/documents/IRM_three_years_06_07.pdf).

<sup>492</sup> *Id.* at 9.

<sup>493</sup> *Id.*

<sup>494</sup> *Id.* at 10.

<sup>495</sup> Hlobil, *supra* note 472.

<sup>496</sup> Nick Cohen, *Trouble in Tashkent*, *THE OBSERVER*, Dec. 15, 2002, at 31.

<sup>497</sup> Mark Milner, *Uzbek President Snubs EBRD Human Rights Plea*, *THE GUARDIAN*, May 5, 2003, at 22.



Lemierre insisted that human rights and political structures do play a role in EBRD loan approval.<sup>498</sup> Lemierre stated that where there is evidence of political repression or human rights violations, the EBRD exclusively funds private sector projects.

As noted in other sections of this paper, the EBRD has recently pushed for the translation of EBRD documents into the myriad languages of the EBRD's member countries. This would allow local citizens and NGOs access to Project Summary Documents (PSDs), for example, and allow them to make informed complaints and raise questions regarding EBRD policy. PSDs in particular are required to be published a certain number of days prior to a Board meeting so that the Board may consider public comments.<sup>499</sup> Environmental Impact Assessments (EIAs) also require a consultation period, open to the public, prior to the project's approval.<sup>500</sup>

The EBRD has developed programs to encourage exchange between NGOs and the EBRD. The EBRD's Outreach Unit publishes a newsletter for NGOs, has a special area on the EBRD's website for NGOs, and organizes various meetings with NGOs.<sup>501</sup> At the EBRD's 2006 annual meeting, seventy-six organizations from twenty-five countries attended the EBRD's special session for NGOs and community organizations.<sup>502</sup> NGOs often meet with Board members at Board Consultation visits to member countries.<sup>503</sup> They also meet with the EBRD regularly to discuss particular projects as well as policy issues.<sup>504</sup> The Environmental Advisory Council (ENVAC) is a group of independent NGO directors and academic professors who meet with the EBRD twice a year to discuss policy and technical issues as well as emerging trends.<sup>505</sup>

The Global Transparency Initiative (GTI) has noted several perceived deficiencies regarding civil society interactions with the EBRD. In 2007, GTI praised the EBRD's initiative in meeting with more NGOs and civil society groups on EBRD visits to its project countries.<sup>506</sup> However, GTI stated that NGOs often learn of EBRD visits too late to request or schedule a meeting with the EBRD entourage, and claim that only certain NGOs are invited to participate in the dialogue.<sup>507</sup>

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<sup>498</sup> Interview by Tejinder Singh with Jean Lemierre, President, European Bank for Reconstruction and Development, in Strasbourg, Fr. (Nov. 13, 2007), *available* at <http://tejindersinghtito.blogspot.com/2007/11/interview-with-jean-lemierre-president.html>.

<sup>499</sup> SUSTAINABILITY REPORT 2006, *supra* note 412, at 63.

<sup>500</sup> *Id.*

<sup>501</sup> *Id.* at 65.

<sup>502</sup> *Id.*

<sup>503</sup> *Id.* at 66.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.* at 67.

<sup>506</sup> INITIAL COMMENTS, *supra* note 447, at 8.

<sup>507</sup> *Id.* at 14.

GTI also called on the EBRD to disclose a greater number of Environmental Action Plans (EAPs) rather than only disclosing them for high-risk projects or in response to case-by-case public requests.<sup>508</sup> GTI also recommended that all EIAs be disclosed 120 days prior to the Board's consideration of the project so that there is adequate time for "thoughtful input."<sup>509</sup>

## VI. CONCLUSION

Understanding the RDBs' structures and policies relating to governance and accountability is crucial to evaluating critics' charges that the banks are ineffective, undemocratic, secretive, and even facilitate human rights violations and environmental destruction.<sup>510</sup> As indicated above, the RDBs have made significant efforts to address the criticisms, with varying measures of success.

Like the World Bank and the International Monetary Fund, the RDBs have recently been attempting to redefine themselves in the face of obsolescence.<sup>511</sup> We believe these institutions still have an important role to play. The RDBs are an importance source of funding for their regional member countries. They are uniquely suited to provide assessments of region-specific challenges and to develop country-specific expertise and strategic plans, in contrast to the larger and more global scope of the World Bank. In addition, RDBs are owned in part by their regional members and therefore are an integral part of the financial infrastructure of each region.

Still, RDBs must continue to improve their effectiveness. In this regard, they should (1) strive to improve their performance indicators under the "managing-for-results" approach of the Annual Common Performance Assessment System (COMPAS),<sup>512</sup> (2) continue to report their operational and institutional performance in the Global Monitoring Report, an annual report issued jointly by the World Bank and the International Monetary Fund that assesses the global development agenda,<sup>513</sup> and (3) make a concerted effort to meet all of the major commitments under the Paris Declaration on Aid Effectiveness by the agreement's target of 2010.<sup>514</sup>

With respect to matters of governance, it is clear that the "golden rule" still prevails at the RDBs, i.e. whoever holds the gold rules. The non-borrowing member countries dominate the RDBs. Even at the IDB,

<sup>508</sup> *Id.* at 14.

<sup>509</sup> *Id.* at 15.

<sup>510</sup> See HEAD, *supra* note 7, at 253.

<sup>511</sup> In the case of the EBRD, it is not a question of redefining itself but of merging with the European Investment Bank once it has accomplished its mission.

<sup>512</sup> See *supra* note 118.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

where borrowing members hold over one-half of the voting power, important action at the institution is often controlled by the United States. There is some financial logic to this power structure, as member countries that provide the majority of capital should have a significant voice with respect to the bank's direction and policies. Nevertheless, as recent developments at the International Monetary Fund indicate,<sup>515</sup> the RDBs' legitimacy will suffer if borrowing countries are not given a stronger, more effective voice that will reflect regional priorities.

The RDBs' information disclosure policies are an important element of their governance structures because they inform civil society of the RDB policies and procedures. All of the RDBs have information disclosure policies that attempt or purport to presume disclosure of all information and documents unless an item is deemed confidential or a member-country government objects to its disclosure. Despite these efforts, the disclosure policies at all four RDBs have been roundly criticized by civil society for not sharing enough information. We believe there should be an

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<sup>515</sup> In April 2008, the Board of Governors of the IMF adopted a Resolution providing for a recalibration of the quota system that determines the relative power of its member countries. International Monetary Fund, IMF Quota and Voice Publications: June 2006-April 2008, <http://www.imf.org/external/np/fin/quotas/pubs/index.htm> (last visited Jan. 31, 2009) [hereinafter IMF Quota and Voice Publications]. Quotas at the IMF determine a member country's voting power as well as financial contributions to the organization. International Monetary Fund, IMF Quotas (Sept. 2008), <http://www.imf.org/external/np/exr/facts/quotas.htm>. The process to revise the quota system began in 2006, where it was initially agreed that China, South Korea, Mexico, and Turkey would receive quota increases. *Id.* The current Resolution expands the initial agreement and proposes quota increases for 54 member countries, many of them classified as emerging market countries. IMF Quota and Voice Publications, *supra*. The Resolution would also triple each country's basic votes. *Id.* Basic votes are distributed to each country regardless of its size or prevailing quota and therefore primarily benefit smaller, developing countries. BROOKINGS INSTITUTION, *Experts Critique Proposal for International Monetary Fund Quota Reform*, Apr. 9, 2008, [http://www.brookings.edu/opinions/2008/0409\\_imf\\_linn.aspx](http://www.brookings.edu/opinions/2008/0409_imf_linn.aspx). The Resolution would also give African countries the ability to appoint an additional Alternate Director at the IMF. IMF Quota and Voice Publications, *supra*. Despite altering the IMF's quotas, the Resolution does not address changing the composition of the Executive Board, the seat of the IMF's day-to-day decision-making power. *Id.* And some critics have noted that despite the Resolution's one-time shift in quota power, the quota system at the IMF still fails to reflect current global economic realities. BROOKINGS INSTITUTION, *supra*. Although the Board of Governors has approved the Resolution, changes in the IMF's Articles of Agreement proposed by the Resolution still must be approved by three-fifths of IMF members representing 85% of the voting power. IMF Quota and Voice Publications, *supra*. These changes in the IMF's Articles of Agreement will require action by most of the member countries' domestic legislatures. Press Release, International Monetary Fund, IMF Board of Governors Adopts Quota and Voice Reforms by Large Margin (Apr. 29, 2008), available at <http://www.imf.org/external/np/sec/pr/2008/pr0893.htm>.

appeal mechanism at all the RDBs that would allow civil society to challenge a bank's decision to withhold information. Perhaps the challenge could be based on the "public interest" override used at the EBRD.<sup>516</sup>

Internal accountability and oversight within the RDBs is critical to improved governance, as, except for very limited circumstances, stakeholders cannot resort to municipal courts to police the actions of the banks. All of the RDBs have notable strides in improving internal accountability. Still, more can be done on this score. The goal should be to achieve a framework of internal accountability and oversight that improves the RDBs' compliance with environmental and human rights norms as well as aid effectiveness in general.

An important aspect of accountability relates to the RDB's independent review mechanisms (IRMs). The IRMs can be divided into two types—two-step mechanisms that emphasize both problem-solving and formal grievance procedures (AfDB, ADB and EBRD), and one-step formal grievance procedures (IDB). The procedures involved in the review mechanisms of the RDBs are largely similar, and the mechanisms tend to focus on whether there was compliance with the RDB's policies and procedures. Because the RDBs do not consider the validity of the policies and procedures themselves, these mechanisms are very limited and unable to effect fundamental changes within the RDBs. For this reason, civil society must be able effectively to engage the RDBs. The relationship between NGOs and the RDBs will always be marked by tension. Perhaps this is how it should be.

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<sup>516</sup> See *supra* note 449 and accompanying text.