

European Bank for Reconstruction and Development  
Five Bank Street, London E14 4BG  
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22 May, 2024

*Via electronic mail*

**Re: Comments on the draft Environmental and Social Policy**

Accountability Counsel is grateful for this opportunity to provide feedback on the draft Environmental and Social Policy (ESP). Our comments are informed by our experience supporting communities around the world to seek accountability and remedy for negative impacts from internationally financed projects, including projects supported by the EBRD. Accountability Counsel specializes in the design and use of independent accountability mechanisms (IAMs), and we have advised on the creation of IAMs at every major development bank, including the EBRD's Independent Project Accountability Mechanism (IPAM).

Our comments highlight some positive changes that appear in the draft ESP, as well as several areas where the ESP could be strengthened to improve the EBRD's accountability to project-affected communities. Broadly, these areas include remediation of project-related harm, effective disclosure of channels for grievance redress and remedy, and strengthening institutional responses to findings of harm, including reprisals. We also provide our feedback on the EBRD's proposal of a management-level grievance mechanism.

**I. Positive aspects of the draft ESP**

First, we commend the draft ESP's enhanced references to human rights instruments that the Policy seeks to align with, including the UN Guiding Principles on Business and Human Rights (UNGPs) and the International Bill of Human Rights. These are positive additions that should be preserved in the finalized Policy.

We also appreciate the strengthened language throughout the draft requiring EBRD clients to provide remediation for negative project impacts. This includes the new clarification that the Environmental and Social Management Systems established by clients must "include provisions for the remediation of significant residual environmental and social impact" (ESR 1 para. 10). We also welcome the addition of a requirement for clients to "identify significant environmental and social risks associated with the project's core supply chains," and where risks or impacts are identified, to "use or seek leverage to work with the suppliers or sub-suppliers in question to prevent recurrence and provide remediation to those supply chain workers affected" (ESR 1 para 21; ESR 2 para. 46). In the same vein, we commend the new clarification that clients "must take

immediate action to remove individuals” from situations of forced and child labor, and to “provide appropriate remediation” (ESR 2 paras. 29; 32).

We also applaud the draft ESP for requiring clients to “develop and implement a responsible disengagement plan” in relation to suppliers or sub-suppliers who prove unable or unwilling to comply with measures to prevent and/or remediate harm to supply chain workers (ESR 2 para. 47).

The draft ESP also contains positive additional requirements for project-level grievance mechanisms to be gender-inclusive and equipped with specialist support to address sensitive issues such as gender-based violence (ESR 4 paras. 20-21).

## **II. Recommended changes to the ESP**

### Strengthen EBRD’s commitment to remediating project-related harm

While it is good that the draft ESP clarifies EBRD clients’ responsibility to remediate harm, the Policy makes no mention of EBRD’s parallel responsibility to contribute to remedy where it has contributed to harm. International human rights instruments such as the UNGPs make clear that business enterprises that contribute to adverse environmental and social impacts have a responsibility to actively engage in remediation, either by themselves or in cooperation with other actors.<sup>1</sup> As an international financial institution, the EBRD enables projects that have the potential to cause major impacts, both positive and negative. The EBRD does not hesitate to [take credit](#) for enabling positive project impacts, but the draft ESP does not reflect a recognition that EBRD funding enables *all* project impacts, including adverse ones.

Adverse project impacts do not simply go away when they are ignored. If left unaddressed, they linger and compound. Leaving harmful impacts in the wake of its investments not only undermines the EBRD’s development goals, it presents a serious [reputational risk](#) to the institution. Ensuring that impacts are remediated is therefore not only beneficial to project-affected communities - it also promotes the EBRD’s sustainability and credibility as a development institution.

The EBRD’s responsibility to ensure that harm is remediated is two-fold. First, the EBRD has a responsibility to build and use leverage over its clients to encourage them to remediate harm. It is not enough to simply add more requirements for clients to the ESP, even though they are good requirements. The ESP must also require the EBRD to take an active role in ensuring that clients are *in fact* providing remedy. There are several aspects of the ESP that could be strengthened in order to do this:

First, we suggest the following edits to the draft ESP’s provision on Monitoring:

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<sup>1</sup> [UN Guiding Principles on Business and Human Rights, Principle #22](#)

7.23. [...] If the client fails to comply with the social and environmental commitments set out in the financing agreements, the EBRD *may will* agree with the client remedial measures to be taken by the client to achieve compliance *and provide remediation for social and environmental harm*. If the client fails to comply with the agreed remedial measures, the Bank may take such action and/or exercise such rights and/or remedies contained in the financing agreements as *it deems may be appropriate to compel the client to implement the agreed remedial measures*. The Bank may also take action to directly provide remediation for social and environmental harm.

In addition, the EBRD should consider a client's failure to remediate social and environmental harm as grounds for debarment. Consider the example of the U.S. Development Finance Corporation's recently implemented rule:

"DFC may debar a person or entity for refusing to engage in efforts to remediate identified environmental, social, and human rights harm stemming from their activities, including harm that may be identified through a DFC Office of Accountability complaints process."<sup>2</sup>

Given that the EBRD participates in [cross-debarment](#) with other multilateral development banks, adopting such a policy could provide a considerable incentive for clients to engage, to the best of their ability and in good faith, in efforts to remediate harm.

As suggested in the edited language above, the other part of the EBRD's responsibility is to itself undertake remedial actions for harmful project impacts. In some cases, this responsibility arises when the EBRD's own actions or omissions contribute to harm. For example, if the EBRD's Independent Project Accountability Mechanism conducts an investigation and finds that the EBRD failed to comply with its own policies, and this non-compliance led to harm, then the EBRD itself must implement measures to restore compliance and remediate harm. This is already reflected in the Project Accountability Policy:

"Where IPAM concludes that the Bank was not in compliance with either Policy [the Environmental and Social Policy, or project-specific provisions of the Access to Information Policy], IPAM will recommend remedial changes related to the actions or omissions of the Bank."<sup>3</sup>

It follows that an important part of the EBRD's responsibility for remediation is to take the findings and recommendations of its accountability mechanism seriously, and to engage constructively with the mechanism to address non-compliance and harm.

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<sup>2</sup> [Federal Register, Nonprocurement Suspension and Debarment; Correction \(March 8, 2024\)](#)

<sup>3</sup> Project Accountability Policy 2.7 a

However, there may also be situations where a client is unable or unwilling to provide the remediation that it is supposed to. In such cases, it may be appropriate for the EBRD to step in and provide remediation to project-affected people to ensure that they are not left unfairly bearing the brunt of the negative impacts. Taking such action may contribute to the EBRD's goals for the project's impact, as well as mitigate the reputational and litigation risks associated with allowing harm to persist unaddressed.<sup>4</sup>

Concerns around moral hazard, namely that such action by the EBRD may disincentivize clients from fulfilling their own responsibilities, could be addressed through indemnification agreements, or otherwise recouping the costs of remedial action from clients. The most important moral hazard the ESP should address is the one that already persists, where the EBRD and its clients are too often insulated from responsibility for environmental and human rights impacts, because the costs are instead externalized to project-affected people who lack decision-making power over projects.<sup>5</sup>

#### Develop responsible exit principles

The draft ESP adds a new requirement for clients to develop a “responsible disengagement plan” for ending relationships with suppliers who fail to prevent and address harm to supply chain workers (ESR 2 para. 47). There should be a parallel requirement for the EBRD to responsibly disengage from projects to ensure that negative environmental and social impacts are not left behind.

In particular, the EBRD should commit to not prematurely exiting projects that are subject to an active IPAM complaint process, unless consultation with the impacted community indicates that such an exit is desired. Project-affected communities typically approach a complaint process in order to engage the investor as part of the solution to the harm. Premature exit often takes away most of the financial institution's leverage, and with it, any hope that harmful impacts will be addressed. [Case experience](#) has demonstrated that severing the Bank-client relationship without planning for the potential impact on the project-affected community can result in communities being left for years without remedy for harm.

#### Revise the mitigation hierarchy to require “remediation” of residual negative impacts

Currently, the ESP provides a general definition of the mitigation hierarchy explaining that clients are required to implement measures that would “minimise, mitigate, and as a last resort, offset and/or compensate for any potential residual adverse impacts.” Though ESR 5 and ESR 6 later

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<sup>4</sup> See, for example, [Jam v. IFC](#) and [Juana Doe v. IFC](#), both filed in response to environmental and social harm that the IFC failed to address when initially raised to its independent accountability mechanism.

<sup>5</sup> For more discussion on addressing moral hazard risk and options for funding remedial action, see Chapter IV on “[Contributing to Remedy](#)” of the UN Office of the High Commissioner on Human Rights report *Remedy in Development Finance: Guidance and Practice* (2022).

provide more detail regarding the application of the mitigation hierarchy in resettlement and biodiversity contexts, the phrasing within the general definition implies that offsets and compensation are the two essential responses to project-related harm. However, a much wider range of measures may be needed to constitute an effective remedy. These measures, including rehabilitation, apologies, and guarantees of non-repetition, are recognized in international law as important components of remediating rights violations.<sup>6</sup>

Furthermore, it is important for the ESP to acknowledge that the appropriate remedy for any given case must be determined in consultation with affected people and be tailored to the specific harm experienced. For biodiversity or climate impacts that do not impact one particular group or community, remedial actions should be consulted with experts and civil society. The current “compensate/offset” framing reads as more prescriptive than a framing of “remediation,” which implies more flexibility and responsiveness to the articulated needs of affected stakeholders.

Several other development finance institutions have adopted mitigation hierarchies that prioritize remediation over compensation or offsetting:

**Green Climate Fund’s Environmental and Social Policy para. IV.8.f:**

“The GCF adheres to the mitigation hierarchy as an overall principle to managing environmental and social risks and impacts, suitable for all instances of GCF- financed activities. The mitigation hierarchy aims to:

- (i) Anticipate and avoid adverse risks and impacts on people and the environment;
- (ii) Where avoidance is not possible, adverse risks and impacts are minimized through abatement measures;
- (iii) Mitigate any residual risks and impacts; and
- (iv) Where avoidance, minimization or mitigation measures are not available or sufficient, and where there is sufficient evidence to justify and support viability, ***design and implement measures that provide remedy and restoration before adequate and equitable compensation of any residual risks and impacts...***”

**African Development Bank’s Operational Standard 7 para. 17:**

“The objectives of OS7 are as follows: [...] Identify and avoid adverse impacts of Bank operations on the lives and livelihoods of vulnerable individuals and groups, including women and girls, highly vulnerable rural minorities including indigenous peoples. ***Where avoidance is not feasible, to reduce, minimize, mitigate, compensate or effectively remedy impacts.***”

**European Investment Bank’s Environmental and Social Standards, Standard 1 para. 3:**

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<sup>6</sup> See, e.g., [Center for International Environmental Law, Remedying Harm: Lessons from International Law for Development Finance \(March 2022\)](#).

“This Standard outlines the promoter’s responsibilities with regard to the process of assessing the potential environmental, climate and/or social impacts and risks associated with the project, and developing and implementing procedures for managing and monitoring these impacts and risks throughout the EIB’s project cycle, specifically: [...] Applying the mitigation hierarchy through the identification of measures to avoid, prevent and reduce any significant adverse effects and, **if required, remedy/compensate any residual effects on project-affected people, communities and workers, as well as on the environment...**”

Furthermore, the draft Environmental and Social Requirements are now much more explicit in requiring clients to “provide remediation” for negative impacts. The mitigation hierarchy’s phrasing is out of step with this new language; it should be revised so that the ESP is internally coherent.

#### Remove the creation of a management-led grievance mechanism

The draft ESP’s proposal to create a management-level grievance mechanism should be deleted from the Policy, as there are significant risks around creating a new grievance mechanism that is not well-defined. The draft ESP 4.2 simply states that:

“EBRD will establish a mechanism to identify, respond, and assist with resolving project related concerns and complaints. The mechanism will strive to efficiently address concerns and complaints brought to their attention by working to identify actions and mutually agreeable solutions. The mechanism will report to the Bank’s management.”

While it is good that the EBRD is seeking to formalize its process for handling project-related complaints, which currently takes place in an ad-hoc manner, the best way to do this would be to define a separate process for stakeholder consultation on a grievance mechanism that incorporates lessons from similar management-led mechanisms at other DFIs. Creating a management-level grievance mechanism via a single paragraph in the ESP is inadequate, because it does not provide the opportunity for stakeholders to review and give feedback on draft procedures defining how the mechanism will operate.

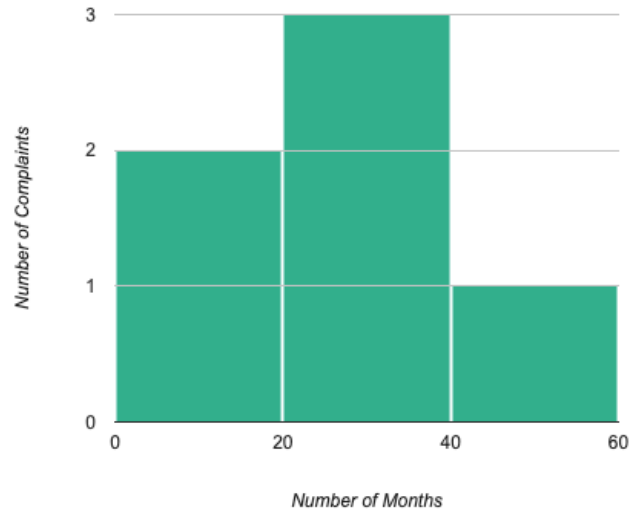
There are several points the EBRD should more fully consider in deciding whether to establish such a grievance mechanism:

- 1. Enhancing existing mechanisms could be a more efficient way for the EBRD to fill some of the gaps that the proposed mechanism seeks to address.**

The creation of a new grievance mechanism risks taking away resources from the existing Independent Project Accountability Mechanism (IPAM). In fact, it is surprising that a new mechanism is being proposed, given that IPAM already lacks sufficient staff and resources

to timely handle the volume of complaints it receives. Data on IPAM cases shows that the process for addressing eligible complaints takes more than two years on average:

LENGTH OF ELIGIBLE COMPLAINTS<sup>7</sup>



If the EBRD’s goal is to increase the speed and efficiency with which it addresses environmental and social complaints, then it could be more effective to bolster the resources of the existing mechanism than to create a new one from scratch, which may further increase demand for limited resources.

One rationale we have heard for creating a management-level mechanism is that it would be able to address issues earlier in the project’s life cycle than IPAM can, because IPAM only gets involved at a late stage when harm has escalated. However, this is not necessarily true. The Project Accountability Policy authorizes IPAM to address complaints about projects as soon as they are approved by the Board.<sup>7</sup> In practice, complaints are often not raised until much later in the project cycle, but this is not because of an inherent inability of IPAM. It is much more likely that complaints tend to reach IPAM at a later stage because project-affected people try to resolve their grievances locally or at the project level first, or because of an initial lack of awareness that IPAM is available. Rather than creating a management-level grievance mechanism, a better way to ensure that EBRD management addresses problems early-on could be to provide for robust stakeholder

<sup>7</sup> Project Accountability Policy 2.2 b iii

engagement and participatory due diligence at the project design stage.<sup>8</sup> In fact, such proactive engagement could contribute to preventing grievances in the first place.

**2. Experience from similar mechanisms at peer development finance institutions has demonstrated that they can pose significant risks to transparency and accountability.**

Other development finance institutions, including the World Bank, the International Finance Corporation, and the Inter-American Development Bank have established management-level grievance mechanisms whose practices have created some cause for concern. Without a robust consultation process that takes into account lessons learned from complainants' experiences with these mechanisms at peer institutions, the EBRD risks repeating such mistakes in the design of its own mechanism.

One fundamental concern is that the addition of a management-level grievance mechanism can create confusion for complainants about the different channels for seeking redress within the institution. Project-affected communities often already have limited information about their options, and are frequently unaware that independent accountability mechanisms (IAMS) exist to address grievances. Adding a new mechanism without planning for clear communication to project-affected people about the difference between the management mechanism and the independent mechanism risks creating confusion about what kind of process complainants can expect when they approach the Bank with a concern.

Another issue that arises for management-led grievance mechanisms is the potential for conflict of interest in cases where significant problems exist within a project or where serious harm is identified. EBRD management does not have the same degree of detachment and independence from projects that an IAM offers, and the management's interest in EBRD projects going forward can conflict with the need to address serious harm, which may require pausing or making significant changes to a project. In fact, this tension is already evident within the EBRD's accountability system: EBRD management's relationship with IPAM has been characterized as "challenging," and management has frequently pushed back on the mechanism's recommendations for addressing harm.<sup>9</sup> Given the EBRD's demonstrated resistance to accepting and addressing findings of harm in its projects, there is cause for concern around a grievance mechanism led by management. In order for such a mechanism to be effective, it must have robust transparency requirements that keep it accountable to communities, the EBRD's Board, and the public.

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<sup>8</sup> For more detailed recommendations on enhancing the EBRD's stakeholder engagement early in the project cycle, see the [2023 Joint CSO Submission to the EBRD](#) on this subject.

<sup>9</sup> The "challenging" relationship between EBRD management and IPAM is highlighted as a key area for improvement in the recently [published](#) external review of IPAM's effectiveness. See especially Section 5.2.



However, the fact is that in practice, project-affected people already routinely approach EBRD management with their concerns. Formalizing the EBRD's response to these concerns would be a positive step, and the creation of a standardized mechanism or process could be beneficial. However, this mechanism would need to have well-defined goals and be adequately resourced to ensure that it can provide real solutions and remedy to complainants.

If the EBRD wishes to create a management-level grievance mechanism, then this merits a separate consultation process with project-affected communities and other experts that focuses specifically on the mechanism's procedures. As a starting point, here are some key attributes the mechanism would need to have to meet the effectiveness criteria for non-judicial grievance mechanisms set out in the UN Guiding Principles on Business and Human Rights:

Transparency:

1. The mechanism should publish a registry of complaints received, along with information on how project issues have been addressed. Information about the identity of complainants should not be shared if complainants have requested confidentiality for their safety, but there should be a presumption of disclosure for environmental and social information related to the project.
2. The mechanism should regularly communicate with complainants and keep them updated on how their complaint is being addressed.
3. Management should inform complainants that IPAM is also available, and should clarify the differences between the mechanisms. Complainants should be offered a free choice of mechanism.

Predictability:

1. The mechanism should publish information about the kinds of issues it can address.
2. The mechanism should publish its complaint-handling procedures, along with estimated timelines.
3. The mechanism should publish information about what complainants can expect in terms of solutions and remedy. Additionally, it should report on complaint outcomes to demonstrate the solutions that complainants have received in the past.

Rights-compatibility:

1. The mechanism should consult with complainants on potential solutions to their grievances.
2. The mechanism must provide access to effective remedy for project-related harm, including retaliation.
3. The mechanism should have a protocol for effectively escalating reports of retaliation to the appropriate actors within the Bank, if necessary and requested by complainants.
4. The mechanism should protect the identities of complainants who have requested confidentiality.
5. Use of the management-level mechanism must not foreclose the availability of IPAM.

Source of learning:

1. The mechanism should track trends in the kinds of complaints it is receiving to identify areas for improving EBRD policies and/or their implementation.
2. The mechanism should provide regular reports, both publicly and to the Board of Directors, summarizing its work and identifying lessons learned.

While it is positive that the EBRD is seeking to address complaints more effectively, the ESP is not the appropriate instrument for creating a new grievance mechanism. Rather, a separate consultation process should be initiated to ensure that the mechanism is as effective as possible for its potential users.

#### Strengthen references to IPAM

The ESP should emphasize the key role that IPAM plays within EBRD's accountability system. The draft's current description of IPAM is incomplete, as it mentions only IPAM's compliance function and fails to mention its ability to facilitate problem solving between complainants and EBRD clients (ESP 4.4). A more complete description of IPAM should be included, along with a commitment that the EBRD will constructively engage with the mechanism's processes.

#### Require clients and sub-clients to disclose the EBRD's role as a project funder, and the availability of IPAM as a grievance mechanism

ESR 10 on Stakeholder Engagement should include a provision requiring EBRD's clients and sub-clients to disclose the EBRD's role as a funder of the project during consultation with communities. Along with this disclosure, clients should be required to share information about IPAM with local communities in a manner that is culturally appropriate, and in an accessible language and format.<sup>10</sup>

#### Strengthen the EBRD's role in assessing retaliation risk, preventing retaliation, and responding to retaliation when it happens.

As was highlighted throughout the 2024 Annual Meeting in Yerevan, the EBRD operates in a number of countries where civic space restrictions make it incredibly difficult for project-affected people to raise concerns. The draft ESP places most of the responsibility for assessing and mitigating retaliation risks on clients (ESR 1 para. 14; ESR 2 para. 25; ESR 5 para. 50; ESR 10 para. 3). This arrangement presents a stark conflict of interest, as nearly all retaliation is perpetrated by, at the behest of, or for the benefit of, the client. An EBRD client should not play the leading role in assessing its own likelihood, or mitigating its own tendencies, to perpetrate reprisals against

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<sup>10</sup> Strengthening awareness early on about the EBRD's relationship to a project also addresses part of the problem of communities' belated engagement with the Bank and/or IPAM after project impacts have escalated.

those who express concern or opposition to a project. Rather, the ESP should make clear that this responsibility will be taken on by the EBRD as part of its contextual risk assessment.<sup>11</sup>

Thank you for considering our feedback on the draft Environmental and Social Policy. We look forward to remaining engaged as the ESP is finalized; please do not hesitate to reach out if we can be of assistance.

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<sup>11</sup> For more detailed recommendations on how responsibility for assessing reprisal risk should be allocated, see the [2023 Joint CSO Submission](#) on this subject.