

Office of the United Nations High Commissioner for Human Rights

Recommendations for EBRD's draft Project Accountability Policy (PAP)

6 March 2019

Introduction

1. OHCHR welcomes the opportunity to comment on the draft Project Accountability Policy of the European Bank for Reconstruction and Development Bank's (EBRD or "Bank"), establishing the new Independent Project Accountability Mechanism (IPAM). OHCHR notes that an independent and effective IPAM will be crucial to ensure the effective fulfilment of the EBRD's mandate to foster "environmentally sound and sustainable development."¹ In this regard, in OHCHR's view, it is critical that the IPAM's rules of procedure reflect international best practice and the lessons learned by other Independent Accountability Mechanisms (IAMs).

2. OHCHR notes that, compared to the Bank's existing Project Compliance Mechanism (PCM), the proposed IAM benefits from an improved institutional design and methods of work. In this connection, OHCHR welcomes the shift towards a case processing by the IPAM team as a way to solve the lack of consistent methodologies by external PCM experts. Moreover, OHCHR welcomes the establishment of a separate IPAM Head, appointed following a multi-stakeholder process, reporting directly to the EBRD Board of Directors, and subject to pre- and post-employment cool-off periods.² OHCHR also welcomes the draft PAP's commitment to reduce case processing times.³

A. General principles

3. OHCHR welcomes the list of principles guiding the IPAM's functions (para 1.1.) and notes that these are broadly consistent with the effectiveness criteria for non-judicial grievance

¹ Agreement Establishing the European Bank for Reconstruction and Development, signed in Paris on 29 May 1990 (entered into force on 28 March 1991), art. 1.7.

² EBRD Project Accountability Policy (Draft for public consultation) (21 January 2019) [hereinafter Draft PAP], para. 3.18ff.

³ *Ibidem*, para. 3.6.

mechanisms under the UN Guiding Principles on Business and Human Rights (UNGPs), which embody international good industry practice (GIP) in this area.⁴

4. However, the draft PAP fails to incorporate the UNGPs' criterion of rights-compatibility. Rights-compatibility requires that outcomes and remedies accord with internationally recognized human rights. Even though stakeholders' grievances may not always be framed in human rights terms or appear to raise specific human rights concerns, international human rights standards correspond directly to the subject matter of the EBRD's ESP and provide important context and benchmarks to inform the Bank's assessment of compliance with its performance requirements. In the draft ESPs, EBRD has committed to, and committed to require clients, to respect human rights in their business activities and to address adverse human rights risks and impacts.⁵ Various performance standards incorporate explicit reference to human rights concerns and relevant international human and labour rights instruments.⁶

5. Moreover, information about human rights risks (which is routinely generated by international and regional human rights mechanisms relevant to environmental and social risk assessment and management) is also relevant to context analysis, strategic environmental assessments, and assessments of the adequacy of information disclosure, stakeholder engagement, the use of borrower frameworks, and of the Bank's due diligence in social and environmental risk assessment and mitigation measures.⁷ The international human rights framework also underscores the importance of the right to a remedy, including the possibility of compensation within the parameters of the EBRD ESP, an option that no longer appears in the PAP.⁸

6. OHCHR recommends that the IPAM should be equipped with the expertise and capacities necessary to recognize the human rights implications of the EBRD's and IPAM's work and effectively integrate human rights risk information within the IPAM's findings and recommendations, as other IAMs have done in the past.⁹

⁴ United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, (A/HRC/17/31 (2011) [hereinafter "UNGPs"], para 31.

⁵ EBRD Environmental and Social Policy (Draft for public consultation) (21 January 2019) [hereinafter Draft ESP], para. 2.4.

⁶ See, e.g. ESP para 2.4; PSR 1, para 11; PR 2, para 2 and accompanying fn. PR 4, fn 51; PR 5, para 2 and accompanying fn; PR 7, para 1u

⁷ See OHCHR, Review and Update of the World Bank's Safeguards Policies Comments and recommendations of UN/OHCHR in relation to the draft Environmental and Social Framework (15 March 2016), Annex III: "The Benefits of Integrating Human Rights Risk Information into the World Bank's Due Diligence." Available at: https://consultations.worldbank.org/Data/hub/files/20160315_memoandum_ohchr_esf_with_annexes.pdf

⁸ PAP, para. 2.2.7(a); cf. PCM Procedures 2014, para. 41, and UNGPs, Principle 25.

⁹ See, e.g., Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD), and Management and the Petroleum Economy (Credit No. 3316-CD) (2000), para 215; Investigation Report: Honduras: Land Administration Project (IDA Credit 3858-HO), Report No. 39933-HN (June 12, 2007), para 256; CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras, CAO Ref: C-I-R9-Y12-F161 (December 20, 2013), paras 38, 46-52.

Recommendation: OHCHR recommends that the criterion of Rights-compatibility be included within the principles guiding the IPAM’s functions.

Recommendation: The IPAM Team should be equipped with specific human rights expertise.

Recommendation: The possibility of compensation, within the parameters of the EBRD ESP, should be reinstated as a remedial option for complainants.

B. Eligibility

Personal eligibility (*ratione personae*)

7. OHCHR welcomes the explicit reference to the possibility that requesters to the IPAM may identify duly authorised representatives to assist them to act on their behalves in relation to IPAM requests. However, the effectiveness of this representation seems to be diluted by the possibility that the IPAM “may communicate directly with the Requesters as necessary” (para. 2.3.b).

Recommendation: The IPAM should refrain from communicating directly with the requesters when the latter have expressed a wish that their representative act as a point of contact for all formal communications.

8. The draft PAP excludes eligible requests relating to “responsibilities, commitments or actions of any third party rather than to issues that are under control of the Client or the Bank” (para. 2.4.b). The specific responsibilities of third parties, including supply chains, contractors and Financial Intermediaries (FIs), in relation to the implementation of the ESP requirements are complex and subject to detailed elaboration under the ESP. Correspondingly, the analysis of the specific responsibilities of parties other than the client in relation to the implementation of the ESP or AIP project-related provisions should not be generally part of the eligibility criteria, but rather be part of the eligibility assessment or substantive examination of the request, as applicable.

Recommendation: Paragraph 2.4.b does not properly establish an eligibility criterion and could therefore be deleted. This would also ensure that the IPAM’s jurisdiction in relation to complaints arising from FI operations is not inadvertently excluded.

Subject-matter eligibility (*ratione materiae*)

9. As part of the eligibility criteria for registration to the IPAM, the draft PAP stipulates that requests should identify the harm believed to have been caused, or likely to be caused by the project (para. 2.3.e). In addition to this, the draft PAP adds that the request should raise “issues deemed by

the IPAM Head to relate to specific obligations of the Bank” under the ESP or the AIP (para. 2.3.f). The later requirement seems to incorporate an additional eligibility requirement that is not necessarily consistent with the material harm criterion established in para 2.3.e. Moreover, and in any event, the subjective assessment of the request should not logically be part of the request’s eligibility criteria (paras. 2.8ff).

10. The draft PAP also stipulates that a case will be eligible for the IPAM’s compliance assessment if “it appears that the Project may have caused or may likely to cause *direct and material* harm” to the project-affected people (para 2.21.a, emphasis added). In OHCHR’s view, this direct and material test represents an unnecessary high eligibility standard that may arbitrarily limit the capacity of affected communities and individuals to access the IPAM. In this connection, the scope of the ESP, which sets forth the environmental and social standards that guide the compliance review by the IPAM, includes “all relevant direct *and indirect* environmental and social risks and impacts” of a given project.¹⁰

11. In addition to the above, the draft IPAP excludes from compliance review those cases involving “minor technical violations” of the applicable EBRD policies, unless such “technical violations are alleged to have caused direct and material harm” (2.21.c). This requirement seems to be at odds with the PAP’s focus on the material harm experienced or likely to be experienced by the requesters as a result of the lack of compliance with the Bank’s policies (which involves an objective assessment) as distinct from the lack of compliance with these policies per se (which requires a norms-based value judgement). From this perspective, the seriousness of the lack of compliance seems to be irrelevant to the determination of the requesters’ actual or potential harm.

Recommendation: Paragraph 2.3.f does not properly establish an eligibility criterion and could therefore be deleted.

Recommendation: A case should be eligible for compliance review if the project may have caused or may be likely to cause *direct or indirect* harm. The exclusion of minor technical violations in paragraph 2.21.c could therefore be deleted.

Temporal eligibility (*ratione temporis*)

12. The draft PAP limits eligible requests to those referring to projects that “the Bank has approved” or have been filed “before the Bank ceases to have a financial interest in the Project” (para. 2.4.). OHCHR notes that the exclusion of requests in the pre-approval or post-exit stages appears to represent a step backwards in relation to the current PCM Rules of Procedure, which allows for the examination of complaints regarding projects that have not been formally approved (under dispute resolution)¹¹ or up to 24 months after the date on which the EBRD ceased to

¹⁰ Draft PS 1, para 11 (emphasis added).

¹¹ PCM Rules of Procedure, paras 12(a), 13.

participate in the project.¹² These eligibility criteria are in line with GIP as reflected in the policies of most IAMs, particularly the later generation mechanisms.¹³

13. OHCHR further notes that the restriction imposed in the draft PAP on the eligibility of requests *ratione temporis* may undermine the accountability of the Bank to the communities and individuals. Communities or individuals affected by EBRD-supported projects may not know of EBRD's involvement and/or the IPAM mechanism until the Bank has ceased to have a financial interest in the project, or alternatively, the harms may only become apparent after that date. Moreover, even where the Bank has ceased to have a financial interest, its role in the inception of the project may have been essential, to the extent that the client could have not been able to carry it out without the Bank's initial support.

14. The exclusion of requests in the pre-approval stage also seems to contradict the precautionary approach, including the mitigation hierarchy, which should govern the EBRD activities in order to "avoid creating environmental and social impacts from the outset of development activities."¹⁴ The precautionary approach adopted by the Bank is reflected inter alia in the possibility that the IPAM Head may issue interim recommendations on emergency measures in cases of "serious and irreparable harm" deriving from the implementation of a project financed by the Bank.¹⁵ The IPAM emergency measures, and their precautionary rationale, would be strengthened considerably if complaints could be filed against projects that are in an advance stage of planning and before they are formally approved. The proposed emergency measures mechanism whereby the IPAM Head may request the Board to suspend further Bank processing of the project or further disbursements would be fully relevant to pre-approval complaints.

Recommendation: OHCHR strongly recommends that the eligibility criteria should be revised to explicitly include the possibility of pre-approval or post-exit requests to the IPAM, in line with the current PCM Rules of Procedure.

Parallel proceedings

15. The draft IPAM rules out the examination of a request in the event that the request's subject matter has been dealt with, or is being dealt with, by "the accountability mechanism of a co-financing institution" or "a judicial or non-judicial dispute resolution body or mechanism," unless otherwise determined by the IPAM Head (paras. 2.4.c-d). In OHCHR's view, these restrictions on

¹² Ibid, para. 24(c).

¹³ On pre-approval complaints, see The Inspection Panel, Operating Procedures, para. 10; CAO Operational Guidelines, para 2.2.1.1; ADB Accountability Mechanism Policy, para. 145; AfDB Independent Review Mechanism Operating Rules and Procedures. On post-exit complaints, see: ADB Accountability Mechanism Policy, para 142; AfDB Independent Review Mechanism Operating Rules and Procedures, para. II.c.3; IDB, Policy of the Independent Consultation and Investigation Mechanism, para 19(f).

¹⁴ Draft EBRD Performance Requirement 1: Assessment and Management of Environmental and Social Risks and Impacts, para 3 and accompanying footnote.

¹⁵ Draft PAP, para. 3.8.

eligibility are couched in unduly broad terms and may arbitrarily limit the possibilities for affected communities or individuals to seek accountability for harms derived from EBRD-financed projects.

16. The automatic exclusion of requests whose subject-matter has been examined, or is being examined, by any “judicial or non-judicial dispute resolution body or mechanism” is sweeping, and may include any proceeding ranging from international mechanisms to national courts or even project-level compliance mechanisms. In OHCHR’s view, the exclusion of requests which are the subject of past or ongoing parallel proceedings confuses the actual function of the IAM, which is to ascertain the Bank’s compliance with its own policies (ESP and AIP), not applicable international or State-level regulations.

17. The exclusion further fails to take into consideration the *quality* of other judicial or non-judicial bodies or mechanism, and whether their procedures are consistent with the procedural guarantees set forth in the IPAM’s own rules of procedure; this includes serious human rights criteria such as minimum due process guarantees and safeguards against the risk of reprisals. In addition, the exclusion is not consistent with the client-orientation of the proposed IPAM, as the previous complaints on the same subject matter may have been filed by persons other than the communities or individuals concerned without their consent or knowledge.

18. OHCHR also notes that the automatic exclusion of requests that have been processed, or, even more importantly, that are *being processed* by a co-financing institution’s IAM seems to be at odds with GIP regarding project accountability in the context of co-financing arrangements. In this regard, the draft PAP expressly opens the door for the IPAM’s cooperation with the IAMs of co-financing institutions “to ensure that Cases are handled efficiently, cost-effectively and to avoid excessive disruptions or disturbances to Parties”, including by establishing written agreements (para. 3.9). OHCHR welcomes this approach, which necessarily requires a case-by-case analysis and an assessment of the other IAMs’ capacities to manage requests according to the EBRD’s own standards.

Recommendation: OHCHR strongly recommends that the eligibility criteria set forth in paragraphs 2.4.(c-d) be deleted. The exclusion of requests based on past or ongoing proceedings should be an exceptional measure, which should apply only when the IPAM Head determines that the request is substantively identical to another that has been dealt with by the IPAM or the IAM of a co-financing institution in coordination with the IPAM.

***Ex officio* registration**

19. The draft PAP currently limits admissible requests to those filed by requesters or their representatives. By doing so, the draft policy excludes the possibility that requests leading to dispute resolution or compliance review procedures could be initiated by the Bank’s Board or Management (a possibility which is common in other IAMs, such as the Inspection Panel¹⁶), or by the IPAM Head

¹⁶ The Inspection Panel, Operating Procedures, para. 10 (d-e).

(e.g. International Finance Institution (IFC) Compliance Advisory Ombudsman (CAO)¹⁷). These institutional avenues can play a potentially important role in helping to overcome accountability gaps caused by lack of capacity or fear of reprisals of project-affected communities and individuals. Moreover, they would be fully compatible with the new IPAM institutional design, in which the IPAM is fully independent from the EBRD Management and Board (paras. 3.18ff)

Recommendation: The EBRD Board or Management or the IPAM should have the capacity to initiate cases ex officio.

C. Protection from reprisals

20. OHCHR notes that the draft PAP incorporates a number of provisions implicitly aimed at ensuring the protection of requesters from acts of reprisals or retaliation derived from their engagement with the IPAM, including the protection of the requester's identity upon his/her request (para. 2.3.a.i.).

21. Reprisals against human rights and environmental defenders have been increasing, including in the context of complaints to the IAMs.¹⁸ Hence it is of crucial importance that the IAM develops, as a matter of priority, a specific protocol or policy on how to assess risk and handle cases where aggrieved parties face intimidation, harassment or retaliation. Reprisals can be further experienced by individuals cooperating with IAM investigations, such as witnesses or translators. The policies recently adopted by other IAMs, such the World Bank's Inspection Panel¹⁹ and the IFC's CAO,²⁰ and that of the EBRD itself,²¹ could serve as useful models, along with the excellent reprisals toolkit recently published by the Independent Accountability Network.²²

Recommendation: The PAP should include a commitment that the IPAM will develop a specific policy or protocol addressing risks of reprisals against communities or individuals engaging with the IPAM, and report annually (publicly) on its the implementation.

¹⁷ IFC CAO Guidelines, para 4.2.1.

¹⁸ See Human Rights Watch, At Your Own Risk: Reprisals against Critics of World Bank Group Projects (June 22, 2015) available at https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf

¹⁹ The Inspection Panel, Guidelines to Reduce Retaliation Risks and Respond to Retaliation During the Panel Process (2018).

²⁰ IFC CAO, Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations (2018).

²¹ EBRD, Retaliation Against Civil Society and Project Stakeholders (January 2019).

²² See Tove Holmström, Guide for Independent Accountability Mechanisms on Measures to Address the Risk of Reprisals in Complaint Management: A Practical Toolkit (2019), available at [http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/\\$file/guide_for_iam_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf](http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/$file/guide_for_iam_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf)

D. Choice of procedure

22. OHCHR notes the detailed elaboration of the IPAM’s problem solving and complaint review procedures and independent but related procedures. OHCHR also welcomes the flexibility in the choice of procedure, which is determined on a case-by-case basis and taking into consideration the requesters’ actual preference (para 2.8.). However, the current drafting of the PAP, which refers to the IPAM’s problem-solving and complaint review as “stages” (e.g. paras. (2.1.; 2.11)) may give rise to confusion in this regard.

Recommendation: The draft PAP should be revised to clarify that the IPAM’s problem solving and complaint review are independent options and not necessarily sequential procedures.

E. Concluding remarks

23. OHCHR is grateful for the opportunity to contribute to the EBRD’s consultation on its draft PAP. We hope that our comments are useful, and that the final version of the Bank’s policy will fully reflect applicable international law and best practice in other MDBs and thereby assure maximum transparency, accountability, and superior development outcomes. We look forward to our continuing dialogue and stand ready to provide further comments and clarifications on request.

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