

PRE-PUBLICATION DRAFT
Please note this draft is an excerpt of a
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MISPLACED TRUST

Why development banks should
not rely on their clients to
address reprisal risks

EXECUTIVE SUMMARY

Too often, human rights defenders and community members who express their views or speak out against projects funded by development banks face high risks of reprisals, ranging from threats to killings. In many cases, development banks' clients – the private companies and public institutions that are implementing or supporting the projects – play a direct role in the perpetration of these attacks. Yet, development banks continue to entrust their clients with addressing reprisals, assessing the project risks and impacts, and conducting consultations.

“Misplaced trust” is based on the analysis of 38 case studies of reprisals taking place in the context of development projects.¹

The first part of this report shows how clients² are directly or indirectly responsible for reprisals. In some instances, they are directly behind the reprisals or coordinating the actions of the perpetrators. In others, they are instigating the attacks, intentionally dividing the community and creating tensions.

Time is money, and clients benefit from hastening project development and minimizing scrutiny. In responding to these incentives, they typically fail to create opportunities for meaningful participation or to proactively prevent reprisals, and might avoid disclosing possible reprisal risks, or opposition to their projects. In highly repressive situations, they can also take advantage of the silencing of dissent by state agencies.

In the second part, this report provides a review of the relevant aspects of the policies, declarations and guidelines published by eight major multilateral development banks, in relation to the prevention and response to retaliations, stakeholder engagement and consultations with the communities affected by their projects. This section shows how development banks are relying heavily on the clients for their due diligence, including crucial steps such as mapping stakeholders, conducting consultations, and addressing reprisal issues.

Finally, this report offers a series of recommendations that development banks should follow to ensure an adequate and independent analysis of retaliation risks in the context of their projects, and the implementation of adequate prevention and response measures.

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reports on reprisals in the context of DFI-funded projects:

- **Uncalculated Risks (2019)**
- **Unhealthy Silence (2021)**
- **Wearing Blinders (2022)**

38

case studies reviewed

8

development banks' policies analysed: ADB, AfDB, EBRD, EIB, IDB, IDB Invest, IFC, World Bank.

“ *In many cases, the private companies or public institutions that are implementing or supporting the projects play a direct role in the perpetration of these attacks. Yet, development banks continue to entrust their clients with addressing reprisals, assessing the project risks and impacts, and conducting consultations.* **”**

INTRODUCTION

As many CSOs have documented, community members and defenders expressing concerns, voicing their opinion or sharing information about activities supported by development banks are often threatened, criminalized, attacked, and even murdered. Reprisals send a chilling message to the wider community, curtail the opportunities for participation and engagement - which are mandatory according to most bank policies - and end up jeopardizing the success of the project itself.

The need to prevent and address reprisals is clear, and it should be an essential component of human rights due diligence (HRDD). Ongoing advocacy efforts and campaigns - advanced by HRDs and civil society organizations (CSOs) around the world - has led to some development banks recognizing, in their safeguards policies or ad-hoc statements, the importance of addressing reprisals in the context of the projects they fund.

Yet, development banks - even though they acknowledge this need - tend to make a fundamental mistake, which turns their commitments on ensuring participation and tackling reprisals into empty words. In the vast majority of cases, banks place the primary responsibility to assess/mitigate reprisals risks and respond to reprisals on the client, despite the fact that the client is often directly or indirectly responsible for perpetrating reprisals. Clients also have conflicts of interest that might prevent them from disclosing or addressing reprisal risks.

This report shows how development banks rely too heavily on the client for carrying out crucial steps related to human rights due diligence, such as

mapping the affected communities, conducting consultations and engaging with the stakeholders, and assessing the project environmental and social risks. The lack of proper due diligence and meaningful consultations is a key factor that can lead to the escalation of reprisals. Yet, too often development banks are merely supervising the reports provided by the clients, without accounting for the fact that clients might avoid disclosing information that could jeopardize the approval or continuity of their activities.

As outlined in the second part of this report, most development banks - in their environmental and social policies - also have some provisions that allow for independent evaluations in specific situations, which can be relevant for assessing and addressing retaliation risks. However, these policies are discretionary and optional, without clearly establishing how and under what conditions they must be applied.

As indicated in the recommendations, it is crucial for DFIs to assume direct responsibility for the assessment of reprisal risks and for preventing, addressing and remedying reprisals. DFIs should develop protocols and guidelines on reprisal issues that cover the entire project cycle and that should be prepared in close consultations with CSOs, in particular those specializing in human rights issues, as well as with HRDs and groups that have directly experienced reprisals in the context of development projects. And most of all, DFIs should be directly responsible for implementing them, instead of relying solely or primarily on their clients for the assessment of reprisal risks, and for the prevention and response to reprisals.

KEY FINDINGS

The 38 cases of reprisals analyzed in the first part of the report show that:

- 1 In all but one of the cases analyzed, clients implementing development projects - including state actors, private companies and combinations of both - play a role in the perpetration of reprisals against HRDs in the context of their projects.
- 2 Reprisals where the responsibility can be attributed to the clients include threats, violent attacks, surveillance, harassment, smear campaigns, criminalization, destruction of property, strategic lawsuits against public participation (SLAPPs), dismissals from jobs, and killings;
- 3 Reprisals were typically perpetrated by the management of companies, people hired by the companies, public and private security forces, and state and government officials supporting the projects;
- 4 Public security forces often play a role in perpetrating or facilitating reprisals, in the context of development projects implemented by public or private actors. Private clients can be considered responsible for retaliations perpetrated by public security forces, when public forces protect the company's headquarters, buildings, facilities and property, or the private clients provide resources for the public forces;
- 5 In most cases, clients also contributed to the conditions that could have led to or exacerbated the likelihood of reprisals, for example by failing to disclose project risks and adverse impacts and provide safe spaces and channels for meaningful communication with communities to voice concerns, questions or grievances throughout the project cycle; or by continuing with the project without the clear consent of communities to proceed.

Beyond the particularities of each bank, the analysis of the policies of eight major DFIs (ADB, AfDB, EBRD, EIB, IDB, IDB Invest, IFC, World Bank) shows that:

- 1 Social and environmental policies require the participation of project-affected people free of coercion and intimidation, in the assessment and management of environmental and social risks and impacts and the design and implementation of mitigation measures, during the different stages of the project, including the earliest stages of project conceptualization.
- 2 Some policies require the free, prior and informed consent of indigenous communities when projects affect them. Most of the policies do not require any evaluation of restrictions to civic space, to assess if there is an enabling environment for participation. Few policies explicitly mention the assessment of risks of retaliation and/or security risks that may affect communities and workers who speak out about the project, and establish some guidance on how to address them. Some policies have developed more specific criteria related to the assessment of risks posed by the use of public or private security forces, which is an essential component of the assessment of reprisals risks. Most of the policies place the responsibility for the assessment of reprisal and security risks on the client.

- 3 Most of the banks have not published protocols or guidelines that establish in detail which procedures the bank staff must follow to assess reprisal risks and to establish measures to prevent and respond to reprisals. Only three of the eight banks analyzed have adopted specific documents on reprisal issues. Two of them have jointly elaborated and adopted specific guidance for clients, who are in the majority of the cases responsible for retaliations, but without indicating specific procedures for the banks themselves. Only the IDB adopted technical notes to support its own staff, borrowers and executing agencies to identify and evaluate reprisal risks.
- 4 The social and environmental policies attribute the responsibility for the evaluation of the risks and impacts of the projects to the client. For some projects, certain policies require these assessments to be performed by independent experts. However, in most of the cases these independent evaluations are of discretionary application, and no rules or guidelines are established to ensure the experts are independent from the client. In one case, for example, it is only required that the expert is not involved in the implementation of the project.
- 5 Social and environmental policies place the responsibility for consulting with stakeholders on the client. For certain types of projects, stricter scrutiny by the bank, or the participation of independent third parties is contemplated, to confirm the free and informed consent or the participation of interested parties. However, these further measures are discretionary.
- 6 In general, the banks assume the responsibility of reviewing the information produced by the clients to monitor compliance with its policies, providing technical cooperation to support the implementation of the safeguards, detecting gaps in the information, verifying that the social management plan covers the different risks and impacts of the project, and verifying the client's capacity to comply with social and environmental safeguards. The possibility of the bank making site visits and engaging independent third parties to monitor different aspects of the projects is established in certain cases. In most of the cases, it is a discretionary power.
- 7 Since the assessment of risks and impacts of the projects and the identification and participation of project-affected people is a responsibility of the clients, the policies do not ensure that the banks' due diligence processes with regards to the assessment of reprisal risks and prevention and response to reprisals can be adequately carried out.



EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Specific documents on reprisals

In January 2019, the EBRD approved a statement about “Retaliations Against Civil Society and Project Stakeholders”. It affirms that EBRD does not tolerate reprisals by its clients or other project counterparties and that the bank takes credible allegations seriously.³

The statement refers to some procedures that can be used to address reprisals cases. For cases related to coercive practices under the bank’s Enforcement Policy and Procedures (EPPs)⁴ - which only applies to allegations of fraud, corruption, collusion, coercion, obstruction, theft or misuse of the bank’s resources raised by bank personnel, Board Officials and experts performing missions - the client is subject to Enforcement Proceedings under the EPPs.

For all the other cases, the EBRD affirms it works with clients and other relevant parties to try to address reprisals. In the statement, the bank commits to raise the issue directly with the client or relevant party, to make EBRD’s position against reprisals clear, and take follow-up action as and where appropriate. It also states that locally affected communities should be able to raise their concerns, without fearing reprisals, through project-level grievance mechanisms or the Project Complaint Mechanism (PCM), which is EBRD’s independent accountability mechanism.

The statement also mentions internal guidelines on the handling of allegations of retaliation for criticism and complaints related to EBRD projects, but these documents - as they are not public - have not been included in this analysis.

ENVIRONMENTAL AND SOCIAL POLICY

• Reprisals

EBRD’s Environmental and Social Policy⁵ requires the identification and management of all relevant direct and indirect environmental and social risks and impacts of the projects and recognizes that in certain cases it may be appropriate to complement these assessments with further studies focusing on specific risks and impacts, such as human rights. One of the performance requirements (PR 4) applies to health, safety and security risks, risks that should be part of a more comprehensive assessment of reprisal risks. The policy mentions retaliations in three instances, stating that meaningful consultations in the context of the projects must be free from manipulation, coercion, intimidation and retaliation; that the client should not retaliate against workers who participate in workers’ organizations; and in connection to grievance mechanisms. Nevertheless, the policy does not establish any procedure or mechanism specifically aimed at assessing reprisal risks and preventing reprisals.⁶

• Consultations

The policy places the responsibility for meaningful consultations on the client. It establishes that, in some cases, the bank may conduct its own public consultation activities to gauge stakeholder views, without specifying the conditions under which the bank will conduct them.

When FPIC is required, the client must retain qualified independent experts to assist in conducting and documenting the good faith negotiations and FPIC process. The policy does not specify the criteria applied to determine when an expert is independent. Since the expert will be selected and hired by the client, the independence from the borrower is not ensured.

Assessment of risks and impacts

The client is responsible for carrying out assessment of risks and impacts. For example, the client is required to assess and identify project security threats for workers and communities, even the risks posed by its own security arrangements and those of its contractors. The client must also verify its workers providing security services have not been implicated in past abuses, and assess potential risks arising from public security forces. For projects that are complex or contentious, or that involve potentially significant multidimensional environmental or social risks or impacts, the client may be required to engage one or more internationally recognized independent experts. Such experts may form part of an advisory panel or be employed by the client, and will provide independent advice and oversight to the project. This is discretionary for the bank, and the policy does not establish specific conditions to ensure actual independence from the client. The client is required to commission an objective and independent study to identify all communities of indigenous peoples who may be affected by the project, and in consultation with them, assess the potential effects of the project on these groups and their views about the project. Independent experts are also required when the project could have adverse impacts on a critical habitat, or where diversity offsets are proposed for priority biodiversity features or critical habitat.

The client is also responsible for monitoring the project implementation. For projects that could have significant adverse environmental and social risks and impacts, the bank may require the client to engage relevant external experts to perform independent reviews of the project or to monitor specific environmental and social risks and impacts. Independent reviews are not mandated but rather discretionally demanded by the bank, since the criteria applied to require them is not established in the policy. The independence of the experts is also not guaranteed since the client is responsible for engaging them.

The bank's role

During project appraisal and monitoring, the bank reviews the client's information, provides guidance to assist the client in addressing environmental and social impacts, as well as to help identify opportunities for environmental or social benefits. EBRD may also periodically verify the monitoring information produced by the clients through site visits by its environmental and social specialists or independent experts. This is a discretionary power since the provision does not establish any criteria to determine its application.



RECOMMENDATIONS

As outlined in this report, clients are often directly responsible for the reprisals occurring in the context of their projects and have incentives to avoid disclosing information related to reprisals. Implementing zero tolerance for reprisals requires DFIs to stop delegating reprisal risk assessment and response to clients. DFIs should take on more direct responsibility for the assessment of reprisal risks and for preventing, addressing and remedying reprisals.

In particular, DFIs should develop protocols and guidelines for what the DFI will do itself on reprisal issues. These protocols and guidelines must cover the entire project cycle and should be prepared in close consultations with those who have directly experienced reprisals in the context of development projects, as well as with their allies, including CSOs specializing in human rights issues. Under these protocols and guidelines, DFI should:

1 Assess reprisal risks and respond when reprisals occur:

- Carry out an initial reprisal risk assessment, related to contexts and clients, through reprisal-sensitive consultations with affected communities. This assessment should precede any further steps on the project.
- Continue to independently assess reprisal risk related to contexts and client, on an ongoing basis throughout the project lifecycle, as part of holistic human rights due diligence; communities should be given the opportunity to actively participate in the ongoing monitoring of the project.
- Take the lead: if there are allegations of reprisals work directly with person or peoples facing reprisals in a reprisal-sensitive manner to respond.

2 Strengthen internal bank capacity to prevent and respond to reprisals

- Strengthen internal capacity to provide oversight and supervision for implementation of environmental and social safeguards.
- Invest in staff capacity to independently verify information from clients to assess reprisal risks and develop protocols to respond to reprisals independently from clients. For higher risk contexts, this should include reprisal-sensitive field visits in project preparation state where they engage directly with communities, independently from the client.
- Align incentives of staff, management and consultants to avoid reprisal risks including implementing concrete adverse consequences for inadequate due diligence or failures to respond to cases of reprisals.
- Build in-house capacity on reprisal prevention and response, and maintain a roster of independent experts on reprisal prevention and response, ensuring they adhere to specific guidelines to avoid conflicts of interest.

3 Align client incentives (including by implementing negative consequences) to avoid reprisals risks and respond when reprisals occur:

- Require clients to provide greater information transparency and disclosure around reprisal risks and cases of reprisals.
- Align client incentives to prevent reprisals and support a human-rights based response to cases of reprisals.
- Develop consequences for clients who withhold information about reprisal risks, fail to act in good faith in response to allegations of reprisals, or actively suppress dissent. Consequences can include higher borrowing costs, blacklisting, remedy framework, etc.

Endnotes

1. "Uncalculated Risks: Threats and attacks against human rights defenders and the role of development banks", Coalition for Human Rights in Development (CHRD), May 2019, <https://rightsindevelopment.org/uncalculatedrisks>; "Unhealthy Silence: Development banks' inaction on retaliation during COVID-19", CHRD, ARTICLE 19 and IFEX, July 2021, <https://rightsindevelopment.org/unhealthy-silence>; "Wearing Blinders: how development banks are ignoring reprisal risks", CHRD, June 2022, <https://rightsindevelopment.org/wearing-blinders>
2. In this report, with the term "client" we refer to the public or private entities directly receiving any type of financial support (grants, loans, equity, etc) from development banks. Clients can therefore include countries, state agencies, private corporations, or consortiums made up of a mix of public and private actors. Further information on the definition of the client's responsibility can be found in the methodology section.
3. "Statement on Retaliation Against Civil Society and Project Stakeholder", EBRD, January 2019, available at: <https://www.ebrd.com/documents/strategy-and-policy-coordination/ebrd-statement-on-retaliation.pdf>
4. "Enforcement Policy and Procedures", EBRD, 2017, available at: <https://www.ebrd.com/news/publications/policies/enforcement-policy-and-procedures.html>
5. EBRD's Environmental and Social Policy (ESP) and Performance Requirements (PR), 2019, available at: <https://www.ebrd.com/news/publications/policies/environmental-and-social-policy-esp.html>.
6. During meetings with civil society organizations, the bank's staff informed them about the existence of internal guidelines and procedures aimed at assessing reprisal risks. Since these documents are not published, they cannot be included in this analysis.