

## **Comments and recommendations to the draft rules of procedure for KfW Development Bank's Complaint Mechanism**

- 1. There is a lack of structural and operational separation of the accountability mechanism. The Bank should ensure the independence of the mechanism, by establishing appropriate processes to appoint external independent experts selected by the Board of Supervisory Directors, the Federal Ministry for Economic Cooperation and Development or members of Parliament. The mechanism should also report directly to the Board of Supervisory Directors and the Federal Ministry for Economic Cooperation and Development, following strict rules to avoid conflict of interests.**

One of the fundamental shortcomings of KfW Development Bank, a deficiency repeatedly pointed out by civil society organizations, is the lack of a truly independent accountability mechanism. Unfortunately, the policy under consultation does not resolve this deficiency. Its lack of independence creates structural difficulties in impartially addressing the various shortcomings in compliance with the Bank's policies and standards, which have had negative impacts on people and communities affected by its projects, including reprisals.

The draft policy states that the Complaints Office will report to and it is accountable to a member of the Executive Board, not directly to the Board of Supervisory Directors.<sup>1</sup> The Executive Board member will also approve the Rules of Procedure and any future revisions.

Members of the Central Complaints Office at KfW are internal employees (even if they are located outside the operational areas) and not external independent experts. They are appointed as Bank's staff, and are part of the Bank's internal structure, not a separate, external independent unit.

The Central Complaints Office will report to a member of the Executive Board, a management body, responsible for managing the Bank's day-to-day business, and for the implementation of resolutions adopted by the Board of Supervisory Directors.

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<sup>1</sup> In section 4.2. it states that "The Central Complaints Office reports to and is accountable to the responsible member of the Executive Board of KfW. The latter approves these Rules of Procedure and any future revisions". Section 7.3 (2) also states that the compliance review procedure "may also be initiated – in the absence of an admissible Complaint - on the reasoned initiative of the Central Complaints Office itself, by request of the Management Committee of KfW Development Bank or of the responsible member of the KfW Executive Board". Section 7.3.(3) c adds that "The Management Committee of KfW Development Bank approves the Action Plan. If the Central Complaints Office deems the measures set out in the Action Plan to be inadequate, it will refer the Action Plan to the responsible member of the KfW Executive Board for final decision". At 8.1. (2) it states that "If necessary, the Central Complaints Office will advise the Management Committee of KfW Development Bank and the relevant member of the Executive Board of KfW on shared and cross-departmental challenges in the areas of environment, social affairs and human rights arising from the Central Complaints Office's cases and best international practices".

An independent mechanism should, at the very least, be entirely separate from the institution's management and respond directly to a body that is truly independent from management such as the Board of Supervisory Directors, who is responsible for the supervision of the Bank and the appointment and dismissal of members of the Executive Board, the approval of financial statements, and the planning and selection of the auditor, or even better, the German Institute for Human Rights. The governing policies and rules of procedure should also be approved by the Supervisory Board of Directors, after public consultation, rather than by members of management through a member of the Board of Executive Directors.

The policy reform should primarily encompass the selection and accountability processes for its members, with the aim of ensuring their genuine independence not only from the Bank's operational units but also from management.

**2. The policy should ensure that the mechanism is financed with a separate budget, established and managed independently of the management of the Bank.**

In section 4.2. (4), the policy states that the Management Committee of KfW Development Bank supports the Central Complaints Office in exercising its mandate in accordance with the Rules of Procedure and provides an appropriate budget. The independence of the mechanism requires a separate budget and personnel, in order to ensure independence from the units its reviews. Its budget should be proposed by the mechanism, subject to approval by the members of the Supervisory Board, or the Federal Ministry for Economic Cooperation and Development.

**3. Throughout the document, the policy should take into consideration reprisals suffered by project-affected people and it should mention that the Complaints Office will commit to implement a more comprehensive approach, looking beyond individual complainants.**

Some sections of the document are mainly focused on reprisals suffered by complainants or other people involved in the complaint<sup>2</sup>. It would be good to clarify that often other people directly affected by the project but not directly connected to the complaint are victims of reprisals when they speak out about the project. Any attack on affected people who criticize the project is also a

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<sup>2</sup> For example, in paragraph 7.1. the policy states that in order to assess whether it is appropriate for the Operational Unit to process the Complaint as part of a Prior Resolution procedure, the Central Complaints Office will take into account, among others, “the risk of Reprisals and *retaliations against Complainants*.” In section IX, it states that KfW Development Bank takes threats and Reprisals against *Complainants or other persons involved in complaints procedures* very seriously, and that if there are indications that Complainants or other affected individuals are exposed to increased risks in terms of threats or Reprisals due to the filing of the Complaint, the Central Complaints Office will endeavour to (i) identify these within the framework of the complaint procedure; (ii) take or propose preventive measures to address or reduce these risks within the limits of its ability; and (iii) develop or propose appropriate responses to Reprisals within the scope of its ability. To protect the Complainant, the Central Complaints Office may take or suggest additional measures.

threat that prevents others, including the complainants, from raising their voices. The policy should acknowledge the chilling effect that fear of reprisals can have on project-affected people and complainants by making explicit reference to the project-affected people, their allies and supporters, when defining reprisals, and when it indicates the information that should be taken into consideration during the assessment of reprisal risks.<sup>3</sup>

Any reprisal risk assessment and subsequent action plan and/or remedies must take into account and address the potential impacts that the collective of people affected by the project may face, either when the complainant is a collective (e.g. grassroots community, civil society organization or association, network, trade union, etc.) or when the complainant is an individual, or a group of individuals, who belongs to a collective.

#### **4. The glossary should add other examples of reprisals.**

The definition of reprisals should also include the example of “withholding access to project benefits or other government services from complainants or other groups of project-affected people who have raised concerns about the project.”

#### **5. The policy should state that an initial reprisal risk assessment should be conducted for all of the cases, after the first interaction with the mechanism. Complaints Office officials will adopt a proactive role in the discussion of potential reprisal risks with the complainants, since the first interaction with them.**

A reprisal risk assessment should be conducted for all the complaints. In section 5.1. the policy states that if possible, the complaint should provide “Information regarding whether the Complainants have experienced or fear any form of Reprisal” and a “statement on whether KfW Development Bank may disclose the identity of the person/organization or should treat it confidentially”. This represents an important step toward assessing the risks of retaliation during the complaint process.

Additionally, it is important to note that some defenders – particularly those who are frequent victims of retaliation, threats, and violence – may underestimate the risks or ignore the possibility of taking steps to prevent them during the complaint process.

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<sup>3</sup> At paragraph 7.1. the policy should add the risk of reprisals against project-affected to the assessment about whether it is appropriate for the Operational Unit to process the Complaint as part of a Prior Resolution procedure. In section IX, it should add that KfW Development Bank takes threats and Reprisals “*against complainants and other persons involved in complaints procedures, project-affected people and anyone criticizing or raising their voices against the project very seriously*”. The glossary should also make explicit reference to project-affected people in the definition of reprisals.

We recommend adding that “Complaints Office officials are at the disposal of the complainants to discuss any concerns about reprisals against them and project-affected people, and since the first interaction with a complainant, they will proactively engage with them in order to discuss any concerns they may have about their safety and security, and establish prevention strategies and a joint action plan for reporting and reacting to reprisals, threats or concerns, even if the complainants didn't mention reprisal risks in the initial complaint. A reprisal risk assessment should be conducted for all the complaints”.

**6. The policy should state that when discussing reprisal risks with the complainants, the Central Complaints Office will explain all the different kinds of reprisals that should be taken into consideration.**

Some defenders may be less likely to mention certain kinds of reprisals, even when explicitly asked more generally about any reprisals suffered in the past, or about reprisal risks. They may underestimate certain risks, such as those posed by smearing campaigns, or even threats. For that reason, it is important to make explicit reference to all the different kinds of reprisals when discussing reprisal risks with them.

When assessing the likelihood of a reprisal occurring in the context of a complaint, the Central Complaints Office should also assess the context with regards to civic space and whether subjects of the complaint have a history of retaliating and the types of reprisals they have recourse to.

**7. The policy should contemplate measures to raise awareness among project-affected people about the possibility of asking for confidentiality when submitting a complaint (in all outreach activities, in the webpage, in meetings with complainants prior and after the submission of the complaints).**

It is important to develop a proactive approach to making sure complainants are aware of the possibility of requesting confidentiality. In addition to making that information visible in the webpage, the policy should state that even when people submit a complaint directly and do not ask for confidentiality, the Central Complaints Office will still engage the complainants to discuss possible risks, and ask them if they want their identities to be kept confidential.

**8. The policy should describe the specific requirements that must be fulfilled in order to conclude there is informed consent to disclosing confidential information shared by the complainants.**

The policy states that “The Complainant’s personal data will only be shared with third parties after the Complainant has provided legally compliant consent” and that “Any publication of information or documents within the framework of the Complaint Mechanism shall take into account the applicable legal provisions and the confidentiality agreements with Complainants and the other parties involved and shall be anonymised if necessary”.

The policy should establish that when asking the complainants for consent to disclose information, the Central Complaints Office will specify exactly what information will be shared, when and with whom. Informed consent should be a requirement every time the Central Complaints Office wants to share confidential information with another actor, including consultants, interpreters and other relevant service providers working with the Central Complaints Office. The policy should also incorporate a vetting process, in order to check the background of other actors who may have access to confidential details, such as consultants and interpreters.

#### **9. The policy should include a list of different actions that can be adopted by the Central Complaints Office in order to prevent or respond to reprisals**

The policy states that “if there are indications that Complainants or other affected individuals are exposed to increased risks in terms of threats or Reprisals due to the filing of the Complaint, the Central Complaints Office will endeavour to:

- (i) identify these within the framework of the complaint procedure;
- (ii) take or propose preventive measures to address or reduce these risks within the limits of its ability; and
- (iii) develop or propose appropriate responses to Reprisals within the scope of its ability. To protect the Complainant, the Central Complaints Office may take or suggest additional measures”.

The policy should make it clear that there is no “one size fits all” approach when it comes to protection action plans, and ensure that any action plan is situated in the specific realities that the complainant(s) face. We suggest incorporating a list of possible concrete actions that may be adopted by the Central Complaints Office in order to respond to reprisal risks, decided in dialogue and with the consent of the complainants and victims of reprisals.

The list should include, among others, the following actions:

- The Central Complaints Office will consult with the complainants and project-affected people about possible actions to prevent and respond to reprisals.
- With the consent of the people affected by reprisal risks, the Central Complaints Office may recommend immediately suspending projects and disbursements until the reprisals have ceased.
- With the consent of the people affected by reprisal risks, the Central Complaints Office may request the Bank to use its leverage to address reprisal risks directly with the Bank’s client.
- With the consent of the people affected by reprisal risks, the Central Complaints Office may request the Bank may raise the incidents of reprisals publicly.

- With the consent of the people affected by reprisal risks, the Central Complaints Office may discuss with protection orgs what the Bank could/should do.
- The Central Complaints Office will document and create a register of all cases of reprisals suffered by complainants or project-affected people.
- The Central Complaints Office may request from the Bank the provision of emergency assistance resources necessary to improve the security of the victims of reprisals.
- With the consent of the people affected, the Central Complaints Office will communicate all cases of reprisals to members of the Board of Supervisory Directors, with the consent of the people affected.
- With the consent of the affected people, communications to national or supra-national authorities, the German Institute for Human Rights, the BMZ or other oversight mechanisms should be considered to address risks of reprisals.

With the consent of the defenders, the policy should make sure that key prevention and mitigation measures – such as encouraging complainants to think about their physical and digital security and psychosocial wellbeing, issuing public statements expressing support for anyone’s right to voice concerns about KfW projects, and providing information on protection mechanisms at all levels, to name a few – figure in all prevention plans.

In order to ensure complainants are clearly and properly informed about the actions that will be adopted to prevent and respond to reprisals, it is important to establish that complainants can have access, if they want, to the assessment and measures that will be adopted by the Central Complaints Office.

#### **10. The policy should make specific provisions with regards to marginalized groups affected by reprisal risks**

The policy should establish different measures aimed at identifying specific risks for discriminated groups, which may cause a project-affected person to be more at risk of retaliation, or which may expose the person to differentiated risks, such as women, people with disabilities, Indigenous Peoples, and LGBT groups. It should also explain what steps will be taken when groups marginalized by local practices in decision-making are raising issues.

#### **11. As part of its prevention and mitigation measures, the Central Complaints Office should compile a list, divided by countries, of organizations that complainants could reach out to for help or support once risks of reprisals have been identified.**

Having a pre-established list of trusted organizations and contact details with the mandate and support skills needed to assist at-risk complainants would be a small but impactful way of helping complainants and would take the guesswork out of figuring out what organizations could be of help.

**12. The Central Complaints Office will communicate clearly to the complainants that they wish to be informed of any reprisals suffered by them, by anyone involved in the complaint or project-affected people.**

The policy should state that the Central Complaints Office will proactively update the risk assessment during the complaint-handling process through regular check-ins. Since some complainants may not inform the Central Complaints Office about new reprisals, it would be good to state explicitly that after the initial assessment the Central Complaints Office will communicate clearly to the complainants that they wish to be informed of any changes in circumstances, new risks or new reprisals that may happen during the process.

**13. The policy should state that the Central Complaints Office will work with different levels of Management in order to raise awareness and drive actions that address risks of reprisals, including regional and country management.**

The policy should state that the Central Complaints Office commits to work with different levels of KfW Management in order to raise awareness and drive actions that address risks of reprisals, including Regional, Country, and Project Management.

**14. The registry created to make information and documents available should also include complaints that were considered inadmissible.**

The policy states that “In order to ensure transparency and accountability, the Central Complaints Office of the KfW Development Bank shall, to the extent possible, make the following information and documents publicly available on its website in English and German, taking into account data privacy and confidentiality obligations:

- a) The annual complaints report. The report includes an analysis of the most common reasons for Complaints, along with the resulting learning and improvement measures;
- b) A register of all admissible Complaints...”.

It is important that the registration and publication also include complaints that have not been considered admissible, in order to guarantee transparency and accountability regarding the interpretation and application of the admissibility criteria established in the policy.

**15. The deadline for raising complaints should be extended, in order to allow complaints more than two years after the final inspection date, and should consider the moment when the person or group suffered the harms or gets to know about the harms**

The policy states that “Complaints may be submitted in respect of:

- Projects already in progress for which a financing agreement has been concluded with KfW;
- Projects that are still in the preparation stage and thus prior to the signing of the financing agreement with KfW, whereby it is at the discretion of the Central Complaints Office whether it will handle the Complaint in accordance with the procedures set out in these Rules of Procedure;
- Complaints regarding Projects whose final inspection dates back no more than two years”.

Large infrastructure projects can take several years to produce impacts on some people, who may or may not be aware of the Bank's role in financing the project. It is important that the time limit for filing a claim also takes into account when the individual or group becomes aware of the harm and its connection to the project.

We recommend stating that complaints will be admissible if they are filed until three years after the date of final inspection, or three years after the harm was discovered by the affected people, whichever is later. For example, the German IKI mechanism allows complaints up to 3 years after project closure, and the Green Climate Fund and the Africa Development Banks’s accountability mechanism establish that complaints can be brought up to two years after the harm was discovered, or two years after the project closes, whichever is later.

#### **16. The policy should always allow the complainant to resume the processing of complaints in the event of late provision of information**

The policy states that “If the admissibility of the Complaint cannot be definitively determined due to the absence of required information, the Central Complaints Office may request this information. If the Central Complaints Office does not receive the required information from the Complainants within a set period, the Complaint shall be declared inadmissible and not registered. The Complainants may apply for an extension of the deadline. The Central Complaints Office may, at its own discretion and in justified cases, resume the processing of a Complaint in the event of late provision of information”.

There is no reason to limit the possibility of resuming the processing of a complaint once complainants obtain and submit the necessary information. As long as they are within the time limit for filing a complaint, there is no reason to limit their right to continue, especially considering the difficulty that affected individuals and communities may experience in gathering the requested information and accessing the Bank. The Central Complaints Office should not have the discretionary power to refuse to resume the processing of a complaint once the complainant has submitted the required information. The deadlines established for complainants should be of an orderly, not peremptory, nature.

#### **17. The Central Complaints Office should ensure the complainants have access to all information used and considered in the context of the processing of the complaint**



The policy states that the “Central Complaints Office informs Complainants and the relevant internal bodies in accordance with the need-to know principle and in compliance with legal requirements regarding the steps outlined in this document for processing the Complaint and its outcome – in line with the established deadlines – and monitors these steps”.

The “need to know basis” is extremely vague, ambiguous, arbitrary and restrictive, allowing for excessive discretion in denying complainants information about the processing of their complaint, contradicting essential principles of transparency and the right to due process. Complainants should have access to all information used by the Central Complaints Office to make a decision. For example, they should have access to all submissions and responses made by the Bank's operational units and the various individuals in charge of the project. All information considered by the Central Complaints Office in making a decision should be accessible to complainants. Failure to do so implies a lack of transparency and makes it impossible to exercise their right to a defense.

**18. The decision about which procedure is to be used to process the complaint should be made by the complainants, and not by the Central Complaints Office**

The policy states that “The decision which procedure is to be used to process the Complaint is made by the Central Complaints Office after consulting the Complainant, provided that the requirements for the relevant procedure are met”.

After the complainants are informed and understand the three possible options for processing of the Complaint (prior resolution, dispute resolution or compliance review), they should make the decision about which procedure they choose to process the Complaint. In most cases, limiting access to Compliance Review and forcing complainants to submit their complaint to the Operational Unit can have a merely dilatory effect. Conversely, if complainants have chosen Prior Resolution or Dispute Resolution, they should have the option to initiate compliance review at any time if they believe the process is inadequate and will not provide a proper resolution to their issue. There is no real reason to limit or postpone the access of complainants to the different options established in the policy. If the Central Complaints Office has good reason to believe the issues raised can be solved more promptly if the complaint is processed under “Prior Resolution”, they can communicate that to the complainants, but the final decision should be freely made by them.

**19. Clarify that the Central Complaints Office should make recommendations to improve and amend the standards to minimize risks of harm to communities and the environment, rather than “non-compliance,” in similar circumstances in the future**

The policy states that “After completion of the Compliance Review, the Central Complaints Office will prepare a draft report containing a summary of the matter and the result of the review. If applicable, the final report will contain recommendations on changes to the Standards and related procedures of KfW Development Bank, to minimize the risk of any non-compliance in similar circumstances in future, as well as recommendation on how KfW Development Bank can be brought in compliance with the Standards in respect of the Project”.

This phrasing suggests, perversely, that the Central Complaints Office could recommend that KfW lower its environmental and social standards to make them easier to comply with in the future - thus “minimizing the risk of non-compliance.” The role of the Central Complaints Office should be focused on ensuring compliance with the Bank's standards and addressing harm to local communities, not on devising ways to modify policies to evade responsibility for damages caused by development projects. The Bank's standards and safeguards must be based on human rights commitments and principles that protect the rights of individuals and communities from the harmful impacts of projects and help ensure that they truly meet development objectives and they should be based on participatory processes.

To avoid this interpretation, which would misrepresent the Office as a tool for evading responsibility, the policy should re-phrase this provision to clarify that final reports produced as a result of complaints must include recommendations on how to modify policies and internal procedures to avoid future harm to communities and the environment.

This would align with the Central Complaint Office’s mandate to “contribute to the continuous improvement of environmental, social and human rights standards in KfW Bank Projects”...including by “identifying weaknesses in Project implementation” and developing “appropriate measures for improvement.”.

## **20. The policy should strengthen its measures to raise awareness about the mechanism and adopt specific measures to ensure the participation of IPs**

The policy should state that awareness raising and understanding of the mechanism’s mandate, functions, and procedures among employees of KfW Development Bank and external stakeholders and on KfW safeguards should start from the earliest stages of project conception and planning. When project affected people include IPs, they should be conducted in Indigenous languages, and with full cultural sensitivity. More importantly, KfW management and the borrower/client should be liable to ensure that the project affected communities know about KfW financing, the applicable safeguards and the accountability mechanism as an avenue for voicing concerns. That can be undertaken such as by installing public signages in local languages at construction sites and across the impact area of the project. Further, they should effectively engage Indigenous Peoples’ communities and their representatives since the design of the project itself.

## **21. The policy should establish the participation of project affected people in the definition of the action plan adopted to remedy the harms.**

The policy should ensure that after wrongdoing and non-compliance with KfW policies has been established in the context of compliance review function, project affected people participate and engage in the discussion of the specific actions and measures that will be adopted to remedy the harms. It should also establish that the affected people can opt to engage in a procedure aimed at

resolving the conflict and remedy the harms through the involvement of all relevant parties in a consensual process.

**22. The Central Complaints Office should have the authority to recommend a remedy for the affected communities**

If the Compliance Review confirms non-compliances of KfW Development Bank with the standards and linkage of harm to the project, the accountability mechanism should also have the authority to recommend a remedy for the affected communities from the project implementing agency or the borrower/client as well as the Bank. This would also bring the mechanism and KfW Development Bank in line with the evolving standards of several multilateral development banks as well as align with the right to remedy under the UN Guiding Principles on Business and Human Rights.

**23. The Policy should give the Central Complaints Office the authority for taking up complaints suo moto**

The policy states that “The procedure may also be initiated – in the absence of an admissible Complaint - on the reasoned initiative of the Central Complaints Office itself, by request of the Management Committee of KfW Development Bank or of the responsible member of the KfW Executive Board. This is particularly applicable but not limited to cases where Complainants are reluctant to file a Complaint due to fear of Reprisals”. The Policy should also give the Complaints Office the authority for taking up complaints suo moto based on credible reports of impacts from KfW-supported projects, even in the absence of a request made by the Management Committee or the responsible member of the Executive Board.

**24. The dispute resolution function should be strengthened to give the Central Complaints Office powers to require parties to take necessary actions for dispute resolution within a defined timeframe.**

The draft states that “If the parties involved agree to proceed with Dispute Resolution, the Central Complaints Office will, together with the parties, establish an appropriate schedule for the procedure...The procedure should generally be completed within 12 months but can be extended to 18 months. In exceptional circumstances and where there is a strong likelihood that an agreement can be reached even beyond an 18-month timeframe, the Central Complaints Office may consent to a further, temporary extension of the procedure”.

The dispute resolution function should be strengthened to give the Central Complaints Office powers to require parties to take necessary actions for dispute resolution within a defined timeframe. Repeated failures to respect such timeframe by the project implementing agency or the borrower/client should also be grounds for suspension of project financing. The complainants should be able to decide if they wish to end or extend the dispute resolution process.

**25. The Central Complaints Office should respect the right to Free, Prior and Informed Consent (FPIC) of the project affected Indigenous communities in its process for handling complaints**

The Complaints Office should be required, in its processes, to respect the right to Free, Prior and Informed Consent (FPIC) of the project affected Indigenous communities, particularly for complaints related to land and resource rights of Indigenous Peoples. Adequate time and information must be provided for consultation within the communities before setting agenda, timing/location of meetings; hiring of consultants and facilitators; and in determining the outcomes of the meetings. Imposing meeting times and predetermined agendas without consultation marginalizes their participation and weakens trust in the process. For this, the processes should follow community or FPIC protocols of Indigenous communities where they exist. Further, the processes must be culturally appropriate and gender responsive. They must respect or follow customary laws and practices of Indigenous Peoples or their customary justice institutions where they exist. They must support equitable participation with Indigenous communities to ensure participation of vulnerable members.

**26. The Complaints Office's processes should be further simplified**

The Central Complaints Office's processes should be further simplified to make them more accessible and effective. Many Indigenous communities in remote areas may face barriers such as limited access to technical support or lack of experience in preparing formal written complaints, particularly in the absence of supporting NGOs. So, they should be able to file complaints verbally or in other forms and through various channels. The current system is overly complex, creating barriers for communities to submit grievances independently without supporting NGOs.

**27. The policy should give the Complaints Office the authority to recommend responsible exit**

The policy should give the Complaints Office the authority to recommend responsible exit when the KfW Development Bank withdraws assistance from a project. This should particularly be ensured to avoid risk of reprisals against complainants or communities' leaders/defenders, or to prevent implementation of the project based on outcomes from the earlier KfW assistance without respect for the rights of the affected Indigenous and other communities.

**Signatories**

Asia Indigenous Peoples Network on Extractive Industries and Energy (AIPNEE)  
Community Empowerment and Social Justice Network (CEMSOJ)  
Defenders in Development Campaign (DiD Campaign)  
Protection International (PI)