



Ensuring Accountability to Human Rights

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Outline -Ensuring Accountability to Human Rights

- A Some history
- B Accountability mechanisms
- C. Access to a remedy



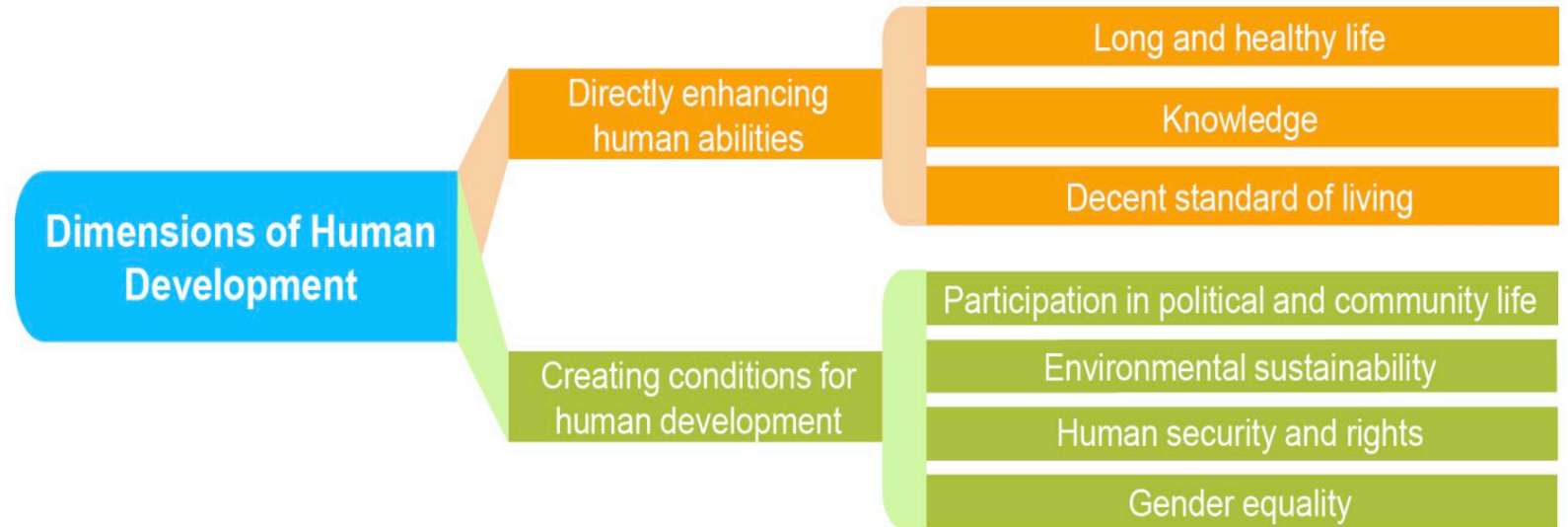
Some history

The 1980s and early 1990s



New definitions of development

The UNDP Human Development Report



Source:
<https://hdr.undp.org/content/what-human-development>

Rio Declaration: Earth Summit 1992

Principle 10 called for the right of citizens to participate in the development process and access information, as well as to be provided with “effective access to judicial and administrative proceedings, including redress and remedy.”



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World Bank-funded Sardar Sarovar Dam project



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Social and environmental safeguards

- ▶ Preventing, minimizing, mitigating, or compensating for adverse environmental impacts;
- ▶ Prioritizing preventive measures over compensatory measures whenever feasible;
- ▶ Meaningful consultation with, and participation of, affected peoples.



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Inspection Panel

The World Bank's Board of Executive Directors established an independent mechanism, the Inspection Panel, with a mandate to investigate complaints from people about social and environmental harm linked to Bank-financed operations.

The problem



MDBs generally have disclosure, environmental and social safeguard policies, as well as accountability mechanisms, but these do not extend to the increasingly important private sources of long-term finance.

Ideal characteristics of independent accountability mechanisms

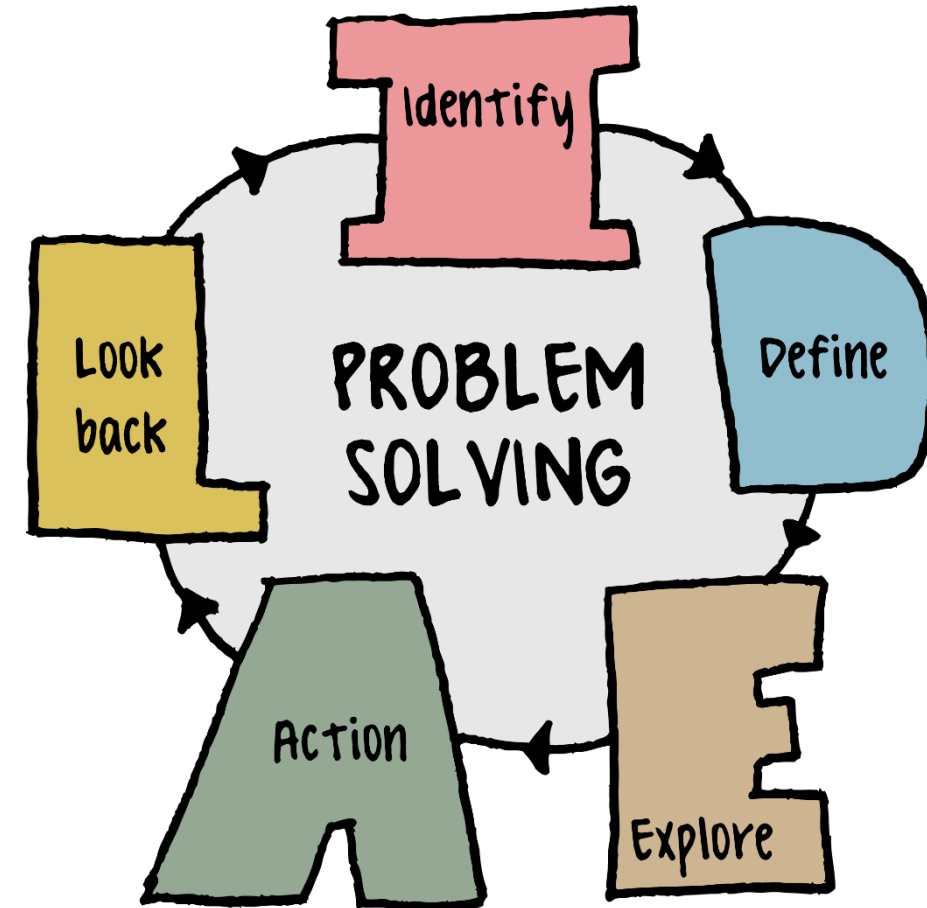
- ▶ Independence
 - ▶ Impartiality
 - ▶ Transparency
 - ▶ Integrity and professionalism
 - ▶ Accessibility, and responsiveness.
-



Roles in compliance review: Compliance review and problem-solving.

IAMs provide project- affected people a fair, effective, and efficient mechanism for securing redress for harm done, or to address risk of serious harm before it materializes.

- the parties find a mutually satisfactory solution (**problem-solving**),
- conducting an investigation about IFI compliance with its own policies (**compliance review**),
- or by a combination of the two.



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Accountability Mechanisms

- ▶ AfDB, Independent Review Mechanism (IRM)
- ▶ ADB, Accountability Mechanism (AM)
- ▶ AIIB, Project-affected People's Mechanism (PPM)
- ▶ Black Sea Trade and Development Bank, Internal Audit Department
- ▶ Caribbean Development Bank, Complaints
- ▶ DEG, Independent Complaints Mechanism
- ▶ FMO, Independent Complaints Mechanism
- ▶ EBRD, Project Complaint Mechanism (PCM)
- ▶ EIB, Complaints Mechanism (CM)
- ▶ European Ombudsman
- ▶ ADF, Environment and Social Complaint Mechanism
- ▶ GCF, Independent Redress Mechanism
- ▶ IADB, Independent Consultation and Investigation Mechanism (ICIM)
- ▶ IFC-MIGA, Compliance Advisor Ombudsman
- ▶ JBIC, Office of Examiner for Environmental Guidelines (OEEG)
- ▶ JICA, Secretariat of The Examiner for the Guidelines
- ▶ NEXI, Objection Procedures on Environmental Guidelines
- ▶ NIB, Complaints
- ▶ OPIC, Environmental and Social Independent, Complaints Mechanism (ICM)
- ▶ Proparco, Environmental and Social Independent Complaints Mechanism (ICM)
- ▶ UNDP, Social and Environmental Compliance Review and Stakeholder Response Mechanism
- ▶ WB, Inspection Panel

Human rights duty-bearers



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- ▶ States are the primary duty-bearers under international law
- ▶ However, international and regional organizations, investors and businesses should respect human rights and put due diligence processes in place through which human rights risks can be identified, managed, reported on, and remediated effectively:
- ▶ Role of the Guiding principles on Business and Human Rights
- ▶ Treaty preparation

Human rights standards?

Nine core United Nations human rights treaties

- International Convention on the Elimination of All Forms of Racial Discrimination, 1965
- International Covenant on Civil and Political Rights; 1966
- International Covenant on Economic, Social and Cultural Rights, 1966
- Convention on the Elimination of All Forms of Discrimination against Women, 1979
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
- Convention on the Rights of the Child, 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990
- International Convention for the Protection of All Persons from Enforced Disappearance 20 Dec 2006
- Convention on the Rights of Persons with Disabilities, 2006

Together with international environmental law

The International Labour Organization's core conventions.

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98)
- Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol)
- Abolition of Forced Labour Convention, 1957 (No. 105)
- Minimum Age Convention, 1973 (No. 138)
- Worst Forms of Child Labour Convention, 1999 (No. 182)
- Equal Remuneration Convention, 1951 (No. 100)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Occupational Safety and Health Convention, 1981 (No. 155)
- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)

Mandates and human rights?

EIB COMPLAINTS MECHANISM POLICY

“The concept of maladministration includes failure by the EIB Group **to comply with human rights**, with applicable law, or with the principles of good administration.”



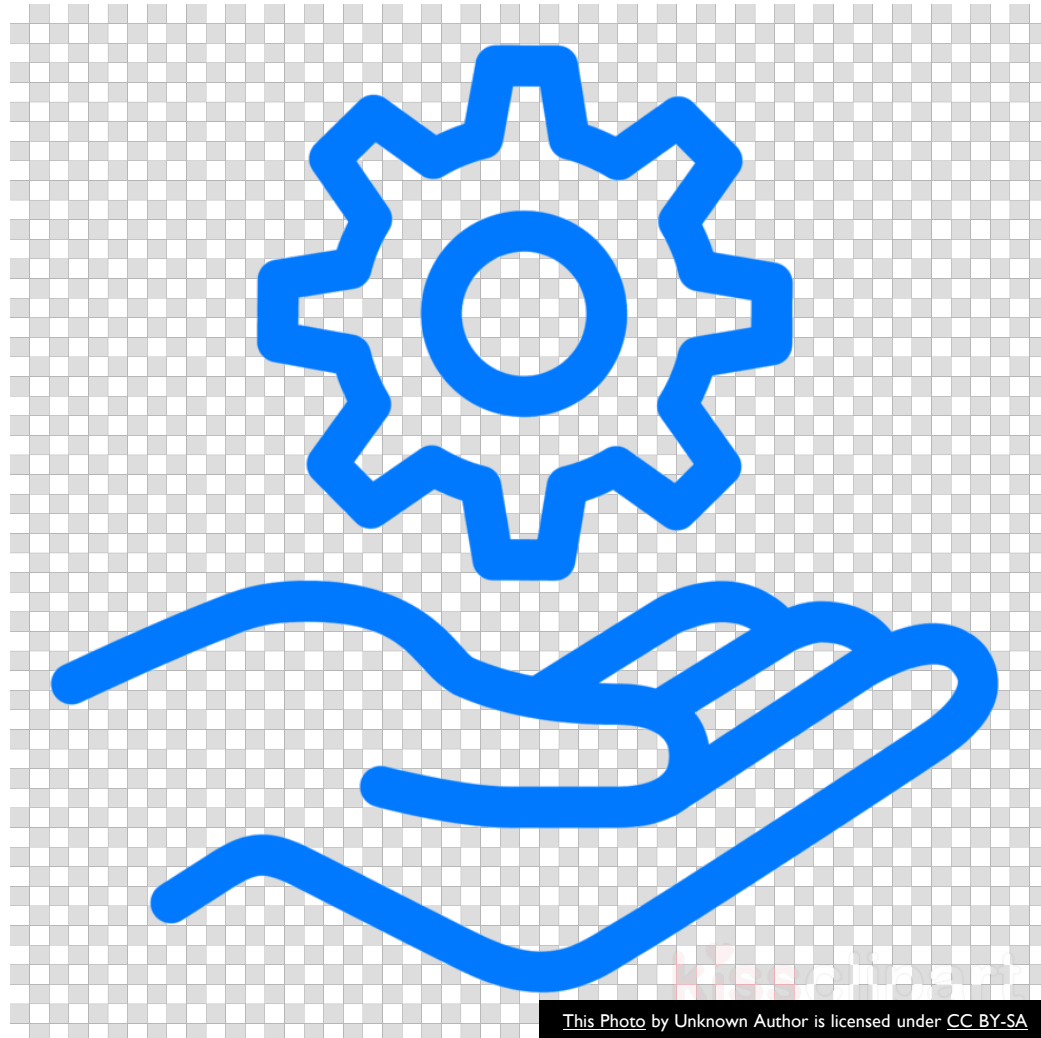
Micro-, Meso- and Macro-Level Human Rights Impacts



At the **micro-level**, projects can be associated with human rights impacts on communities, workers and the environment.

- Acquisition of or access to land,
- Rights of way and resources
- Tenure
- Relocation
- Forced eviction and
- Loss of adequate standard of living and livelihoods.
- Biodiversity loss
- Health, safety and security problems for workers and communities
- Threats to biodiversity, natural resources and the climate.
- Sexual violence, intimidation of and reprisals against human rights defenders, and violence by security forces

Meso level



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- ▶ Access to and affordability of certain **social services**, includes access to water; infrastructure services are often denied physical or economic (affordable) access to **infrastructure**. Frequent or exorbitant rate increases or denial of service due to inability to pay may violate human rights law.
- ▶ Generally, the private sector lacks incentives to enhance affordability of services, and regulatory reforms to enable private sector participation can cut off vulnerable individuals and communities from informal services.

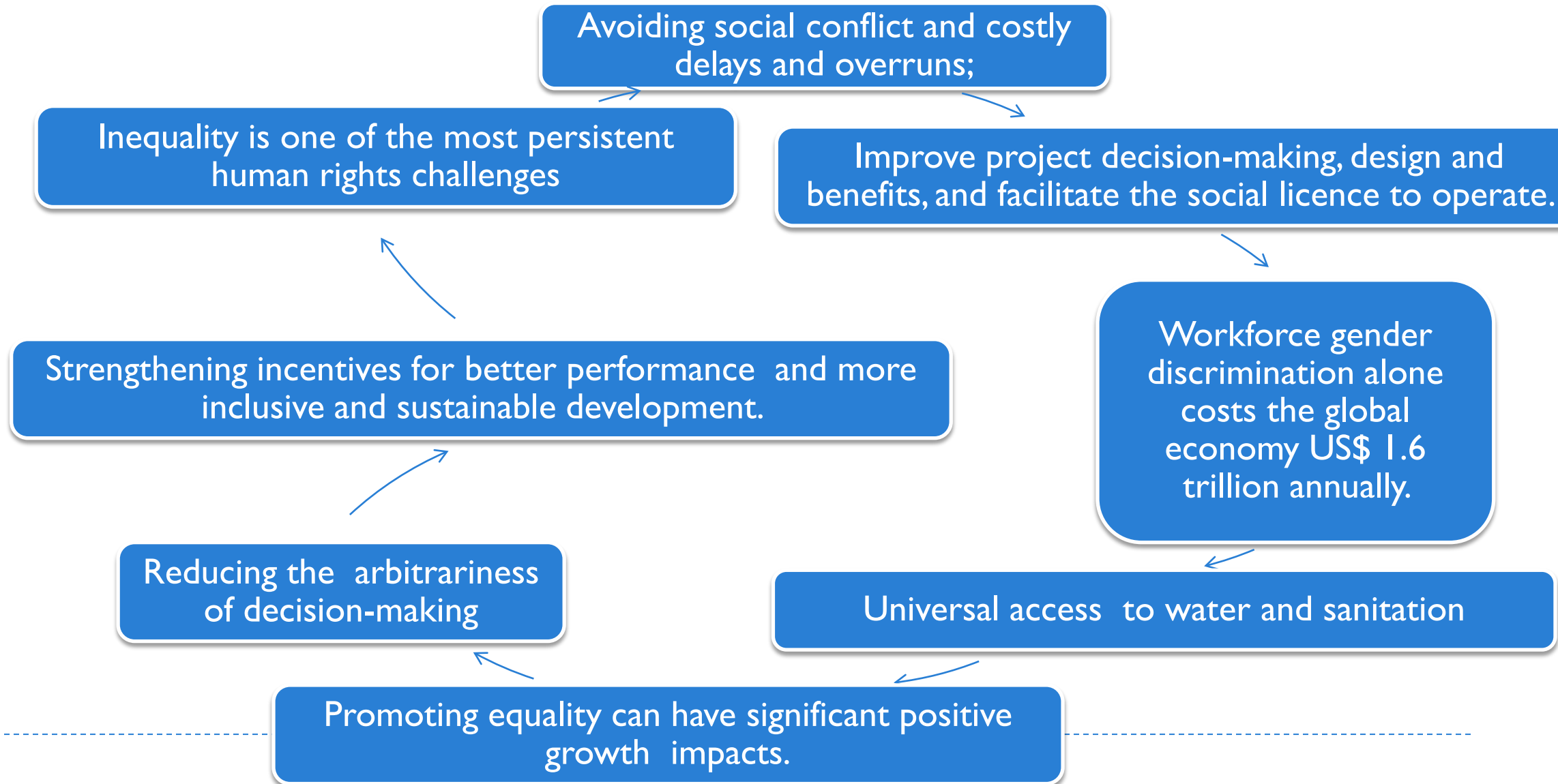
Macro level

- ▶ At the macro-level, the actions and omissions of states and other duty-bearers can affect **taxpayers and the general population** in various negative ways.
- ▶ Examples include poor design, process and planning decisions, the failure to carry out environmental and human rights impact assessments at the project, cumulative, transboundary and strategic levels, as well as **fiscal and financial** mismanagement of projects, which may waste public resources and lead to fiscal burdens, over-indebtedness, austerity and withdrawal of public services.
- ▶ Procurement decisions may also trigger significant human rights and environmental concerns in the supply chain.



A number of procedural and substantive human rights are of fundamental importance across all three levels of impact.

In addition, respecting human rights is efficient (smart economics)



European Union



Lisbon Treaty, December 2009,-the Charter of Fundamental Rights of the European Union became legally binding.

Article 41 defines the fundamental right to good administration as the right to have one's affairs handled "impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union."

The concept of good administration also includes the right of all people to be heard before a decision on any individual measure that could affect them is taken and the right to have access to their file.

The Charter recognizes the right of every person to have the European Union make good any damage it cause

Other recent events

Agenda 2030: indicators



Addis Ababa Action Agenda
“sustainable, accessible,
affordable and resilient
quality infrastructure”.

The 2015 Paris Climate Agreement includes an explicit reference to human rights obligations.

“Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, **respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity**”



Right to a remedy

- ▶ IAMs see only a very small percentage (as little as 1 to 3 per cent) of a given DFI project portfolio

- ▶ Human rights are increasingly (explicitly) being reflected in DFI safeguard policies, but the practical contributions of the international human rights framework to remedy are still poorly understood.



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Remedy is about both the processes involved in providing remedies and the outcomes of the process, including the reparations provided. Remedies play a number of roles:

- (a) redress, making victims “whole” and returning them to the status quo ante;
- (b) prevention, pre-empting future abuses; and
- (c) deterrence, discouraging others from causing harms.

Reparations to redress harms may take many forms,

including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition

New Trend

- ▶ Going to court!



US Supreme Court

Budha Jam v IFC, 27 February 2019

- ▶ The Foreign Sovereign Immunities Act.
- ▶ “Sovereign entities sometimes participate with others, through commercial conduct, in various sorts of harmful acts, including fraud, price-fixing, human trafficking, terrorism, breach of contract, torts, and property expropriation.
- ▶ Under the FSIA, a sovereign is subject to suit in any “action..... based upon,” among other things, “a commercial activity carried on in the United States by the [sovereign]; or upon an act performed in the United States in connection with a commercial activity of the [sovereign] elsewhere.”
- ▶ This case arises out of a commercial project financed by respondent, International Finance Corporation (IFC). Headquartered in Washington, D.C., IFC is an international organization that provides loans in the developing world to private corporations, at profit-generating interest rates, for projects that otherwise would not attract “sufficient private capital.”
- ▶ In 2008, IFC made a \$450 million investment in the coal-fired Tata Mundra Power Plant, located in Gujarat, India. The agreement required the borrower, Coastal Gujarat Power Ltd., to meet “IFC’s environmental and social requirements.”
- ▶ According to IFC’s ombudsman, however, “the plant’s construction and operation did not comply” with the loan.
- ▶ “The result is a “dismal picture.” The power plant has “devastated” the local environment and way of life.
- ▶ All of IFC’s decisions that contributed to these harms were made at IFC headquarters in Washington, D.C
- ▶ This Court granted certiorari, reversed and remanded. The Court clarified that the IOIA grants organizations like IFC only the restrictive immunity codified in the FSIA, and thus IFC may be sued for its commercial acts

Role of CAO

▶ 2011

Complaint filed with the IFC's accountability mechanism – the Compliance Advisor Ombudsman (CAO)

2013 Investigation, the CAO issued its Audit Report, which harshly criticized the IFC's role

The IFC responded to the report by rejecting most of the CAO's findings and ignoring others.

- ▶ 2015 In January, the CAO issued its first Monitoring Report examining the IFC's response to the Audit. It found the IFC had failed to effectively respond to any of the CAO's findings, failed to remedy the injuries to local communities, and remained out of compliance with its obligations. The CAO emphasized "the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts." Again, the IFC failed to take any action to remedy the injury.
- ▶ In April, EarthRights filed suit against IFC on behalf of the plaintiffs in federal court in Washington, D.C., where the IFC is headquartered. s also argued that the IFC had waived immunity from suit in its own Articles of ment.



European Court of Justice

ClientEarth v EIB

- ▶ Can NGOs object to EIB's lending on environmental law grounds?
- ▶ ClientEarth requested the EIB Board to review the financial decision concerning a biomass project in Galicia, Spain
- ▶ The EIB refuses, ClientEarth goes to the EU General Court
- ▶ 21 January 2021. ClientEarth wins. Appeal
- ▶ Advocate General Kokott also gives reason to ClientEarth at appeal's process
- ▶ It is the Aarhus Convention: Contracting Parties, including the EU, are obliged to give the public administrative or judicial procedures for acts and omissions of authorities concerning violations of environmental law. Procedures must be adequate, effective, fair, equitable, timely, not prohibitively expensive
- ▶ Waiting for decision of Tribunal

The Case at the Complaint Mechanism of the EIB

- ▶ Insufficient public engagement and availability of project-related information:

Outcome: No grounds.

- ▶ Insufficient availability of forest residue: The complainants challenge the availability of forest residue in terms of its characteristics and sourcing area. Outcome: The EIB-CM suggests that the EIB operational services liaise with the promoter

Future projects:

the EIB operational services develop their procedures further within one year after the closure of the case to include paying particular attention during appraisal to the fuel characteristics in biomass-related projects.

the EIB operational services use the term “average transport distance” instead of the term “radius”.

- ▶ Appropriateness of certification schemes:

Outcome: No grounds.

Public

- ▶ Negative environmental impact of the forest residue used:

Outcome: No grounds.

- ▶ Economic sustainability of the project: The complainants raise concerns about the economic sustainability of the project.

Outcome: The EIB-CM suggests that the EIB operational services clarify in the ESCS that, while one of the objectives of the regional law is to prevent forest fires, the law does not contain an exact provision requiring collection of forest residue following forest operations with the aim of preventing fires, apart from some specific cases (e.g. along highways).

Aarhus Compliance Committee

Entered into force on 30 October 2001, the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) contributes to good governance and performing such public services as environmental protection and law enforcement. It is generally acknowledged as the world's foremost international instrument that links environmental and human rights.

The Convention grants public rights, and imposes on Parties and their public authorities, obligations regarding access to environmental information, public participation in environmental decision-making and access to justice in environmental cases. It focuses on interactions between the public and public authorities, and supports the development of an open administrative culture. This contributes to governmental accountability, transparency and efficiency.



- ▶ The Convention's provisions are closely linked with article 6 (right to life), article 19 (right to information), article 14 (right to a fair trial), article 25 (right to take part in the government), and other provisions of the International Covenant on Civil and Political Rights.
- ▶ The rights under the Convention are bestowed on all natural and legal persons, regardless of citizenship, nationality or domicile. Moreover, persons exercising their rights under the Convention must not be penalized, persecuted or harassed in any way for their involvement
- ▶ The strength of the Aarhus Convention lies in its binding obligations on public authorities to ensure proper access to environmental information, public participation in decision-making procedures and effective access to justice, supported by a compliance mechanism, subsidiary bodies and a work programme to support the implementation of these obligations



Thank you

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