



SECTION IV

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WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?

Using Financial Institutions'
Mechanisms and Engaging
with Shareholders



A soldier stands by a bulk liquid carrier at a checkpoint in the outskirts of Puerto Gaitan, Meta department, eastern Colombia, on October 8, 2011. Colombia. 2011 © AFP PHOTO/Eitan Abramovich

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As members of Multilateral Development Banks, which are public banks, states are bound by their human rights obligations and should therefore make sure that the operations of these banks comply with human rights standards. It can also be argued that International Financial Institutions (IFIs), which bring together public and private banks, have – as “organs of society” – human rights responsibilities as per the Universal Declaration of Human Rights. Victims of corporate abuses can, under certain conditions, turn to the organisations which financially support TNCs involved in corporate-related abuses. Accountability mechanisms are “offices in these international financial institution that have been given the authority to try to resolve a dispute or determine compliance with the institution’s policy. Accountability mechanisms may resolve the dispute formally or informally, and may use a variety of tools to resolve the dispute, including investigations or formal dispute resolution proceedings”.¹ These accountability mechanisms are increasingly used by affected communities. The following section will specifically look at:

- the Multilateral Development Banks, often criticised for funding projects which have negative impacts on human rights (World Bank, European Investment Bank and the European Bank for Reconstruction and Development, Inter-American Development Bank, African Development Bank and Asian Development Bank)². These institutions have set up internal accountability mechanisms to address disputes and compliance with their own policies.
- Most Multilateral Development Banks also have an office or department which investigates allegations of fraud and corruption in activities financed by the Bank concerned (such as the Inter-American Development Bank’s Office of Institutional Integrity). Although this guide will not be looking into this issue, it could represent an interesting avenue for victims, as corruption and human rights violations

¹ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, available at www.accountabilitycounsel.org

² There are various others regional banks that are not covered by this guide.

are too often linked, including in cases of human rights violations committed by multinational corporations.

- the Export Credit Agencies (ECAs) which are private or quasi-governmental institutions that act as intermediaries between national governments and exporters to issue export financing. Many ECAs also feature accountability mechanisms where people affected by ECA-funded projects can file complaints.
- the private banks, of which some are bound by the Equator Principles.
- the shareholders of companies that can act as powerful actors to raise human rights or environmental concerns.



➤ Children working on shipbreaking yards in Bangladesh.

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PART I

International Financial Institutions

For many years, international financial institutions did not consider human rights norms as part of their work. It is only recently that they have started to take human rights standards into account. Yet, none of the financial institutions have adopted a comprehensive human rights policy with adequate standards of implementation. Most multilateral development banks have adopted social and environmental policies, which most often do not use human rights language. **The different policies and standards applied by these institutions remain uneven, vague and widely criticised. Nevertheless, where an institution's social and environmental policies correspond with human rights law, human rights concerns can be raised before complaints mechanisms that banks have put in place to attempt to resolve disputes and/or to assess whether a project is compliant with the institution's policies.** Most accountability mechanisms have two functions, a 'dispute resolution' or 'problem solving' function and a 'compliance' function. These mechanisms may entail on-site visits by inspectors and generate reports, including recommendations for corrective action plans.

Although most of these mechanisms remain criticised for various reasons (lack of staff with required expertise, length of processes, lack of enforcement of recommendations), they can be used by civil society as powerful lobbying tools. Moreover, these mechanisms' problem-solving function may enable communities to participate in negotiating a settlement agreement to address their concerns.

The review, by these mechanisms, of a project supported by a financial institution may lead to adjustments in the project to better benefit communities, or to better compensation packages than those initially offered by corporations. However, these mechanisms **do not directly provide reparation to victims**, and are often incapable of providing adequate remedy for victims of serious human rights violations. They can also lead to institutions' withdrawals from projects which can in turn paralyse a company's activities.

The **list of the projects financially-supported** by these institutions is normally **publicly made available** on their respective websites. As it can prove difficult to find which institution may be financing a project due to a lack of accessible information and increased channelling through financial intermediaries, it is recommended to contact specialised NGOs to seek assistance in researching which institutions may be financially supporting the project.³

³ See list of additional resources at the end of this section.

CHAPTER I

The World Bank Group

A. World Bank Inspection Panel

B. Compliance Advisor Ombudsman (CAO)

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The World Bank Group consists of five closely associated institutions. All five are governed by member countries, and each institution plays a distinct role in the group's stated mission, i.e. to combat poverty and elevate living standards for people in the developing world. The term 'World Bank Group' encompasses all five of the following institutions:

- the International Bank for Reconstruction and Development (IBRD), which focuses on middle income and credit-worthy poor countries;
- the International Development Association (IDA), which focuses on the poorest countries in the world;
- the International Finance Corporation (IFC), which supports private sector investments in developing countries;
- the Multilateral Investment Guarantee Agency (MIGA), which provides insurance to private corporations for investments in developing countries, and
- the International Centre for Settlement of Investment Disputes (ICSID), which provides for a neutral forum to resolve international investment disputes between its member states and the nationals of other member states

The World Bank Inspection Panel hears complaints regarding projects financed by the IBRD and IDA, which are often collectively referred to as the "World Bank." The Compliance Advisor Ombudsman (CAO) hears complaints regarding projects supported by the IFC or MIGA. **The Inspection panel and the CAO complaints processes are discussed below.**

A. World Bank Inspection Panel

The World Bank (WB) is an international development bank that provides low-interest loans, interest-free credits and grants to developing countries for education, health, infrastructure, communications, and many other purposes. The World Bank specifically refers to two of the five World Bank Group development institutions: the IBRD (International Bank for Reconstruction and Development) with 188 member states, and the IDA (International Development Association), with 173 member states.

The World Bank Inspection Panel, created in 1993, is composed of three members appointed by the Board of Executive Directors of the World Bank for a non-renewable period of five years. The Panel is a non-judicial “impartial fact-finding body, independent from the World Bank management and staff”⁴. Panel members cannot have worked for the Bank in any capacity for the two years prior to being appointed to the Panel, and cannot go back to working for the Bank again after their term at the Panel.⁵

② What are the issues that can be dealt with?

The World Bank Inspection Panel was created to address the concerns of people who believe they have been harmed, or are likely to be harmed, by the projects supported by the WB. The Panel assesses allegations of harm to people or the environment and reviews whether the Bank followed its operational policies and procedures during the design, preparation and implementation phases of the various projects.⁶ The Panel handles on average 3-4 complaints a year, and in 2014 it received 8 complaints. **The Panel does not prescribe remedies.**

From its establishment through to June 2015, the Panel has been asked to consider claims that have been framed explicitly in human rights terms in 14 out of 96 total Panel cases filed.⁷ Nevertheless, in its consideration of claims that directly or indirectly raise human rights concerns, it has identified **four circumstances in which Bank policies and procedures may require the Bank to take human rights issues into account:**⁸

- The Bank must ensure that its projects do **not contravene the borrower’s international human rights commitments**;
- The Bank must determine whether human rights issues may impede compliance with Bank Policies as part of its **project due-diligence**;
- The Bank must interpret the requirements of the **Indigenous Peoples policy** in accordance with the policy’s human rights objective; and
- The Bank must consider **human rights protections enshrined in national constitutions or other sources of domestic law.**

4 The Inspection Panel, *About Us*, The World Bank, www.worldbank.org. For more information see See The Panel Resolution and Mandate, The Inspection Panel, *About Us*, The World Bank, www.worldbank.org.

5 In early 2014, Panel members proposed to change these rules, which was seen as a risk for the Panel’s independence by NGOs and former Panel members. For more information, see Accountability Counsel, 2014 Inspection Panel Secretariat Crisis, www.accountabilitycounsel.org.

6 The Inspection Panel, *About Us*, The World Bank, *op. cited*

7 The Inspection Panel, *Panel Cases*, worldbank.org http://ewebapps.worldbank.org/apps/ip/Pages/Panel_Cases.aspx

8 See Steve Herz and Anne Perreault, *Bringing Human Rights Claims to the World Bank Inspection Panel*, CIEL, BIC and International Accountability Project, October 2009, www.bankinformationcenter.org.

In practice however, the Panel has not typically considered claims that were framed in terms of domestic or international law violations unless they were also framed as violations of Bank policy. When claimants seek to raise human rights issues, they should be careful to show how alleged violations of their human rights were caused by the Bank's failure to adhere to its own policies.

The WB has about 50 operational policies, including the following⁹:

- *Environmental assessment*: this policy evaluates the potential environmental risks and impacts of a project and examines alternatives as well as ways of improving the project selection, siting, planning, design, and implementation. It also includes the process of mitigation and management of adverse environmental impacts throughout the project's implementation.
- *Gender development*: this policy covers the gender dimensions of development within and across sectors in the countries in which the WB has an active assistance program. Here, the borrower's record with respect to gender and minority rights should be assessed.
- *Indigenous peoples*: this covers special considerations with regards to land and natural resources, commercial development of natural and cultural resources, as well as the physical relocation of indigenous peoples. The policy includes a process of free, prior, and informed consultation with the affected indigenous peoples' communities at each stage of the project and the preparation of an "Indigenous Peoples' Plan" or "Indigenous Peoples' Planning Framework". This policy requires the borrower to undertake a social assessment to evaluate the project's potential positive and adverse effects on indigenous peoples, and to examine project alternatives where adverse effects may be significant.
- *Involuntary resettlement*: this policy covers direct economic and social impacts that result from the Bank-assisted investment projects in order to avoid involuntary resettlements whenever it is possible. The policy provides for a resettlement plan or resettlement policy framework that includes information, consultation and compensation. This policy requires that particular attention be paid to the needs of vulnerable groups among those displaced, including women and ethnic minorities. Complaints can therefore address situations where free, prior and informed consultation has not been conducted prior to resettlement, or when information, consultation or compensation has been insufficient.

In sum, various rights may be affected in projects financed by the World Bank. These may range from the right to food (activities that pollute land or destroy it, preventing its use for production of food), the right to health (transportation of chemicals), the right to life (the use of security personnel, environmental damages) to the right

⁹ The World Bank, Operational Manual, *Operational Policies (Ops)* <http://web.worldbank.org/>.

to property (indigenous peoples' land rights, free, prior and informed consent), etc.¹⁰

World Bank's safeguards under review: dangerous risk of roll-back on environmental and social protections

In July 2012, the World Bank started a review process of its operational policies, also known as the "WB's safeguard policy requirements" or "WB safeguards", with the aim of updating and strengthening its environmental and social policies¹¹. The review focuses on the WB's eight environmental and social safeguard policies¹², as well as the Policy on Piloting the Use of Borrower Systems for Environmental and Social Safeguards ("Use of Country Systems").

The review process will be undertaken in three Phases, which each include consultations with a range of stakeholders and feature meetings, focus groups and submissions¹³. During Phase one, consultations were held on an "Approach Paper" focusing on the approach the new safeguards should take, and which led to the drafting of a first draft Environmental and Social Framework (ESF)¹⁴. This document was open to consultations during Phase two, which took place between July 2014 and March 2015, and which saw wide criticism emerging from World Bank Vice Presidents, civil society organisations (CSOs), UN experts and local communities, both on the content of the first draft safeguards, as well as on the consultation process¹⁵. The **second draft ESF**¹⁶ was published on 4 August 2015, thereby opening the third round of consultations, which will close on March 15, 2016. The second draft has received immediate criticism from civil society, once again with regard to content¹⁷ and to the consultation process¹⁸.

While acknowledging that the new WB Safeguards contain some improvements on language, civil society groups worldwide strongly criticize the new policy for representing a significant step backwards in terms of protection for communities and the environment, and a serious weakening of human rights standards in the safeguards, in particular in relation to Indigenous Peoples, resettlement, discrimination, and labour rights. The new draft overly relies on borrower's national

¹⁰ Steve Herz and Anne Perreault, *Op. cit.* www.bicusa.org/wp-content/uploads/2013/01/InspectionPanel_HumanRights.pdf

¹¹ For information on the review process, consultations and to access drafts, see *Review and Update of the World Bank Safeguard Policies*, <http://consultations.worldbank.org>. Bank Information Center, *World Bank Safeguards Review*, www.bankinformationcenter.org/safeguards/.

¹² The WB's eight environmental and social safeguard policies under review are: OP 4.01-Environmental Assessment; OP 4.04 -Natural Habitats; OP 4.09 - Pest Management; OP 4.10 - Indigenous Peoples; OP 4.11- Physical Cultural Resources; OP 4.12- Involuntary Resettlement; OP 4.36 -Forests; OP 4.37 - Safety of Dams.

¹³ See *Review and Update of the World Bank Safeguard Policies*, *po.cit.*

¹⁴ Environmental and Social Framework, World Bank, SFirst Draft for consultation, <http://consultations.worldbank.org>.

¹⁵ See *Submissions Hub: World Bank Safeguards Review*, Bank Information Centre, www.bankinformation-center.org.

¹⁶ Environmental and Social Framework, World Bank, Second Draft for consultation, <http://consultations.worldbank.org>.

¹⁷ A repository of Reactions to the Second Draft is available at www.bankinformationcenter.org/safeguards/.

¹⁸ *World Bank Safeguards Review –Phase 3 Consultations*, Joint CSO letter, 22 May 2015, www.bankinformationcenter.org.

systems and would de facto eliminate the bank's mandatory due diligence requirements to ensure that borrower environmental and social protections are at least as strong or equivalent to those of the bank: in other words, it removes mandatory timing and procedural requirements for borrower compliance.¹⁹ Moreover, many CSOs are concerned about the precedent that the World Bank's new safeguard policies could set, given that these highly influence standards for many of the world's financial institutions.²⁰ They have been described as a "shocking attempt to eviscerate protection from the poor". Interestingly, in January 2015, the US Congress passed the 2015 Omnibus Appropriations Act which includes a provision requiring the U.S. Treasury Department to veto any WB policy that is less protective of human rights and the environment than the current operational policies. With this Act, the United States, the World Bank's largest contributor, is required to vote against any new loans or grants if the World Bank weakens its safeguard policies.²¹

🕒 Who can file a complaint?²²

Complaints to the World Bank Inspection Panel are formally known as a "Request for Inspection", which can be submitted by "any group of two or more people in the country where the Bank financed project is located who believe that, as a result of the Bank's violation of its policies and procedures, their rights or interests have been, or are likely to be adversely affected in a direct and material way"²³. Organisations, associations, societies or other groups of individuals can file requests, as long as they meet this directly affected standards. However, one individual alone can not. Alternatively, the following entities may file a request on behalf of affected people:

- A duly appointed local representative acting on explicit instructions as the agent of adversely affected people;
- A foreign representative acting as the agent of adversely affected people, in exceptional cases;²⁴
- An Executive Director of the Bank in special cases of serious alleged violations of the Bank's policies and procedures; and
- the Executive Directors acting as a Board.²⁵

Requesters may ask for confidentiality in the handling of the Request.

¹⁹ BIC, *Dangerous Rollback on Environmental and Social Protection*, www.bankinformationcenter.org.

See also: "Coalition for Human Rights in Development, <http://rightsindevelopment.org>

²⁰ Bank on Human Rights, *Get Informed*, <http://bankonhumanrights.org/get-informed/>.

²¹ Inclusive Development International, *US Congress opposes World Bank plan to weaken environmental and social protections*, www.inclusivedevelopment.net. For more information on the US position see: *Review and Update of the World Bank's Safeguards Policies Committee on Development Effectiveness Discussion of the Proposed Second Draft of the Environmental and Social Framework World Bank Safeguards Policies*, <https://consultations.worldbank.org>

²² The Inspection Panel at the World Bank, *Operating Procedures*, April 2014, www.worldbank.org.

²³ How To File A Request For Inspection To The World Bank Inspection Panel, General Guidelines, <http://ewebapps.worldbank.org>.

²⁴ See *The Inspection Panel at the World Bank, Operating Procedures*, April 2014, *op. cited*

²⁵ How To File A Request For Inspection To The World Bank Inspection Panel, General Guidelines, *op cited*

② Under what conditions?

- The complainant must live in the territory of the borrowing state and in the area affected by the project.²⁶
- An affected party must believe that:
 - they are suffering or may suffer harm from a WB-funded project;
 - the WB **may have violated its operational policies or procedures** with respect to the design, appraisal, and/or implementation of the project;
 - the violation is causing the harm.²⁷
- The complaint can be submitted during the design, appraisal or implementation of a project, and must be submitted **before** the project's funding is closed and **before 95 percent** of the funding has been disbursed. A complaint may be submitted before the WB has approved financing for the project or program.²⁸
- The project must be funded at least in part by the International Development Association (IDA) or the International Bank for Reconstruction and Development (IBRD).²⁹
- **Before speaking to the Inspection panel**, the complainant needs to raise his/her concerns with WB staff;
- If Management fails to demonstrate that it is taking adequate steps to follow policies and procedures, the complainant may submit a request for inspection to the Inspection Panel directly;
- The complaint can be submitted in any language. For working purposes, the Panel will translate the request into English.
- The request should be dated and signed by the Requesters or their representative, and be sent with any supporting documentation, via post or email.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- name, contact address, and telephone number of the complainants or representative(s);
- name of the area the complainants live in;
- name and/or brief description of the project or program;
- location/country of the project or program;
- description of the damage or harm the complainants are suffering or likely to suffer from the project or program;
- list (if known) of the WB's operational policies believed not to be observed; and
- explanation as to the unsatisfactory response given by the World Bank management as a result of the attempts made to bring the matter to its attention³⁰.

²⁶ The World Bank, *Accountability at the World Bank: The Inspection Panel 10 Years On*, 2003, Report No. 26758, p.19.

²⁷ *Ibid*, p. 25.

²⁸ *Ibid*, p. 24.

²⁹ *Ibid.*, p. 7.

³⁰ Accountability at the World Bank. The Inspection Panel, 15 years, www.worldbank.org, p. 23

The request must be sent to³¹:

The Inspection Panel
1818 H Street, NW
Mail Stop: MC10-1007
Washington, DC 20433 USA
Phone No. 202 458 5200
Fax No. 202 522 0916
E-mail address: ipanel@worldbank.org

The suggested format for a request for inspection can be found at www.worldbank.org

Process and Outcome

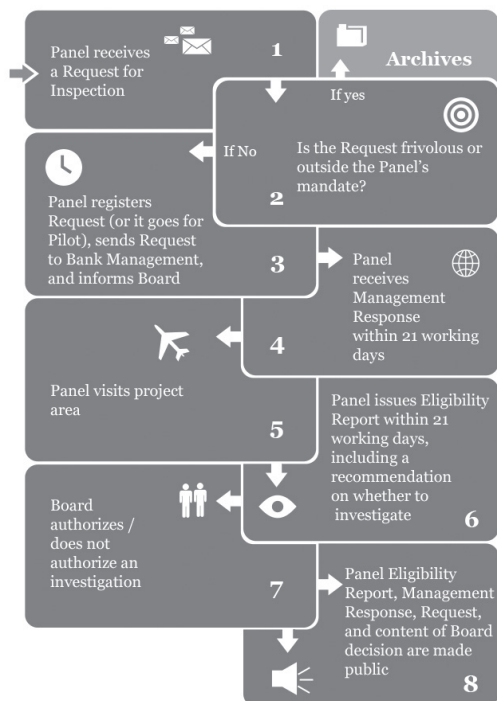
- When the Panel receives a request, it first checks whether it is frivolous or outside its mandate. If it is the case, a notice of non-registration will be sent, but if the request is admissible, it is registered by the Panel and sent to the World Bank's management. The latter has 21 days to respond. Under the Inspection Panel's new Pilot Program, the Panel can delay a decision on registration and allow bank management an opportunity to resolve the dispute before the Panel takes any further action.³² This new policy has generated a lot of criticism from civil society.³³
- The Panel may visit the project area, or make an eligibility determination based on a desk review. It then decides whether to recommend an investigation to the World Bank Executive Board. The Panel may also postpone the decision on whether to recommend an investigation in order to give management and complainants another chance to resolve the issues first.
- If the Executive Board approves an investigation, the Panel reviews relevant documents, interviews WB staff, and visits the project site.
- An investigation may take a few months, or more in complex cases.
- The Panel sends a written report of its findings to the Executive Board and the President.
- Within six weeks, the WB Management must respond and indicate how it plans to address the Panel's findings, usually in the form of an action plan, which it must develop in consultation with affected people.
- These decisions are then made available to complainants and the public in the form of an investigation report published on the World Bank's website.

³¹ A sample form for a request for inspection is available at: www.worldbank.org.

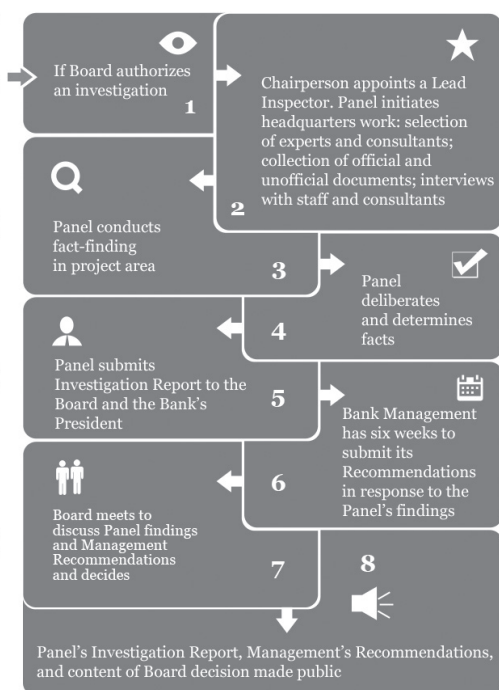
³² *The Inspection Panel at the World Bank, Operating Procedures*, April 2014, p. 24, *op. cited*

³³ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p.9, *op. cited*

1- Inspection Panel Eligibility Phase



2- Inspection Panel Investigation Phase³⁴



The Inspection Panel in action

➔ Cambodia: Boeung Kak Lake evictions³⁵

Until recently, the Boeung Kak settlement consisted of nine villages surrounding the iconic lake in central Phnom Penh, where some 4000 families resided. In February 2007, the Municipality of Phnom Penh granted a 99-year lease to the private developer Shukaku Inc. over a 133-hectare area covering the lake and the nine surrounding villages, illegally stripping residents of their land rights. In September 2009, IDI associates assisted community representatives to prepare a complaint to the World Bank Inspection Panel, alleging that the World Bank breached its operational policies by failing to adequately supervise the Land Management and Administration Project (LMAP). This World Bank financed land titling project was established with the stated aim of improving security of tenure for the poor

³⁴ How to File a Request, The Inspection Panel, The World Bank, <http://ewebapps.worldbank.org/apps/ip/Pages/Processing-a-Request.aspx> (FIDH was granted permission to use the graphic).

³⁵ Case extract from Inclusive Development International, Cambodia: Boeung Kak Lake evictions, www.inclusivedevelopment.net/bkl/.

and reducing land conflicts in Cambodia by systematically registering land and issuing titles across the country. However, land-grabbing and forced evictions have escalated significantly over the last ten years, while many vulnerable households have been arbitrarily excluded from the titling system. This exclusion has denied these households protection against land-grabbing and adequate compensation for their expropriated land, often thrusting them into conditions of extreme poverty.

Despite many households having strong evidence to prove their legal rights to the land, Boeung Kak residents were excluded from the titling system when land registration was carried out in their neighborhood in 2006. Shortly thereafter, the Cambodian Government granted the Boeung Kak lease to Shukaku, and the 4000 families residing in the area were suddenly classified as illegal squatters on State-owned land. In addition to being unfairly denied title en masse, residents were also denied the protection of the LMAP Resettlement Policy Framework (RPF), which established a fair process for resettlement and compensation of people found to be residing on State land, in accordance with World Bank social safeguards.

The Inspection Panel found in favor of the Boeung Kak community's claim that non-compliance with Bank safeguard policies in the design, implementation and supervision of LMAP contributed to the harms that they had suffered. Accordingly, Bank Management made a number of commitments to attempt to address harms suffered. Specifically, it committed to "working with the Government and Development Partners towards ensuring that the communities who filed the Request will be supported in a way consistent with the Resettlement Policy Framework." Further, Management pledged to "continue to pursue actions so that people can benefit from a set of protection measures in line with what they would have received under the RPF,"³⁶ including the possibility of using other World Bank credits or trust fund mechanisms.

The Cambodian government, however, showed no willingness to cooperate with the Bank on these remedial actions. In turn, Bank Management informed the Government that it would stop providing loans to Cambodia and would not resume lending until there was a satisfactory resolution of the Boeung Kak case.

Within a week after this lending freeze became public knowledge, on August 17th, the Cambodian government issued a sub-decree granting title to the remaining 800 families over 12.44 hectares of residential land in the Boeung Kak area. By the end of December 2011, more than 500 families had received titles.

Despite this considerable positive development, the case is by no means closed. At least 90 families were excluded from the land concession, and on September 16th, eight of the excluded families were violently evicted. The other excluded families live under a daily threat of being forcibly evicted.

³⁶ *Id.* 35

FIDH – through the Observatory for the Protection of Human Rights Defenders – is also mobilised to protect members of the Boeung Kak community targeted for their activities in defense of human rights.³⁷

B. Compliance Advisor Ombudsman (CAO)

The Office of the Compliance Advisor Ombudsman (CAO) is the independent recourse mechanism for environmental and social concerns **regarding the private sectors activities of the World Bank Group**.³⁸

It relates to the:

- International Finance Corporation (IFC);³⁹ and
- The Multilateral Investment Guarantee Agency (MIGA).⁴⁰

The CAO has three functions:⁴¹

- **Dispute resolution** with project-affected communities and companies to address environmental and social concerns.
- **Compliance** investigations of the environmental and social performance of IFC/ MIGA.
- Independent **advice** to the World Bank Group president and IFC/MIGA senior management on systemic environmental and social issues.

② What are the issues that can be dealt with?

Regarding the social and environmental impact of the projects they support, IFC and MIGA apply their Performance Standards (PS) which cover the following areas:

- Assessment and management of social and environmental risks and impacts
- Labour and working conditions
- Resource efficiency and pollution prevention
- Community, health, safety and security
- Land acquisition and involuntary resettlement
- Biodiversity conservation and sustainable management of living natural resources
- Indigenous peoples
- Cultural heritage

³⁷ See notably Interview of Yorm Bopha at: FIDH, *We Are not Afraid*, <https://wearenotafraid.org/en/>.

³⁸ Compliance Advisor Ombudsman, www.cao-ombudsman.org/ All Compliance Advisor Ombudsman cases can be found at www.cao-ombudsman.org.

³⁹ The IFC provides investments and advisory services to support private sector investment in developing countries. See International Finance Corporation, *About IFC*, World Bank Group, www.ifc.org/about.

⁴⁰ The MIGA provides advisory services and political risk insurance (guarantees) to protect private investors against non-commercial risks, such as war, expropriation, and currency inconvertibility. See Multilateral Investment Guarantee Agency, The World Bank Group, www.miga.org/Pages/Home.aspx

⁴¹ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.4-5, www.cao-ombudsman.org.

Revision of IFC Sustainability framework

The IFC Board of Directors approved the updated sustainability framework in May 2011, culminating a two-and-a-half year review and a 18-month consultation process. The new policies and standards came into effect on January 1st 2012. The main objectives of the new framework are to strengthen IFC commitment to critical issues such as climate change, business and human rights, supply-chain management and transparency.

The 2012 PS include measures to enhance energy, water efficiency and target greenhouse-gas reduction. The framework advocates for more transparency and also recognizes the responsibility of the private sector to identify adverse risks and impacts through **environmental and social due diligence** and to provide effective **grievances mechanisms**. Updates also address human trafficking, forced evictions (even if the PS does not specify that evictions are forbidden or that private sector must be carried out also in accordance with international human rights standards) and communities access to cultural heritage. The IFC has adopted the principle of **“Free, prior and Informed consent” introduced by the 2007 UN Declaration on the rights of indigenous peoples**, but only in certain cases: where activities have impacts on lands and natural resources subject to traditional ownership or under customary use, in cases of relocation of indigenous peoples from lands and natural resources subject to traditional ownership or under customary use and where a project may significantly impact on critical cultural heritage.

In 2011, the IFC recognised the responsibility of business actors to respect human rights, and stated that it would be guided by the principles of the International Bill of Human Rights and of the 8 core ILO Conventions. More specifically, it considered that in “limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business”.⁴²

Civil society had called for stronger human rights language in the policies, including engagement by the IFC not to support activities that could lead to or contribute to human rights abuses and a requirement that IFC clients should carry out human rights due diligence.

Some improvements include requirements regarding the disclosure of principal contracts for extractive projects, greater transparency and communication at the project-level concerning the environment and social impacts and development

⁴² See notably Environmental Finance, *NGOs Welcome Reforms to IFC Sustainability Policies*, 11 August 2011, www.environmental-finance.com.

outcomes of projects funded by the bank⁴³ and the requirement to obtain “free, prior and informed consent” of indigenous peoples.

Although the new PS disclose significant improvements with regard to rights of indigenous peoples, the UN Special Rapporteur on this question⁴⁴ highlighted some of the limitations that can still be found in the final version and recommended:

- The establishment of a consultation model for all projects affecting local communities;
- The prohibition of a project if the free, prior and informed consent is not obtained;
- The establishment by states of mechanisms to financially and technically support affected communities with a view to balance negotiation powers between the latter and IFC clients.

② Who can file a complaint?

Any individual or group of individuals directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project can file a complaint.

A complaint may be lodged by an organisation or individual representing those affected, if they provide explicit evidence of authority to present the complaint on their behalf.⁴⁵

② Under what conditions?

- The complaint may not be anonymous but the complainant can ask for confidentiality.⁴⁶
- The complaints may relate to any aspect of the planning, implementation, or social or environmental impacts of IFC/MIGA projects.
- The complaint may be submitted in any language.
- The complaint must be submitted to the office of the CAO in writing.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:⁴⁷

- the complainant’s name, address and contact information or the identity of those on whose behalf the complaint is being made;
- information on whether or not the complainant wishes its identity or any information communicated as part of the complaint be kept confidential (stating reasons);

⁴³ James Anaya, UN Special Rapporteur on the rights of indigenous peoples, Memorandum, *Draft IFC performance standards*, March 2, 2011.

⁴⁴ *Ibid.*

⁴⁵ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.10, *op. cited*

⁴⁶ *Ibid.*

⁴⁷ Compliance Advisor Ombudsman, *CAO Operational Guidelines*, 2013, p.12, *op. cited*

- the identity and nature of the project;
- a statement of the way in which the complainant believes it has been, or is likely to be, affected
- by social or environmental impacts of the project;
- a statement of which performance standards are alleged to have been violated.

Complaints should be submitted by email, fax, and mail/post or delivered to:

Office of the Compliance Advisor/Ombudsman (CAO)

2121 Pennsylvania Avenue, NW

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➡ Process and Outcome⁴⁸

Within five days after submission of the complaint, the CAO will acknowledge its receipt. The CAO will then determine whether the complaint is receivable and will inform the complainant of either its acceptance or rejection within 15 days. The CAO will then conduct an assessment of the complaint for up to 120 days, which may include:

- a visit to the project site
- a review of IFC/MIGA files
- meetings with the complainants and other project stakeholders.

At the end of the assessment, the CAO issues an Assessment Report. Such assessments should not entail judgements on the merits of the case, but rather are an opportunity for the CAO to learn more about the issues, engage with the parties, and determine which process the parties seek to initiate.

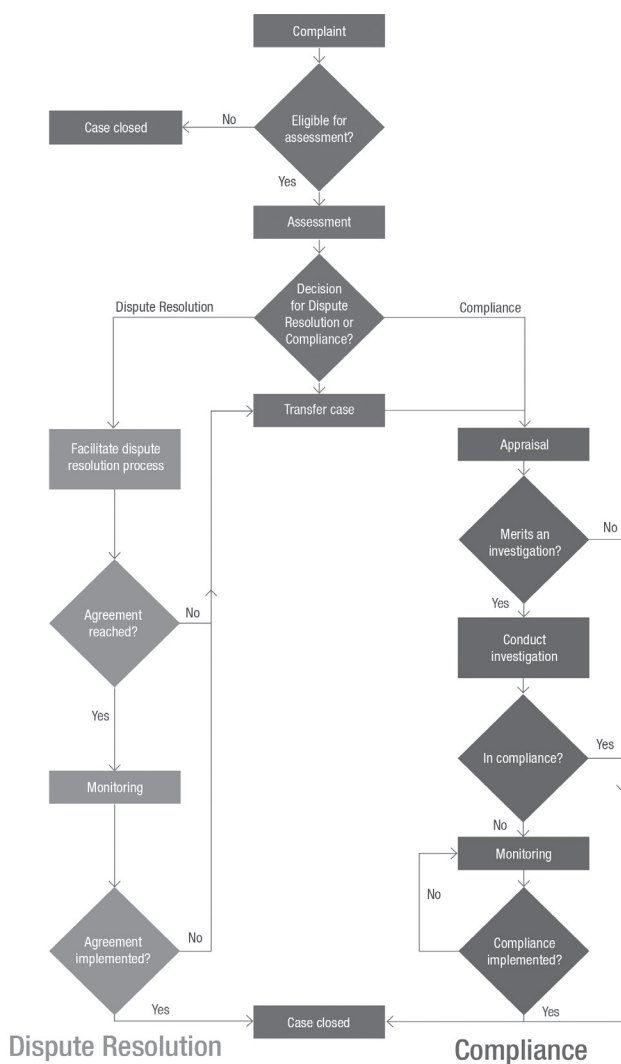
The complaint may first go through the **Dispute Resolution** process, if the CAO sees an opportunity to reach a solution through mediation, which may involve hiring a professional mediator, hire experts to assist with fact-finding or use other techniques to address the conflict.

If Dispute Resolution is not possible, or if at any point either party no longer wishes to be a part of the process, the complaint is transferred to the **Compliance Function**. The CAO decides whether a case deserves investigation in 45 days during the Appraisal phase, and then conducts a Compliance Investigation which may involve review of documents, interviews and site visits. In cases where the CAO's investigation shows that the IFC or MIGA is not in compliance with their

⁴⁸ Compliance Advisor Ombudsman, CAO Operational Guidelines, 2013, p.12-15, *op. cited*.

rules, the CAO will keep the case open to monitor IFC's actions until compliance has been achieved.⁴⁹

CAO process for handling complaints⁵⁰



⁴⁹ *Compliance Advisor Ombudsman Brochure*, SOMO and Accountability Counsel, www.accountability-counsel.org

⁵⁰ Compliance Advisor Ombudsman, CAO Operational Guidelines, 2013, www.cao-ombudsman.org (FIDH was granted permission to use the graphic)

The CAO in action

As of 2015, the CAO had accepted 151 complaints and requests for audits spanning 42 countries since its inception in 1999.⁵¹

➔ **Palm oil production, Wilmar Group, Indonesia**⁵²

Between 2003 and 2008, the IFC made several investments in the Wilmar Group, a multinational agri-business company head-quartered in Singapore.

In July 2007, NGOs, smallholders and Indigenous peoples' organisations of Indonesia (under the lead of Forest Peoples Programme, Sawit Watch and Serikat Petani Kelapa Sawit) filed a complaint with the CAO alleging that the Wilmar Group's activities in Indonesia violated a number of IFC standards and requirements.

The complainants raised concerns in particular about the analysis of social and environmental risks and impacts that were examined in a social and environmental assessment which looked at the actions related to provisions given for land acquisition and involuntary resettlement, for biodiversity conservation and sustainable natural resource management, and for Indigenous peoples and cultural heritage.

The CAO concluded that IFC did not meet the requirements of its own Performance Standards for its assessment of the Wilmar trade facility investment and that "the adoption of a narrow interpretation of the investment impacts – in full knowledge of the broader implications – is inconsistent with IFC's asserted role, mandate of reducing poverty and improving lives, and commitment to sustainable development".⁵³

This case clearly relates to indigenous peoples' rights as well as the right to be protected against forced evictions.

"The IFC/World Bank President, Robert Zoellig has then agreed to suspend IFC funding of the oil palm sector pending the development of a revised strategy for dealing with the troubled sector.⁵⁴" Furthermore an in-depth six month review of how the IFC will engage in the palm oil sector in the future was supposed to be implemented through open and extensive consultations. The Wilmar Group's social and environmental procedures were to be analysed and assessed.⁵⁵

⁵¹ Compliance Advisor Ombudsman, Annual Report 2015, www.cao-ombudsman.org

⁵² CAO, Audit of IFC, C-I-R6-Y08-F096, Compliance Advisor Ombudsman, 19 June 2009, www.cao-ombudsman.org.

⁵³ *Ibid.*

⁵⁴ Forest Peoples Programme, *IFC agrees to suspend funding for palm oil sector in response to NGO critique*, Press Release, 9 September 2009, www.forestpeoples.org.

⁵⁵ Robert Zoellig, Letter to Forest Peoples Programme, World Bank, 28 August 2009, available at www.forestpeoples.org.

In April 2011, the World Bank announced its new strategy⁵⁶ in the controversial palm oil sector putting an end to the investments moratorium in the sector. Considering the concerns of the stakeholders, the IFC says it will now pay attention to the careful selection of the clients depending on their ability to address environmental and social issues, the land acquisition in compliance with local regulations, biodiversity conservation, profit sharing with local communities and finally the need to focus on the food and agribusiness supply chain.

This strategy relies on four pillars:

- 1 – Sharing the benefits with people from rural areas, local communities and small farmers;
- 2 – Limiting the palm oil culture's impact on natural habitats through implementing a biodiversity conservation policy;
- 3 – The sustainable development of the private sector investments;
- 4 – Enable small farmers to access markets and finance through the enhancement of the services to improve their productivity and the development of new financial mechanisms.

However, NGOs criticise this strategy⁵⁷ denouncing the weak provisions regarding free, prior and informed consent of indigenous peoples and the lack of clarity on how performance standards will be applied across the entire supply chain.

➔ **Movimiento Unificado Campesino del Aguan (MUCA) v. Corporación Dinant, Honduras**

The Honduran palm oil and food company Corporación Dinant has operating plantations, mills and refineries in the Lean and Aguan Valleys, and around the cities of Tocoa and La Ceiba. It was granted a loan of \$30 million by the IFC, partially financing the increase of its production capacity, the expansion of its distribution networks and the building of a biogas facility to produce electricity.

On 25 July 2014, the MUCA filed a complaint with the CAO against Corporación Dinant, alleging that its operations in the Aguan Valley had a negative environmental impact, and generated land disputes, the displacement of communities, as well as the use of violence and security forces against peasants.

After having found the MUCA's complaint eligible in August 2014, the CAO conducted a first trip to Honduras in October 2014 as part of its assessment of the case. Since discussions had already been initiated between both parties under the supervision of the IFC and CBI, the CAO decided to postpone the completion of its assessment. This decision was discussed and confirmed with the MUCA and Corporación Dinant during a second trip of the CAO in November 2014. The CAO was to resume its assessment in June 2015 but the case has remained suspended.⁵⁸

⁵⁶ See: www.ifc.org/palmoilstrategy.

⁵⁷ See for example Bretton Woods Project, "Open for business: World Bank to reinvest in palm oil amid criticism", 14 April 2011, available at: www.brettonwoodsproject.org/art-568287.

⁵⁸ Compliance Advisor Ombudsman, Honduras/Dinant 03/Aguan Valley, www.cao-ombudsman.org.

In the meantime, the CAO affirmed that it is helping IFC to address the shortcomings in its environmental and social performance regarding its investment in Corporación Dinant, that were highlighted by an investigation report published in January 2014, following concerns raised by FIDH and other civil society groups who continue to monitor the process.⁵⁹

Local groups such as "Plataforma Agraria" are calling on the World Bank to suspend all funding to Honduras and to call on Honduras to ensure effective and meaningful participation of peasant organisations in decision related to land titles, and to hold perpetrators accountable for human rights violations committed.

ADDITIONAL RESOURCES

- **World Bank Inspection Panel**
www.worldbank.org/inspectionpanel
- **Compliance Advisor Ombudsman**
www.cao-ombudsman.org
- **Accountability Counsel**
www.accountabilitycounsel.org/
- **Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development, Accountability Counsel, 8th edition, August 2015, available at:**
www.accountabilitycounsel.org
- **CIEL, "International Financial Institutions Program"**
http://ciel.org/Intl_Financial_Inst/index.html
- **Bank Information Center**
www.bankinformationcenter.org
- **World Bank Inspection Panel brochure, Human Rights & Grievance Mechanisms, SOMO**
<http://grievancemechanisms.org>
- **Compliance Advisor Ombudsman brochure, Human Rights & Grievance Mechanisms, SOMO and Accountability Counsel**
<http://grievancemechanisms.org>
- **Bretton Woods Project**
www.brettonwoodsproject.org
- **Inclusive Development International, Following the Money – An Advocate's Guide to Securing Accountability in Agricultural Investments, Emma Blackmore, Natalie Bugalski and David Pred, September 2015, available at:**
www.inclusivedevelopment.net

⁵⁹ FIDH, *Honduras : World Bank criticized for inadequate supervision of its investments*, Press release, 3 January 2014, www.fidh.org.

An insight into...

The International centre for the Settlement of Investment Disputes (ICSID)

A bilateral investment treaty (BIT) is an agreement between two states which contains guarantees aiming at promoting investment. Over 170 countries have signed one or more bilateral investment treaties⁶⁰ and more than 2,900 BITs have been signed.⁶¹ As of today, the overwhelming majority of BITs contain a clause for recourse to the International Centre for the Settlement of Investment Disputes (ICSID).⁶² Created in 1965 under the Convention on the Settlement of Investment Disputes between States and Nationals of other States [hereinafter “ICSID Convention”]⁶³, the establishment of ICSID was motivated by a desire to promote international investment by providing a neutral forum for dispute resolution.

This means that in case of a dispute, a foreign investor can file a complaint against a state before the ICSID without having to exhaust domestic remedies.⁶⁴ ICSID may also administer disputes under non-ICSID rules; namely, the UNCITRAL Arbitration Rules. While these types of forums were initially created to ensure stability for investors fearing arbitrary decisions by states, they have led to the application of significant protection for investors and the granting of important financial penalties for states. Hence, they have become an important obstacle for states wanting to implement public policy measures which would potentially affect investors’ revenues. The multiplication of investor-state disputes, the tendency of arbitrators to favour investors, the scarce attention paid to human rights law in the settlement of these disputes as well as the ongoing debates surrounding the human rights responsibilities of multinationals have generated wide criticisms in relation to investment tribunals such as ICSID. Numerous trade agreements currently in place include clauses for international investor-state arbitration in case of disputes between foreign investors and governments. Investor-state tribunals are criticized for granting disproportionate protection to investors, at the expense of human

60 For a list of signed BITs, see the website of the United Nations Conference on Trade and Development (UNCTAD): www.unctad.org

61 U.N. CONFERENCE ON TRADE AND DEV., *World Investment Report 2014: Investing in the SDGs: An Action Plan* 114, UN Sales No E.14.II.D.1 (2014).

62 G. Van Harten, *Private authority and transnational governance: the contours of the international system of investor protection*, Review of International Political Economy, vol. 12, 2005, p.608.

63 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, adopted 18 March 1965, entered into force: 14 October 1996, www.icsid.worldbank.org.

64 Besides the World Bank, there are other instances providing for arbitration tribunals such as the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce, the Hong-Kong International Arbitration Center (HKIAC), the Singapore International Arbitration Center (SIAC), and other institutions. For a good introduction on human rights and international investment arbitration, see L.E. Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law within Investor-state Arbitration*, Rights & Democracy, 2009.

rights, environmental protection and national sovereignty. Part of the opposition to the Trans Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP) that are currently being negotiated is based on objections to the investor-state dispute settlements provisions being discussed.

In the face of these criticisms and since many cases brought to these forums were matters of public interest, arbitrators have accepted, in certain cases, the submission of *amicus curiae* by third parties, such as NGOs. It is therefore crucial for victims to have their voices heard during the arbitration proceedings of investment tribunals such as ICSID.⁶⁵ Since the amendment of the ICSID rules of procedures in 2006, third parties can access hearings if both parties agree.⁶⁶ In addition, new UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration⁶⁷ were adopted in July 2013, significantly improving the transparency of the proceedings. The rules are not exclusive to UNCITRAL arbitrations. The UNCITRAL Transparency Rules came into effect on April 1, 2014.⁶⁸

Such rules provide for the publication of key documents such as the tribunal's decisions and the **parties' statements (the company's claims and the State's defence). They allow in certain circumstances the participation of non-disputing third parties**, as well as **open hearings**. However, these rules only apply to arbitration proceedings based on investment treaties that entered into force after 1 April 2014. They can apply to earlier treaties only if the parties agreed so. To facilitate such agreement, a UN Convention on Transparency in Treaty-Based Investor-State Arbitration (the Mauritius Convention) was opened for signature in March 2015, so that the UNCITRAL Rules on Transparency apply automatically to the parties of this Convention, regardless of the date of entry into force of their investment treaties. As of October 2015, 15 States had signed the Convention (among them Germany, France, the United Kingdom, Canada and the United States), and one state (Mauritius) had ratified it.⁶⁹ The Convention will enter into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession.⁷⁰

65 For a useful resource see: International Human Rights Program at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), Guide for Potential Amici in International Investment Arbitration, January 2014, http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf. The Guide provides an overview of ICSID and the guidance to submit *amicus curiae* briefs in the context of these proceedings.

66 J.E. Vinuales, *Human Rights and Investment Arbitration: the Role of Amici Curiae*, International Law: Revista Colombiana de Derecho Internacional, vol. 8, 2006, p.259

67 U. N. Comm'n on Int'l Trade Law, Dec. 16, 2013, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, art. 1, www.uncitral.org.

68 UNCITRAL, Rules on Transparency in Treaty-based Investor-State Arbitration, www.uncitral.org/.

69 UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014), Status, www.uncitral.org.

70 UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, www.uncitral.org.

➔ Vivendi case

The Vivendi case⁷¹ is related to a water dispute resulting from a concession contract made between the French Compagnie Générale des Eaux – subsequently Vivendi Universal – and its Argentine subsidiary, the *Compañía de Aguas del Aconquija S.A.* The French investors accused Argentina of having breached the Bilateral Investment Treaty (BIT) it had concluded with France, because it had entrusted the water supply and the management of used waters to another company. Argentina argued that such concession was necessary to ensure access to water to its population, with referring to its obligations under international human rights law. Parts of the Respondent's arguments were built around the necessity to interpret investment clauses, and specifically States' obligation to provide fair and equitable treatment to investors, in light of their human rights commitments on the international plane. In 2007, the ICSID Tribunal accepted to receive amicus curiae briefs written by a coalition of NGOs⁷². It was one of the first times that it decided in favour of the admissibility of such submissions. Like the Respondent, NGOs sustained that Argentina was under an international law obligation to guarantee the right to water under, and that it was therefore constrained to undertake measures ensuring water accessibility and affordability to its citizens.

Registered in 2003, the case ended up with a final decision rendered in July 2010. Despite the central place of their human rights arguments, the tribunal considered that the non-disputing parties had not provided sufficient evidence to prove their capacity to bring “a perspective, particular knowledge or insight that is different from that of the disputing parties”⁷³.

Actually, despite the occurrence of several similar disputes, the Biwater Gauff case that involved an Anglo-German consortium against the Tanzanian State remains one of the very few cases where the arbitral tribunal having accepted the submission of amicus curiae effectively took their content and relevance into account⁷⁴.

71 *Aguas Argentinas, S.A. Suez, Sociedad General de Aguas de Barcelona, S.A. Vivendi Universal, S.A. v. The Argentine Republic*, ICSID case n° ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae of May 19, 2005, 21 ICSID Rev.—FILJ 342 (2006); Order in Response to a Petition by Five Non-Governmental Organisations for Permission to make an Amicus Curiae Submission of February 12, 2007, Decision on Liability of July 30, 2010, available at <https://icsid.worldbank.org>.

72 CIEL, ICSID tribunal accepts civil society organisations as amici curiae, available at www.ciel.org.

73 ICSID, Rule 37 (2), a) of the Arbitration Rules of the ICSID Tribunal, available at <https://icsid.worldbank.org>.

74 *White&Case. No Remedy for an Investor's Own Mismanagement: The Award in the ICSID case Biwater Gauff v. Tanzania*, available at www.whitecase.com.

➔ **Bechtel v. Bolivia the “water revolt” in Cochabamba (Bolivia)**⁷⁵

In 1997 the World Bank informed Bolivia that it would provide additional aid for water development under the condition that the government privatises the public water systems of two of its largest urban centres, El Alto/La Paz and the city of Cochabamba.

In September 1999, in a confidential process involving only one bidder, Bolivia's government turned over Cochabamba's water to a company controlled by the California engineering giant, Bechtel. Within a few weeks, Bechtel raised water rates by an average of more than 50%, sparking a citywide rebellion that has come to be known as the Cochabamba Water Revolt. In April 2000, following the declaration of martial law by the President, the death of a seventeen- year-old boy, Victor Hugo Daza, who was killed by the army, and more than a hundred wounded civilians, the citizens of Cochabamba refused to back down and Bechtel was forced to leave Bolivia. Eighteen months later Bechtel and its Spanish co-investor, Abengoa filed a \$50 million dollar legal demand against Bolivia before the ICSID. For the following four years, Bechtel and Abengoa found their companies and corporate leaders so dogged by protest, damaging press, and public demands from five continents, that they dropped the case.

On January 19, 2006, representatives of Bechtel and Abengoa travelled to Bolivia to sign an agreement in which they abandoned the ICSID case for a token payment of 2 bolivianos (30 cents). This is the first time that a major corporation has ever dropped an international investment arbitration case, as a direct result of public pressure and multi-faceted local and international action.

Other controversial cases have been filed before the ICSID. A case opposing the Canadian-Australian mining company OceanaGold to the state of El Salvador is currently pending before the ICSID.⁷⁶ OceanaGold, formerly known as Pacific Rim, filed a lawsuit against El Salvador in 2009 for not granting permission to the company's El Dorado gold mine, after the project failed to meet national regulatory requirement. The government denied approval to the mining proposal over fears of contamination of the El Salvador's already scarce water resources, and correlated impacts on local communities' health and on the environment. In 2008, the government instituted a moratorium on new mining permits which is still in force and receives broad popular support. OceanaGold originally filed the lawsuit for US\$77 million, and raised it to US\$301 million, which represents just under 2 percent of El Salvador's GDP. Such a fee would significantly weaken the states' capacity to protect and fulfill health and education rights.

⁷⁵ Extracts from the communications of the Democracy Center (<http://democracycenter.org/>) and the Business & Human Rights Resource Centre (<http://business-humanrights.org/>)

⁷⁶ *Pac Rim v. El Salvador*, ICSID case N°. ARB/09/12

NGOs such as la MESA, CIEL and FESPAD worked together to intervene in this case. The arbitral tribunal accepted their submission, but refused them to make an oral presentation at the jurisdictional hearing. Through La MESA's submission, NGOs provided a different perspective on the case, insisting on public participation, democracy principles and respect for human rights. In July 2014, a second submission was filed. A hearing on the merits took place in September 2014. Post-Hearing Briefs and submissions on costs were filed on November and December 2014. To date, the ICSID Tribunal has not given its final verdict.⁷⁷

NGOs involved published a useful report with lessons learned when engaging in investor-state dispute proceedings. (see below)

ADDITIONAL RESOURCES

- ICSID
<http://icsid.worldbank.org> (all cases before the icsid can be found online)
 - Investment Treaty Arbitration - italaw (all cases are available on this webpage)
www.italaw.com
 - International Institute for Sustainable Development (see international trade section)
www.iisd.org
 - Investment Arbitration Reporter
www.iareporter.com
 - Centre for International Environmental Law
www.ciel.org
 - International Human Rights Program at the University of Toronto, Faculty of Law and the Center for International Environmental Law (CIEL), Guide for Potential Amici in International Investment Arbitration, January 2014,
http://ciel.org/Publications/Guide_PotentialAmici_Jan2014.pdf
 - Marcos A. Orellana, Saúl Baños and Thierry Berger, Brining Community Perspectives to Investor-State Arbitration: The Pac Rim Case, IIED, CIEL & FESPAD, July 2015,
www.ciel.org/wp-content
 - Kluwer Arbitration blog
<http://klowerarbitrationblog.com>
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⁷⁷ *When Corporations Sue Governments*, Manuel Pérez-Rocha, Op-Ed, The New York Times, 3 December 2014, www.nytimes.com.

CHAPTER II

Regional Development Banks

A. European Investment Bank

B. European Bank for Reconstruction and Development

C. Inter-American Development Bank

D. African Development

E. Asian Development

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There are regional public financial institutions in every part of the world. Europe has two such banks: the European Investment Bank and the European Bank for Reconstruction and Development.

A. European Investment Bank⁷⁸

The European Investment Bank (EIB), created in 1958 by the Treaty of Rome, is the long-term lending bank of the European Union. In 2010, it approved 79.12 billion Euro worth of loans. The bank's mission is "to contribute towards the integration, balanced development and economic and social cohesion of the EU Member States."⁷⁹ It lends money to projects that further EU policy objectives. These projects cover a number of geographical regions and a wide range of topics⁸⁰. The EIB has a complaint mechanism composed of the **EIB Complaints Mechanism and of the European Ombudsman**. The former is an internal mechanism, independent from operational activities; the latter is an external and independent mechanism. In case of maladministration by the EIB Group, a complaint can be filed with the EIB complaints mechanism. If the complainant is unsatisfied, there is the possibility to lodge a complaint with the European Ombudsman against the EIB. **The European Ombudsman's recommendations are non-binding, and it can only rule on EIB "maladministration"**.

In March 2015, the EIB adopted a new Transparency Policy,⁸¹ which defines the EIB procedures concerning information requests from the public, the information that the EIB makes routinely available to the public, and EIB's approach to transparency

⁷⁸ The EIB is not a "development" bank as such but it is increasingly funding development projects. For the sake of clarity, it is therefore discussed in this chapter.

⁷⁹ EIB, *About the EIB*, www.eib.org.

⁸⁰ EIB, *Projects*, www.eib.org.

⁸¹ European Investment Bank Group, *Transparency Policy*, 6 March 2015, www.eib.org.

and stakeholder engagement.⁸² This Transparency Policy replaces the 2010 one,⁸³ which was revised following a public consultation process launched in July 2014, and during which the views and comment of a wide range of stakeholders were collected through written contributions and consultation meetings⁸⁴.

The new Transparency Policy was criticised by several CSOs in particular in relation to: a) provisions expanding exceptions to the disclosure of internal documents, namely by adding in a presumption that all documents related to investigations, reports and audits into irregularities such as corruption and maladministration shall be **confidential**, even if they concern matters of public interest and even once investigations are closed, b) for failing to respect the Aarhus convention and EU Regulation 1367/2006 on disclosure of environmental information, and c) for not imposing an obligation on the EIB to disclose information regarding loans which go through financial intermediaries.⁸⁵

During the public consultation process regarding the policy, the European Ombudsman's representative also recommended against including the exceptions on of internal documents.⁸⁶

1. The EIB complaints mechanism

The EIB established a Complaints Mechanism in 2008. The latest version of the mechanism's policy were released in August 2013.⁸⁷

The Complaints Mechanism has two functions, which apply both to private and public sector EIB operations:

- **Compliance review**
- **Problem-solving**

The EIB decides which approach to follow depending on the case. Complainants may request the compliance review or problem-solving functions, or a combination of the two.

If complainants are not satisfied with the outcomes of the Complaints Mechanism proceeding, they may appeal to the European Ombudsman within two years (see below).

⁸² European Investment Bank, *EIB Group Transparency Policy*, www.eib.org.

⁸³ EIB, *EIB Transparency policy*, 2 February 2010, www.eib.org.

⁸⁴ European Investment Bank, *Public Consultation on EIB's Transparency Policy*, www.eib.org.

⁸⁵ *Draft EIB Transparency Policy*, Letter sent to the Directors of the EIB by 11 CSO groups, 26 December 2015, www.counter-balance.org.

⁸⁶ *EIB's new transparency policy allows for more secrecy*, CEE Bank Watch Network, 11 March 2015, <http://bankwatch.org>

⁸⁷ European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, www.eib.org.

② What are the issues that can be dealt with?

The EIB Statement of Environmental and Social Principles and Standards were published in February 2009, following a public consultation process.⁸⁸ The goal is to “increase environmental and social benefits”, while “decreasing environmental and social costs”. These standards and principles are mostly based on EU legislation:

- *Environmental Standards in the EU and Enlargement Countries*: the EIB requires that all projects that it finances comply at least with:
 - Applicable national environmental law;
 - Applicable EU environmental law (EU EIA Directive, the Nature Conservation Directives, Sector-specific Directives, “Cross-cutting” Directives);
 - The principles and standards of relevant international environmental conventions incorporated into EU law.
- *Environmental Standards in the Rest of the World*: For projects in all other regions of EIB activity, the Bank requires that all projects comply with national legislation, including international conventions ratified by the host country, as well as EU standards.
- *Social standards*: The EIB restricts its financing to projects that respect human rights and comply with EIB social standards based on the principles of the Charter of the Fundamental Rights of the European Union and international good practices⁸⁹. “Promoters that seek EIB financing outside the EU are required to adopt the social standards regarding involuntary resettlement, Indigenous Peoples and other vulnerable groups, the core labour standards of the International Labour Organisation (ILO) and occupational and community health and safety.”⁹⁰
- *Cultural heritage* is a broad concept referring to the promotion of human development through inter-cultural dialogue as an essential element in the achievement of balanced spatial development. Thus the Bank shall not finance projects threatening the integrity of sites that have a high level of protection for reasons of cultural heritage, as UNESCO World Heritage Sites for instance.
- *Consultation, participation and disclosure standards*, referring to EIB’s complaint system.

⁸⁸ EIB, *Statement of Environmental and Social Principles and Standards*, February 2009, www.eib.org.

⁸⁹ EIB, the *EIB Statement of Environmental and Social Principles and Standards*, *European Investment Bank*, 2009, p. 16 §, 47: In all other regions of EIB operations, the approach of the EIB to social matters is based on the rights-based approach mainstreaming the principles of human rights law into practices through the application of its Social Assessment Guidelines (SAGs) (see Handbook). These requirements are also consistent with the social safeguard measures developed and applied by those MFIs with whom the Bank works closely. www.bei.org/attachments/strategies/eib_statement_esps_annex2_statement.pdf

⁹⁰ *Ibid.*, p. 16, § 50.

– *Biological diversity.*

- *Climate change:* promoters are encouraged to identify and manage climate change risks. Where risks are identified, the Bank requires the promoter to identify and apply adaptation measures to ensure the sustainability of the project. The Bank also recognises that adaptation is necessary and actively promotes adaptation projects.

The EIB Environmental and Social Handbook⁹¹ provides an operational translation of the policies and principles contained in the EIB Environmental and Social Principles and Standards translating these in due diligence processes and practices. However in practice, the EIB delegates many responsibilities to the project developers, and as a result the principles and standards of the EIB remain largely criticised by NGOs for being nebulous and for not clearly stating what is required from the EIB to act in conformity with its standards and principles.

② Who can file a complaint?

Any EIB stakeholders, individuals, organisations or corporations that have concerns about the EIB Group's activities. Complainants do not need to prove that they are directly affected by an EIB decision, action or omission and are not required to identify the rules, regulations or policies in question.⁹²

③ Under what conditions?⁹³

- The EIB does not accept anonymous complaints, but it does treat all complaints confidentially unless that right has been expressly waived by the complainant.
- Any person may write in one of the 24 official languages of the European Union⁹⁴ and has the right to receive a reply in the same language.
- The complaint must concern any alleged maladministration in of the EIB Group in its decisions, actions or omissions.⁹⁵
- Complaints may be about access to information, the environmental and social impact of projects, procurement procedures, human resources issues, customer

⁹¹ EIB, *Environmental and Social Handbook*, December 2013, www.eib.org.

⁹² EIB, *The EIB Complaints mechanism Flyer*, www.eib.org.

⁹³ European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, *op cited*

⁹⁴ See European Commission, "Official EU languages" <http://ec.europa.eu>. The EIB also considers complaints in non-EU languages spoken by those affected by EIB projects.

⁹⁵ Complaints must concern alleged failure by the EIB Group to comply with applicable law, internationally recognized human rights, EIB policy, or principles of good administration. See the definition of maladministration in European Investment Bank, *Complaints Mechanism Operating Procedures*, August 2013, p 4-5, *op cited*.

relations, etc. Complaints may also relate to any aspect of the planning, implementation or impact of EIB projects.

- Complaints must be filed within one year of acknowledgment of the matter to which they relate. Complaints concerning access to information must be filed within 20 working days of the date of the correspondence to which the complaint relates.⁹⁶

HOW TO FILE A COMPLAINT?

Content of the complaint must include⁹⁷:

- Name, contact information and location of the complainant;
- The subject of the complaint (e.g., access to information, environmental and/or social impacts of projects, procurement procedures, human resource issues, customer relations, or other issues);
- A description of the circumstances of the complaint (all relevant documents should be provided);
- A description of what the complainant expects to achieve with the complaint.

Written complaints may be emailed, hand delivered, mailed or faxed in the form of a letter to:

European Investment Bank
Secretary General
100 boulevard Konrad Adenauer
L-2950 Luxembourg
Phone: (+352) 43 79-1
Fax: (+352) 43 77 04
Email: complaints@eib.org

Complaint may also be filed using the Complaints Mechanism's online complaint form:
www.eib.org/infocentre/complaints-form.htm.

➡ Process and outcome

The Complaints Mechanism will acknowledge receipt of the complaint within 10 days.

If admissible, the complaint will either be addressed through a Standard Procedure or an Extended Procedure. The Standard Procedure applies to all complaints, except those regarding environmental and social impacts, or governance aspects of EIB lending operations, which are handled through the Extended Procedure.⁹⁸

⁹⁶ EIB, *The EIB Complaints mechanism Flyer*, op. cited

⁹⁷ EIB, *How to complain*, www.eib.org.

⁹⁸ EIB, *Complaints Mechanisms, Procedures*, www.eib.org.

“In the Standard Procedure, an initial assessment of the concerns will be made through an initial meeting with EIB services concerned and a review of the relevant documentations. If the concerns seem well grounded, there will be an investigation including a compliance review and where appropriate, problem solving and dispute resolution techniques such as facilitation of information sharing, mediation, dialogue and negotiation facilitation will be used. The Complaints Mechanism may conduct site visits, request oral or written submissions from the parties, meet with local and international organisations, and rely on expert research. The assessment/investigation of this Standard Procedure process will determine whether or not there was maladministration by the EIB, suggest further corrective, mitigation actions and recommendations or determine that the problem was solved during the complaints handling process and that no further action is required.

The Extended Procedure follows the same basic steps and procedures as the Standard Procedure except that a more extensive and formal process replaces the complaint assessment/investigation. The initial assessment will be completed within 40 working days after admissibility of complaint, and will determine whether or not to proceed with an investigation/compliance review, as decided by the head of EIB-CM in agreement with the EIB Inspector General. Moreover, if there is opportunity for a collaborative resolution process before the issuance of the Initial Assessment Report, and the relevant project stakeholders agree to it, a mediation process will take place. If such a process has not brought the parties to mutually accepted and sustainable solutions within the specified timetable, a recommendation for an investigation/compliance review may follow. At the end of an inquiry, the Complaints Mechanism prepares a Conclusions Report and formulates corrective actions and recommendations. Corrective actions will include an implementation plan that must be carried in any case no later than 12 and 24 months after the date of the Conclusions Report.”⁹⁹

Duration of proceedings

The final reply must be sent to the complainant no later than 40 working days after the date of the acknowledgement. The deadline can be extended to an additional period of 100 working days in case of complex issues.

Confirmatory complaints

If the complainant is not satisfied, the EIB Complaints Mechanism office can review the case. Whether the complainant wishes to appeal the EIB Complaints conclusions or whether it is to follow up on implementation of EIB conclusions, he or she may address, in written form, a confirmatory complaint:

- within 15 working days from the receipt of the EIB’s response;
- or within 6 months from the due date set for the implementation of the action, if the agreed corrective action is not implemented correctly or within the time delay.

⁹⁹ *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p 33-34.

2. The European ombudsman

If unsatisfied by the outcome of a complaint to the EIB Complaints Mechanism, it is also possible to appeal to the European Ombudsman.

🕒 Who can file a complaint?¹⁰⁰

- EU citizens or a person residing or having its registered office in an EU country.
- It should be noted that non-EU nationals can also lodge complaints with the Ombudsman regarding maladministration of the EIB. The Ombudsman will deal with them at his/her discretion.

🕒 Under what conditions?

- The complaint must refer to alleged maladministration of the EIB in its actions and/or omissions;
- it must be lodged within two years of acknowledgement of the facts on which the complaint is based;
- it cannot deal with matters that are being settled in court or have already been settled in court;
- it cannot investigate complaints against national, regional or local administrations in the Member States of the European Union, even when the complaints refer to the EIB's field of activities;
- the remedies provided by the EIB internal complaint mechanisms must have been exhausted; and
- the complaint should be written in one of the 23 official EU languages.

HOW TO FILE A COMPLAINT?

Content of the complaint must include:

- Name, contact information and location of the complainant;
- Grounds of complaint;
- A description of what the complainant expects to achieve with the complaint.

The complaint can be lodged via:

European Ombudsman
1 Avenue du Président Robert Schuman
B.P. 403
FR- 67001 Strasbourg Cedex
Tel. +33 (0)3 88 17 23 13
Fax: +33 (0)3 88 17 90 62
E-mail: complaints@beig.org

¹⁰⁰ The EIB Complaints Mechanism - Principles, *Terms of Reference and Rules of Procedure*, October 2012, Section V www.eib.org.

A complaint form is available on the European Ombudsman's website: <https://secure.ombudsman.europa.eu>

② Process and outcome

The European Ombudsman will first encourage conciliation. If such process fails, he/she will make recommendations to solve the case. For instance, the Ombudsman can request corrective action to be taken or formulate critical remarks relating to the maladministration of the EIB Group. The Ombudsman can further address a special report to the European Parliament, if the EIB Group does not concur with his remarks and recommendations.¹⁰¹

The European Ombudsman's has been challenged by CSOs, in particular as it can only rule on EIB "maladministration", and as its recommendations are non-binding. The European Ombudsman has moreover been criticised for not being proactive enough as far as the EIB was concerned.¹⁰²

* * *

The EIB is expected to go through important changes in 2015, as it will review and reform the Complaints Mechanism's policies and procedures, as well as the Memorandum of Understanding between the European Ombudsman and the EIB, which outlines the competences of the Ombudsman's scrutiny over EIB operations.¹⁰³ The EIB will also play a greater role in the European Fund for Strategic Investments, which entered into force in 2015 under the Juncker investment plan.¹⁰⁴ In a May 2014 report, a European coalition of development and environmental NGOs assessed the track record of the EIB's Complaint Mechanism during its five years of existence.¹⁰⁵ Based on case studies and NGOs' experience, the report concluded that the EIB's Complaint Mechanism had so far struggled to operate effectively because of a lack of capacity, a lack of cooperation from within the EIB, a lack of independence and a lack of binding powers.

¹⁰¹ *The EIB Complaints mechanism – Principles, terms of reference and rules of procedure*, Op. cit., Part V, § 6.

¹⁰² *Holding the EIB to account – a never ending story*, Counter Balance, May 2014, www.counter-balance.org.

¹⁰³ For recommendations on this upcoming revision and on EIB accountability see *Towards a reinforced accountability architecture for the European Investment Bank*, Xavier Sol, Counter Balance, June 2015, www.counter-balance.org.

¹⁰⁴ For more information on the European Fund for Strategic Investments see *The European Fund for Strategic Investments (EFSI)*, European Commission, <http://ec.europa.eu/>.

¹⁰⁵ *Holding the EIB to account – a never ending story*, Counter Balance, May 2014, op cited

ADDITIONAL RESOURCES

- EIB www.eib.org
 - Holding the EIB to account – a never ending story, Counter Balance, May 2014, www.counter-balance.org.
 - The Bretton Woods Project www.brettonwoodsproject.org.
-

B. EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT

Established in 1991, the European Bank for Reconstruction and Development (EBRD), is the largest single investor in the region and mobilises significant foreign direct investment beyond its own financing. It is owned by 64 countries, the European Union (EU) and the EIB¹⁰⁶. The aim of the EBRD is to provide project financing for banks, industries and businesses, both new ventures and investment in existing companies. It also works with publicly owned companies that aim to support privatisation, restructure state-owned firms and improve municipal services.

🕒 What are the issues that can be dealt with?

The EBRD doesn't mention the term 'human rights standards' in its guiding policies¹⁰⁷; yet, it focuses on environmental sustainability in the broad sense of the term to encompass not only ecological impacts but also worker, health and safety and community issues. The Bank chooses the projects it may finance according to **three principles**:

- 1 – Social and environmental sustainability;
- 2 – Respect for the rights of affected workers and communities; and
- 3 – Compliance with applicable regulatory requirements and good international practices¹⁰⁸.

To ensure the respect of these principles, the EBRD adopted, on May 6, 2009, a new Project Complaint Mechanism (PCM) to replace and render more effective the existing Independent Recourse Mechanism (IRM) which had been in use since 2004. The PCM Rules of Procedure, which set out the rules about how a complaint may be filed and how it will be processed, were revised in 2014 and the new Rules entered into force on November 7, 2014.¹⁰⁹

¹⁰⁶ EBRD, *Who we are*, www.ebrd.com.

¹⁰⁷ EBRD, *Strategies and Policies*, www.ebrd.com/what-we-do.

¹⁰⁸ EBRD, *Environmental and social sustainability*, www.ebrd.com.

¹⁰⁹ Project Complaint Mechanism (PCM), *Rules of Procedure*, May 2014, www.ebrd.com.

The PCM has **two functions**.¹¹⁰

- The **Problem-solving Initiative**, which has the objective of restoring dialogue between the parties and of trying to resolve the underlying issues giving rise to the complaint or grievance where possible.
- The **Compliance Review function**, which seeks to assess whether a Bank approved project complies with relevant EBRD policies, relevant environmental policies and project-specific provisions of the Public Information Policy.

Complainants may request a Problem-solving Initiative, a Compliance Review, or both.

► NOTE

As the EBRD is an international financial institution which is owned by 64 countries, the EU, and the EIB, it is not possible to lodge complaints concerning this bank with the European Ombudsman.

② Who can file a complaint?

- With regard to the **Problem solving Initiative**: one or more individual(s), located in an area adversely affected by an EBRD-project, or who has or have an economic interest in such area.
- With regard to the **Compliance Review**: one or more individual(s) or organisation(s).

② Under what conditions?¹¹¹

- The PCM will not accept complaints relating to the adequacy or suitability of EBRD policies, or to matters in regards to which a Complaint has already been processed by the PCM or its predecessor IRM (unless there is new evidence or circumstances), or if the complaints raises allegations of fraud or relates to procurement matters.¹¹²
- Anonymous complaints will not be accepted. However, complainants who are not organisations may ask for the complaint to be treated confidentially.¹¹³
- Complaints can be submitted in any of the working languages of the Bank (English, French, German and Russian) or in any of the official languages of the Bank's countries of operation¹¹⁴.

¹¹⁰ EBRD, *About the Project Complaint Mechanism*, www.ebrd.com.

¹¹¹ EBRD, *Project complaints mechanism – A user's Guide and Rules of Procedure*, Novembre 2014

¹¹² Project Complaint Mechanism (PCM), *Rules of Procedure*, op. cited, §14

¹¹³ EBRD, Project Complaint Mechanism, *Rules of Procedure*, op. cited §4

¹¹⁴ *Ibid.*, §6.

- Complaints can be submitted in any written format, and the PCM officer can be contacted for guidance on how to write and submit a complaint¹¹⁵.

In case of a complaint filed under the **Problem-solving Initiative**, the complaint must¹¹⁶:

- relate to a project in which the Bank has presented a clear interest in financing the project;
- relate to a project in which the Bank maintains a financial interest, in which case the complaint must be received within 12 months of the last disbursement of funds from the Bank.
- describe the efforts made to address the issues pointed out in the complaint through discussions with the Bank and/or its Client, and the results of such efforts. This obligation may be waived by the PCM Officer if he/she considers them futile or detrimental to the Complainant.
- be filed after the EBRD has shown clear interest in financing the project, and no later than 12 months after the last disbursement of funds, or in the case of equity funding, where the Bank has not sold or exited from its investment.

In case of a complaint filed under the **Compliance Review**, the complaint must relate to a Project that has been approved for financing by the Board or the Bank Committee¹¹⁷.

The complaint must be submitted after the EBRD has approved the project, and no later than 24 months after the Bank has ceased to participate in the project.

HOW TO FILE A COMPLAINT?

- Content of the complaint must include:¹¹⁸
- The names of the complainants;
- The name of the authorised representative, if any, and proof of the authorisation;
- Contact information of the complainant and of the authorised representative, if any;
- The name or the description of the project at issue;
- A description of the harm caused or likely to be caused by the project;
- in the case of a complainant requesting a compliance review, where possible, the relevant EBRD policy that has allegedly been violated;
- In case of a complainant requesting a Problem-solving initiative, a description of the good faith efforts the complainant has made to address the issue at stake either with the Bank or the client.
- if possible, which PCM function is expected to be used as well as the outcome expected;
- if possible, copies of the correspondence between the Bank and relevant parties.

¹¹⁵ *Ibid.*, §3.

¹¹⁶ *Ibid.*, §12.

¹¹⁷ *Ibid.*, §13.

¹¹⁸ *Ibid.*

The complaint must be sent (post, fax, email or hand delivery) to:

Project Complaint Mechanism
Attn: PCM Officer
European Bank for Reconstruction and Development
1 exchange Square
London EC2A 2JN
United Kingdom
Fax: +44 20 7338 7633
Email: pcm@ebrd.com

Complaints may also be delivered, at any one of the Bank's Resident Offices¹¹⁹, indicating that it is for transmission to the PCM.

② Process and Outcome

- The PCM Officer will consider whether to register, and will notify the relevant parties of its decision.
- Once the complaint is registered, the Bank Management will send its response to the Complainant within 21 business days, and within 5 days following registration of the complaint, the PCM Officer will appoint a PCM Expert to conduct an Eligibility Assessment.
- Once eligibility has been determined, and within 40 business days after the submission of the Bank Management response to the Complainant, the Eligibility Assessors will issue an Eligibility Assessment Report that will notify whether the complaint is eligible for a Problem-solving Initiative, Compliance Review or both.
- The eligibility of the complaint will **not** suspend the Bank's interest in the project. However, interim recommendations to suspend the Bank's proceeding with the process or disbursements can be made by the PCM Officer to prevent irreparable harm¹²⁰.

In case of a complaint filed under the Problem-solving Initiative:

The objective is to restore dialogue between an affected group and the client, as well as any relevant party, to try to resolve the issues underlying a complaint without attributing blame or fault to any party. It may be undertaken instead of, or as well as, a compliance review.

The Problem-solving Initiative is considered completed when the relevant parties reach an agreement, or when no further progress can be made according to the Problem-solving Expert. Upon completion, the Expert will issue a report available to all relevant parties, the President and the Board. The report and the decision

¹¹⁹ Addresses for the Bank's Resident Offices can be found at www.ebrd.com.

¹²⁰ EBRD, Project Complaint Mechanism, Rules of Procedure, *op. Cited* §35

will be publicly released and posted on the PCM website, if the parties agree. **The PCM will monitor the implementation of any agreements reached during a Problem-solving initiative. A Problem-solving initiative might include independent fact-finding, mediation, conciliation, dialogue facilitation, investigation or reporting.**

In case of a complaint filed under the Compliance Review:

The objective is to establish whether any of the Bank's action (or failure to act) in respect of an approved project has resulted in non-compliance with a relevant EBRD policy. In carrying out the assessment, the PCM expert might use any of the following methods:

- Review of the key documents;
- Consultations with relevant parties; and
- Site visits¹²¹.

If the Compliance Review Expert concludes the Bank was not in compliance with relevant EBRD policies, she/he will issue a draft Compliance Review Report with recommendations to address these non-compliance issues, either with adapting the Bank's systems or procedures, for similar issues not to happen in the future, or with changing the scope and implementation of the relevant Bank-financed project, if possible. A final Compliance Review Report will then be drafted on the basis of the Bank Management's Action Plan and Complainants' comments. The PCM Officer monitors the implementation of the recommendations and the Action Plan by issuing a Compliance Review Monitoring Report at least twice a year until the PCM determines that such monitoring is no longer needed. These reports will be made publicly available on the PCM website¹²².

The PCM in action

The PCM mechanism received **73** complaints between 2010 and 2014 (it received 14 in 2014). Among them, **19** were registered, while **54** were considered ineligible. These complaints were mainly related to projects in the power and energy sector, and to a lesser extent, to projects related to the transport sector.¹²³ Three complaints registered in 2015 are currently under process, such as one regarding the financing of Tayan Nuur iron ore mining project in Tseel soum Mongolia.

¹²¹ *Ibid.*, §41 and 42

¹²² *Ibid.*, §44

¹²³ EBRD, Project Complaint Mechanism, Annual Report 2014, p. 6, www.ebrd.com.

➔ BTC pipeline complaint

The complaint which was examined concerned the BTC (Baku-Tbilisi-Ceyhan) pipeline in Georgia, a project operated by the company British Petroleum (BP). A complaint was submitted by seven residents of the Atskuri village. It was determined eligible for further processing through a problem-solving initiative, but not through a compliance review.

The individual complaints brought under the then IRM covered the following issues:

- The clearance work and the damage to land on the oil pipeline construction route exceeded the area indicated in the proposal package for which compensation was available;
- The area covered by the pipeline passage exceeded the area indicated in the proposal package for which compensation was available;
- Heavy construction traffic and road improvements carried out during construction of the pipeline caused loss due to vibration, and subsequently damage to houses and other buildings;
- Damage to the irrigation channel of the village during the construction of the pipeline caused loss of harvests;
- The lack of economic viability of ‘orphan’ land caused loss of harvests;
- There have been undue delay and uneven treatment in the payment of compensation for damage to land and plants and for uncollected harvests; and
- There have been a lack of responsiveness and undue delay in the project grievance procedure and an inadequate application of that procedure.

Previous attempts to carry out a problem-solving initiative under the IRM in relation to two other complaints concerning alleged impacts of the BTC pipeline construction on residents in the Gyrakh Kesemenli village in Azerbaijan and in the Akhali Samgori village in Georgia had both been unsuccessful.

Following the review of the individual complaints against BP/BTC during Spring 2008, BP/BTC subsequently made an additional compensation payment to one complainant for crop loss related to the years 2004 and 2005, and also commissioned a geological survey to investigate the damage to property allegedly arising from road widening in connection with the pipeline project. BP/BTC also undertook a field survey concerning the alleged damage to the irrigation channel serving one of the agricultural plots, and subsequently agreed that construction had indeed impacted on it. Since then, BP/BTC has informed the particular complainant that it will compensate for the work required to re-build the channel. BP/BTC also reviewed its records in relation to several of the claims regarding alleged crop loss, and presented evidence from satellite imagery of pre and post pipeline construction to the problem-solving facilitator supporting its rejection of several of the individual claims for compensation. In relation to alleged vibration damage to three properties from the passage of heavy construction vehicles, BP/BTC considered that a technical review conducted by the International Finance Corporation (IFC)’s Office of Compliance Advisor/Ombudsman (CAO) and the decision of CAO in June 2006 to close the complaints concerning cultural monuments in the village had adequately dealt with the issue of vibration damage. In light of BP/BTC’s reliance on that review and its view that complaints to the IRM concerning alleged damage

to property as a result of vibration damage during construction of the pipeline should be similarly dealt with, the IRM decided it would not be productive to pursue this aspect of the IRM complaint any further¹²⁴.

Therefore, all complaints before the IRM were closed, and the problem-solving completion report was published in September 2008.

Yet this project remains highly controversial and the individual country strategy used by the Bank has been criticised as overestimating development possibilities while severely disregarding the environmental risks and the poverty issues caused by the BTC pipeline project¹²⁵.

* * *

The EBRD, like other banks, remains highly criticised by civil society groups for financing a number of environmentally and/or socially harmful projects, for its lack of transparency and for its approach (such as the use of country strategies mostly based on economic indicators) which is considered contrary to its guiding policies.¹²⁶

ADDITIONAL RESOURCES

- EBRD Project Complaint Mechanism, PCM Register, www.ebrd.com
 - SOMO, Human Rights and Grievances Mechanisms, www.somo.nl
-

C. Inter-American Development Bank (IDB)

The Inter-American Development Bank (IDB) was established in 1959 and is “the main source of multilateral financing and expertise for sustainable development” in Latin America and in the Caribbean. The IDB is owned by 48 sovereign states, which are its shareholders and members. Among these 48 shareholders, 26 are eligible to receive loans from the IDB (Latin American and Caribbean countries) and 22 are not (Western Europe, United States, Canada, South Korea and Japan)¹²⁷.

The IDB Group is composed of the Inter-American Development Bank, the Inter-American Investment Corporation (IIC) and the Multilateral Investment Fund

¹²⁴ IRM, *Problem-solving completion report - Complaint: BTC Georgia/Atskuri Village*, Georgia, Independent Recourse Mechanism Register, www.ebrd.com.

¹²⁵ CEE Bankwatch Network, <http://bankwatch.org/>.

¹²⁶ For a critical assessment of the EBRD's Policies and Case studies, see www.counter-balance.org and <http://bankwatch.org>.

¹²⁷ IDB, About Us, Inter-American Development Bank, www.iadb.org/aboutus.

(MIF). According to its mandate, the IDB is meant to promote environmental sustainability through the process of Environmental Impact Assessments (EIAs) that are prepared by the borrower/client for projects with potentially substantial environmental impacts¹²⁸. **In February 2010, the Board of the Bank approved the policy establishing the Independent Consultation and Investigation Mechanism (MICI under its Spanish acronym)**, which replaced the former Independent Investigation Mechanism (IIM)¹²⁹ and covers all operations financed by the IDB, from the date of their approval up to 24 months after the last disbursement by the Bank. On December 17, 2014, the IDB's Board approved the new Policy of the MICI¹³⁰. The MICI provides for **two different procedures: a consultation phase and a compliance review phase**.

Although it will not be looked at in this guide, the Bank has other specialized offices that can address other issues:

- Fraud, Corruption, and Prohibited Practices (Office of institutional Integrity)
- Fraud and Prohibited Practices involving Bank staff (Office of Ethics)
- Process for the procurement and hiring of consultants (Office of Procurement and Financial Management for IDB-Financed Projects)
- Requests for information unrelated to the mandate of the MICI (Public Information Center)

The Independent consultation and Investigation Mechanism (MICI)

⑤ What are the issues that can be dealt with?

The MICI applies to all “Relevant Operational Policies” of the Bank, including the following:¹³¹

- Access to information (OP-102);
- Environment and Safeguards Compliance (OP-703, including environmental assessment requirements, consultation with affected parties, supervision and compliance, natural habitats and cultural sites protection, pollution prevention);
- Disaster Risk Management Policy (OP-704);
- Public Utilities (OP-708)
- Involuntary Resettlement (OP-710)
- Gender Equality in Development (OP-761)
- Indigenous Peoples (OP-765)

¹²⁸ IDB, *Environmental Impact Assessments*, Inter-American Development Bank, last viewed on 23/10/09, www.iadb.org/aboutus/III/environmental.cfm.

¹²⁹ This change corresponds with the Bank's ninth request for a capital increase (whereas the creation of the 1994 IIM mechanism corresponded with the 8th).

¹³⁰ Policy of the Independent Consultation and Investigation Mechanism, December 17th 2014, <http://iadb.org>.

¹³¹ IDB, *Policy of the Independent Consultation and Investigation Mechanism*, December 17th 2014, § 11

The MICI will be applicable to other Relevant Operational Policies approved following the entry into effect of the 2014 Policy and explicitly designated by the Board as falling within the purview of the MICI.

② Who can file a request?

A request may be filed by¹³²:

- Any group of two or more people residing in the country where a Bank-Financed Operation is implemented who are or anticipate being affected by such Operation;
- A representative residing in the country where the Bank-Financed Operation is implemented or in another country, provided he or she indicates the persons on whose behalf he or she is acting and provides written evidence of the authority to represent them.

③ Under what conditions?

There is no particular format to follow to file a request. However, anonymous requests will not be accepted; although confidentiality will be respected if requested.¹³³

The Bank will **not** consider a request eligible if¹³⁴:

- the matter has already been reviewed by the MICI, unless justified by new evidence or circumstances not available at the time of the initial request,
- the matter relates to procurement decisions or processes, internal finance or administration, complaints of corrupt practices, considerations of ethics or fraud, and specific actions by Bank employees. (Requests relating to these issues will be forwarded to the relevant IDB office),
- the request raises issues that are under arbitral or judicial review in an IDB member country,
- the request related to operations that have not yet been approved by the Board or the President,
- the request was filed more than 24 months after the last disbursement of the bank.

The fact that a Consultation phase or a Compliance review phase is initiated or ongoing will **not** halt the processing, execution or disbursements for a project funded by the IDB.¹³⁵ If the MICI Director determines that serious irreparable harm may result from the execution of a project, he may recommend to the Board that execution be suspended.

¹³² *Ibid.*, §13

¹³³ *Ibid.*, §15

¹³⁴ *Ibid.*, §19

¹³⁵ *Ibid.*, §18

HOW TO FILE A REQUEST?

The request should include¹³⁶:

- the name, address, and other contact information of the Requester;
- when a Request is made through a representative, it must clearly identify the people on whose behalf the Request is made and provide written evidence of the authority to represent the Requesters;
- an indication of whether the Requesters wish to maintain their identity confidential and the reasons why;
- a description of the Bank-Financed Operation and the country where it is implemented;
- an allegation that the Bank failed to correctly apply one or more of its Relevant Operational Policies;
- a clear explanation of the alleged Harm and its relation to the non-compliance of the Relevant Operational Policy in a Bank-Financed Operation, if known;
- a description of the efforts made by or on behalf of the Requesters to address the issues in the Request with Management, and the results of those efforts;
- a statement as to whether the Requesters wish to use the Consultation Phase, the Compliance Review Phase, or both, or to request further information.

The request can be sent in writing, via electronic or regular mail or fax.

Unlike in the mechanisms provided by other regional banks, oral requests will be accepted, though subject to subsequent receipt of a signed communication.

The IDB's official languages are Spanish, English, Portuguese, and French. Requests submitted in other languages will be accepted, but additional time will be required for their translation and processing.

Requests should be addressed to the MICI, and sent to any IDB Country Office (addressed "To the attention of the ICIM Office") or directly to the MICI office:

Independent Consultation and Investigation Mechanism Office
Inter-American Development Bank
 1300 New York Ave., N.W., Washington, D.C. 20577 USA;
 Email: mecanismo@iadb.org
 Telephone: +1 202-623-3952
 Fax: +1 202 312-4057

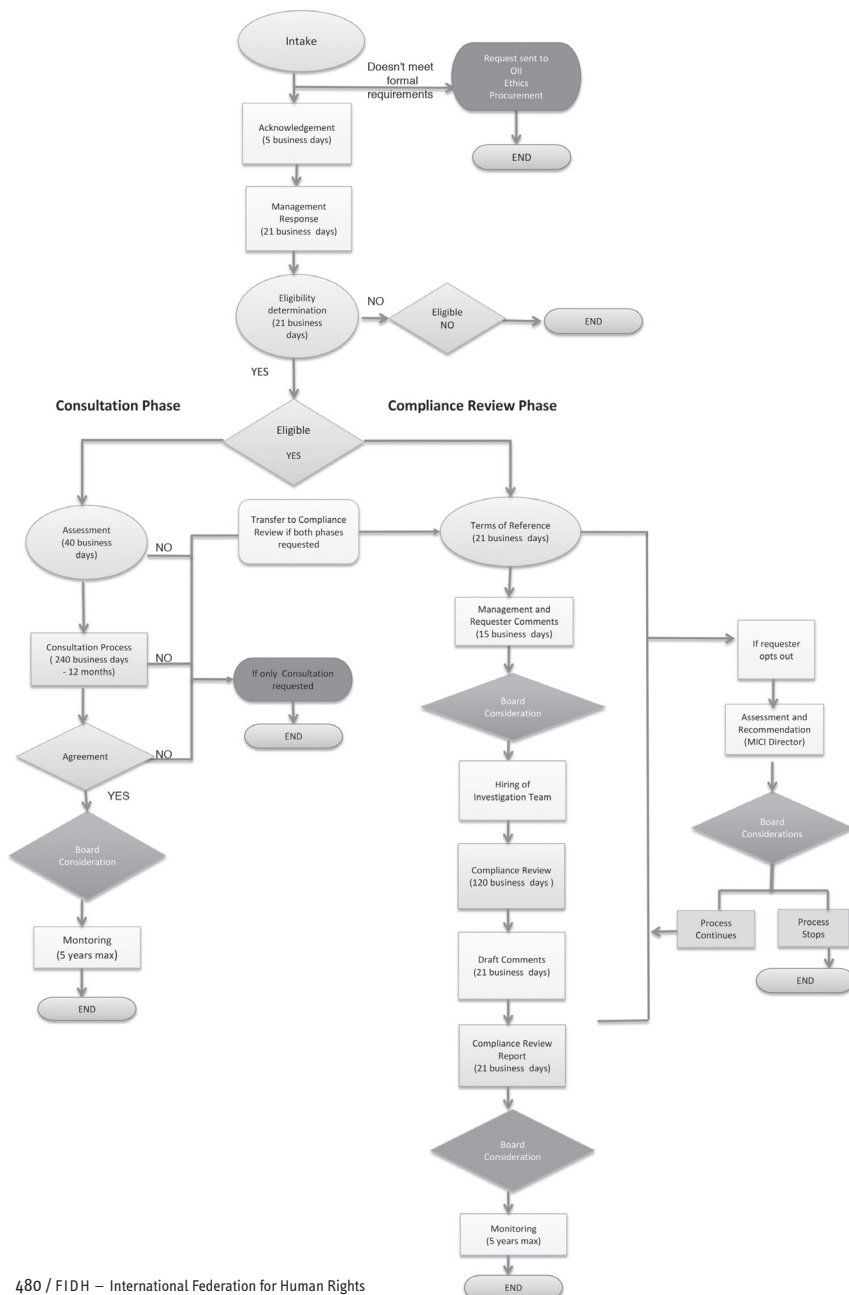
More information on the procedural requirements for submission of a Request can be obtained from on the MICI's website (www.iadb.org/icim) or by contacting MICI's staff at mecanismo@iadb.org

¹³⁶ *Ibid.*, §14

➤ Process and Outcome

MICI Process Flowchart

MICI PROCESS FLOWCHART



After receiving the request, the MICI will verify that the request contains all required information and is not ineligible in maximum 5 working days. If the request can be moved forward with, the MICI will issue a notice of registration and request a response from Management, which has 21 business days to do so. Upon reception of the Management's response, the MICI will have 21 working days to determine the request's eligibility.

The mechanism then provides for **two distinct phases**:

- **Consultation phase**
- **Compliance review phase**

Requesters may choose the Consultation phase, the Compliance review phase, or both. If both phases are requested, processing will begin with the Consultation phase.

Consultation phase

The Consultation phase provides an opportunity to address the issues raised in the request in a flexible and consensus-based approach, using methods including but not limited to information gathering, joint fact-finding, facilitation, consultation, negotiation, and mediation. Participation in the Consultation phase is voluntary and requires the consent of all Parties. Any of the Parties may unilaterally withdraw from the Consultation phase at any time.

The Consultation phase begins with the **assessment stage**, which aims at understanding the harm related to potential policy non-compliance, identifying and gathering information, determining whether the Parties would agree to seek a resolution using consultation methods, and if so, determining the best process for addressing any policy non-compliance. The assessment stage, which may include meetings with relevant stakeholders and visits to the project site, will conclude whether a Consultation phase process should be conducted within 40 business days after the declaration of eligibility. After the assessment, the MICI will either:

- Work with the Parties to reach an explicit agreement to move forward with the Consultation Phase process, establishing a method for addressing the issues raised, which should include an agreed course of action, consultation method and time line; or
- forward the request to the Compliance Review Phase, if it had been requested. If not, the MICI process will be declared concluded.

The results of the assessment will be set forth in an assessment report. The MICI will complete the Consultation Phase process within a maximum period of 12 calendar months from the date of issue of the assessment report, extensible if deemed necessary to reach a consensus-based resolution to the issues raised.

Upon completion of the Consultation Phase process, the MICI will distribute a results report to the Management and to the Board for consideration, after which the report will be made available to the requesters and published on the Public Registry. When applicable, the MICI will develop, in consultation with the Parties, a monitoring plan and time frame for the agreement reached. The monitoring plan may not exceed 5 years of duration.

Compliance review phase

The objective of the **Compliance Review Phase** is to investigate allegations of non-compliance with a Relevant Operational Policy in operations financed by the IDB and of harm caused to the Requesters.

The Compliance Review process is fact-finding in nature. It is not a judicial or adjudication process. The MICI does not have a mandate to investigate actions of governments, public entities, local authorities, Borrowers, Executing Agencies or other lenders, sponsors, or investors in connection with the Bank-Financed Operation.

The Compliance Review process begins with the Compliance Review Phase Coordinator drafting, within 21 business days and in consultation with Management and the Requesters, the recommendation and Terms of Reference (TOR) for the investigation. The TOR will include, but not be limited to, the objectives of the investigation, the items to be investigated, a description of the Bank-Financed Operation, a proposed timeline and budget for the investigation, and anticipated use of consultants. The Management and the Requesters will each have up to 15 business days to comment on the TOR. The Board then considers these comments and the MICI's recommendation on whether or not to conduct a Compliance Review investigation.

Upon approval of the Compliance Review, the MICI Director, in consultation with the Compliance Review Phase Coordinator, will identify and hire two independent experts to form the Panel that will conduct the Compliance Review. The Panel will be made up of the Compliance Review Phase Coordinator, who will act as Panel Chair, and two additional members who will be selected from the Roster based on the experience required in each case.

The time required to conduct the Compliance Review will depend on the complexity and scope of the Bank-Financed Operation, and on the number of Relevant Operational Policies involved. However, a maximum term will be defined in the TOR, and the MICI will attempt to complete the investigation within a maximum term of six calendar months as of formation of the Panel. Upon completion of its investigation, the MICI will issue a draft report including a review of its main findings of fact and recommendations, which the Management and Requesters will have 21 days to comment on. The contents of the final report are however the exclusive decision of the MICI.

The Compliance Review report will include the Panel's findings as to whether (and if so, how and why) an action or omission by the Bank relating to a Bank-Financed Operation resulted in the failure to comply with one or more Relevant Operational Policies, and in Harm to the Requesters. It should also include a description of the Compliance Review Phase methodology used, and should provide the factual and technical basis for a decision by the Board on preventative or corrective action. The Board will make the final decision, and can demand that an action plan be prepared by the Management.

When applicable, the MICI will monitor implementation of any action plans or remedial or corrective actions agreed upon as a result of a Compliance Review, for a maximum of 5 years as of the date on which the Board approves the Management's action plan.

As of March 2016, the MICI had examined 34 requests since 2010¹³⁷.

* * *

Civil society organisations continue to work towards democratizing the bank and ensuring it is accountable. In particular, groups are calling for timely access to information on the bank's operations (including to be informed prior to the approval of the projects), for public participation in the design, implementation, monitoring and implementation of the bank's projects and for the bank to effectively prevent and mitigate the social and environmental impacts of the bank's operations.¹³⁸

ADDITIONAL RESOURCES

– MICI

<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39629936>

– IDB, Bank Information Centre

www.bankinformationcenter.org

– Accountability Counsel, Inter-American Development Bank (IDB),

www.accountabilitycounsel.org

¹³⁷ Interamerican Development Bank, Independent Consultation and Investigation Mechanism, Public Registry, Chronological Public Registry 2010 – 2014, www.iadb.org/en/mici.

¹³⁸ Bank Information Centre, IDB, www.bicusa.org/idb.

D. African Development Bank

The African Development Bank (AfDB) is a regional multilateral development finance institution, established in 1964 and engaged in mobilising resources towards the economic and social progress of its Regional Member Countries (RMCs). It is head-quartered in Abidjan (Côte d’Ivoire), but has been operating from Tunis since 2003. It includes 54 African countries and 27 non African countries¹³⁹.

Similar to the World Bank, its mandate is “to combat poverty and improve the lives of the people on the African continent.” According to the AfDB, its mission is to promote economic and social development through loans, equity investments and technical assistance. Many projects funded by the AfDB are co-financed with other major financial institutions such as the World Bank. The AfDB has specific mandates from the New Partnership for Africa’s Development (NEPAD) and is now taking the lead in certain areas such as infrastructure projects in Africa¹⁴⁰.

In 2004, the AfDB put in place an **Independent Review Mechanism (IRM)**¹⁴¹, operated by the **Compliance Review and Mediation Unit (CRMU)**, which provides people affected by a project financed by the Bank with an independent mechanism through which they can request the Bank to comply with its own policies and procedures. The IRM handles requests through two functions:

- Compliance Review
- Problem-Solving

In 2011, the AfDB approved a new Disclosure and Access to Information Policy,¹⁴² which was developed in consultation and with input from CSOs, and requires the AfDB to publicly disclose all documents unless there is a compelling reason for confidentiality. Should a request for information be denied by the Information Disclosure Committee of the AfDB, an appeal may be lodged to an Appeal Panel. In January 2015, the AfDB issued revised Operating Rules and Procedures for the IRM¹⁴³. According to the new rules, the IRM will, at the President and/or the Boards’ request, be able to provide advisory services to the Bank on its projects, programs, policies and procedures, in particular in relation to the Bank’s social and environmental impacts.¹⁴⁴ The advisory function is yet to be activated.¹⁴⁵

¹³⁹ African Development Bank. *About Us*, <http://www.afdb.org/en/about-us/>

¹⁴⁰ Bank Information Centre, *Examining the African Development Bank: A Primer for NGOs*, May 2007, www.bicusa.org

¹⁴¹ AfDB, *About the IRM*, www.afdb.org.

¹⁴² AfDB, Disclosure and Access to Information Policy, www.afdb.org.

¹⁴³ AfDB, The Independent Review Mechanism, Operating Rules and Procedures, January 2015 www.afdb.org.

¹⁴⁴ AfDB, The Independent Review Mechanism, 28 January 2015, Resolution B/BD/2015/03, www.afdb.org.

¹⁴⁵ *AfDB Board approves revised Resolution establishing Bank’s Independent Review Mechanism*, AfDB Press Release, 30 January 2015, www.afdb.org.

② What are the issues that can be dealt with?

The Bank's policies address several topics such as food production, poverty reduction, quality assurance and results, regional integration, or financial crisis¹⁴⁶. On 17 December 2013, after a one-year process that involved public participation through consultations¹⁴⁷, the Bank's environmental and social policies were replaced for the first time¹⁴⁸. The policies, now called the Integrated Safeguards System (ISS), entail five operational safeguards¹⁴⁹:

- *Environmental and social assessment*: This operational safeguard aims to integrate environmental and social considerations into the Bank's operation – including those related to climate change – for the Bank's activities to contribute to sustainable development.
- *Involuntary resettlement: land acquisition, population displacement and compensation*: This operational safeguard aims at ensuring fair and equitable treatment to those who will have to be relocated as a result of the implementation of a project financed by the Bank, as well as compensation and resettlement assistance.
- *Biodiversity, renewable resources and ecosystem services*: This operational safeguard underlines the requirement for the Bank's clients to sustainably use biodiversity and natural habitats.
- *Pollution prevention and control, hazardous materials and resource efficiency*: This operational safeguard underlines the requirement for the Bank's clients to prevent pollution and achieve high-quality environmental performance.
- *Labour conditions, health and safety*: This operational safeguard underlines the requirement for the Bank's clients to respect and protect the workers' rights and provide with their basic needs.

Although civil society organisations denounced serious flaws in relation to the protection of Indigenous Peoples in the ISS, the latter remains a significant improvement of the Bank's former safeguards. It is especially the case for risk management in lending operations, as the new standards will enable the automatic screening of policy loans according to the environmental and social risks they imply, and their categorization per risk level. A Strategic Environmental and Social Assessment (SESA) tool has been put in place to provide for public consultation processes and for the elaboration of Environmental Social Management Plans to address the issues related to projects involving moderate or significant environmental and/or social risks.¹⁵⁰

¹⁴⁶ AfDB, *Topics and Sectors*, African Development Bank, www.afdb.org.

¹⁴⁷ AfDB, Africa-wide consultation on AfDB Integrated Safeguards System, www.afdb.org.

¹⁴⁸ Bank Information Center, *African Development Bank safeguards coverage sets standard for the World Bank to emulate*, www.bankinformationcenter.org.

¹⁴⁹ AfDB, *Integrated Safeguards System*, p. 21-51, www.afdb.org.

¹⁵⁰ Bank Information Center, *African Development Bank safeguards coverage sets standard for the World Bank to emulate*, www.bankinformationcenter.org.

② Who can file a complaint?¹⁵¹

- **Any group of two or more** people in the country or countries where the Bank-financed project is located who believe that as a result of the Bank Group's violation of its policies and/or procedures, their rights or interests have been, or are likely to be, adversely affected in a direct and material way. They may be an organisation, association, society or other grouping of individuals.
- A duly appointed **local representative** acting on the instructions and as the agent of adversely affected people. Foreign representatives may act as agents in cases where no adequate or appropriate representation is available in the country or countries where the project is located.
- The Boards of Directors of the Bank Group

② Under what conditions?¹⁵²

The CRMU will accept requests that allege that an actual or threatened material adverse effect on the affected persons' rights or interests arising directly from an act or omission of a member institution of the Bank Group, as a result of the failure by the said institution to follow any of its own operational policies and procedures during the design, appraisal and/or implementation of a Bank Group-financed project.

Matters related to fraud or corruption, or to procurement from bidders and suppliers are handled by other units within the Bank Group.

There is no specific format for requests. Requests may be treated confidentially if requested, and must be submitted in writing, in the language of the Bank (English or French), and dated and signed.

The CRMU will **not** accept requests that:

- are filed more than 24 months after the physical completion of the project concerned or more than 24 months after the final disbursement under the loan or grant agreement or the date of cancellation of the disbursement amount, whichever comes first.
- relate to matters before the Administrative Tribunal of the Bank, **or** before other judicial review or similar bodies;
- relate to adequacy or unsuitability of Bank Group policies or procedures;
- relate to matters considered frivolous, malicious or anonymous complaints;

¹⁵¹ AfDB, *The Independent Review Mechanism, Operating Rules and Procedures*, January 2015, op. cited, III b)

¹⁵² AfDB, *The Independent Review Mechanism, Operating Rules and Procedures*, January 2015, op. cited, II

- relate to matters over which the CRMU, a Panel, the President or the Boards has/ have already made a recommendation or reached a decision after having received and reviewed a Request, unless justified by new evidence or circumstances;
- allege human rights violations, other than those involving social and economic rights alleging any action or omission on the part of the Bank Group;
- Actions that are the sole responsibility of other parties, including the borrower or potential borrower, and which do not involve any action or omission on the part of the Bank Group.

The filing of a Request or carrying out of a compliance review or problem-solving exercise will **not** suspending processing or disbursements for Bank Group-financed project. Interim recommendations to suspend further work or disbursements may be issued if the project's processing or implementation is deemed to cause irreparable harm.¹⁵³

HOW TO FILE A COMPLAINT?¹⁵⁴

The content of the complaint must include:

- Explanation on how the Bank group's policies, procedures, and/or contractual documents were seriously violated.
- Description on how the act or omission on the part of the Bank group has led or may lead to a violation of the specific provision.
- Description on how the parties are, or are likely to be, materially and adversely affected by the Bank group's act or omission.
- Description of the steps taken by the affected parties to resolve the violation with Bank group staff, and explanation on how the Bank group's response was inadequate.

The request must be sent to AfDB field offices¹⁵⁵ or sent by mail, fax or email to:

Compliance review and mediation unit (CRMU) P.O. Box 323-1002
10th Floor, EPI-C,
African Development Bank Group
Tunis-Belvedere, Tunisia
Tel: +216 71 10 20 56, +216 71 10 29 56
Fax: +216 71 10 37 27
Email: crmuinfor@afdb.org

¹⁵³ *Ibid*, III, f)

¹⁵⁴ *Ibid*, III

¹⁵⁵ AfDB, *Countries*, <http://www.afdb.org/en/countries/>

② Process and Outcome¹⁵⁶

The process before the CRMU can be divided into two main procedures: Problem-solving (mediation) or Compliance review (investigation).

Common procedures for both mediation and compliance review:

- Preliminary review by the Director CRMU upon receipt of a request to determine whether the request contains a bona fide allegation of harm from a Bank Group- financed operation.
- Within 14 days of receipt, the Director CRMU shall decide whether to:
 - register the request;
 - ask for additional information, in which case the decision period may be extended until the necessary information and documents have been filed, or
 - decide that the request is outside the mandate of IRM.
- If the request contains a bona fide allegation of harm arising from a Bank Group-financed operation, the Director CRMU shall determine whether the request shall be registered for mediation exercise, or for further consideration for a compliance review.

These two procedures are not exactly independent; it is possible that both be used for the same request.

Problem-solving

“If requests are eligible for problem-solving, the Director will initiate a process that could include mediation, fact-finding or dialogue facilitation. At the end of the process, the Director reports to the President and the AfDB Boards regarding any results achieved and any recommendations or comments from relevant parties. The President or Boards will then decide whether to accept or reject the recommendations and a summary is made public.”¹⁵⁷

Compliance review

“If the complaint presents evidence of a violation of Bank policy, the Director of the CRMU or the IRM Roster of Experts may recommend a compliance review. It is up to the President or Boards to approve a compliance review. Experts from the CRMU Roster conduct the investigation of compliance review, which could include site visits and meetings with the affected community. Once completed, the experts submit the compliance review report and any recommendations for remedial action to the President or Boards.

¹⁵⁶ See AfDB, The Independent Review Mechanism, Operating Rules and Procedures, January 2015, *op. cited*,

¹⁵⁷ Extract from *The Independent Review Mechanism of the African Development Bank Extract from*, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, September 2013, <http://grievancemechanisms.org>.

Following the release of the compliance review report, Bank Management has 90 days to prepare a response and action plan. Thereafter, Bank Management and the CRMU jointly present the findings to the Boards. The President or Boards will make the final decision to accept or reject the findings and recommendations of the compliance review report. The relevant parties are informed of their decision, and it is published on the AfDB's website. CRMU and one of the experts monitor the implementation of the approved Management remedial action plans."¹⁵⁸

To date, the CRMU has ten registered cases.¹⁵⁹

The CRMU in action

➔ The Bujagali Hydropower Project in Uganda

On 8 May 2007, the CRMU received a request from local NGOs and individuals to conduct a compliance review of the Bujagali Hydropower Project and the Bujagali Interconnection Project in Uganda. This project was managed by Bujagali Energy Limited, a company jointly owned by subsidiaries of the international development company Sithe Global Power, LLC and of the Aga Khan Fund for Economic Development, an international development agency. The request alleged non-compliance with the Bank Group's policies regarding the assessment of hydrological and environmental risks, the project's economics, and more specifically its affordability and alternatives analysis, consultations with affected people on resettlement and compensation and cultural and spiritual issues.¹⁶⁰

Upon finding *prima facie* evidence of harm or potential harm, the CRMU director made a recommendation to the Board of Directors to approve the compliance review of the Bujagali projects.

On 7 September 2007 the Board of Directors authorised the compliance review together with the establishment of the review panel. Since a similar request for investigation of the Bujagali Hydropower Project had been submitted to the World Bank's Inspection Panel (IPN), the CRMU and the World Bank agreed to collaborate on the Bujagali review.

The Inspection Panel and IRM Bujagali Review Panel, accompanied by specialists on key issues raised in the request, undertook a fact-finding mission in Uganda from 26 November to 8 December 2007. In addition, the IRM Bujagali Review Panel conducted document research and interviews with the staff at the Bank.

¹⁵⁸ Extract from *The Independent Review Mechanism of the African Development Bank*, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, *op. cited*

¹⁵⁹ See AfDB, IRM, Requests Register www.afdb.org.

¹⁶⁰ Compliance With Safeguard Policies Of The World Bank And African Development Bank, Emmanuel Kasimbazi, 'IAIA09 Conference Proceedings', Impact Assessment and Human Well-Being, 29th Annual Conference of the International Association for Impact Assessment, 16- 22 May 2009, www.iaia.org.

On June 20, 2008, the IRM released its report on the Bujagali projects compliance review¹⁶¹. In March 2009, the Bank management published its action plan in response to the IRM's report, including actions to be taken to comply with the Bank's policies¹⁶².

An IRM Monitoring Team was authorised on 9 July 2009 by the Board of Directors of the Bank Group to monitor the implementation of the findings of non-compliance issues raised by the IRM Review Panel's Compliance Review Report and the related management action plan. The IRM Monitoring Team conducted a mission to Uganda in May 2009.

The mission found the project lacking in compliance in the following 3 areas: resettlement and compensation, cultural and spiritual issues, and Forest Reserves Mitigation Measures. Between 2009 and 2012, four monitoring reports assessing the implementation of the Action Plan were submitted to the Board. The completion report is meant to be published in 2015¹⁶³, however little progress seems to have been made and this project remains one of the world's most controversial and expensive hydro-power plant projects.¹⁶⁴

* * *

As the AfDB appears to be having a growing influence on the development agenda of the African continent, civil society organisations are slowly starting to pay more attention to the AfDB's conduct. Whilst the bank remains under-staffed and has been criticised in the past for being secretive and deprived of any significant influence, it has undergone changes and its growing influence on the African continent should be accompanied by increased efforts by civil society to monitor its actions. The review process of the Independent Review Mechanism (IRM)'s, which took place between 2013 and 2015, was criticised by CSOs for providing highly inadequate opportunity for public comment on the IRM's new policy. CSOs also provided recommendations on to improve the IRM's accessibility and independence.¹⁶⁵

¹⁶¹ AfDB, Rapport de vérification de la conformité sur le projet d'hydroélectricité et le projet d'interconnexion de Bujagali, AfDB, 20 June 2004.

¹⁶² "AfDB Management Action Plan in response to the independent review panel's report on the Bujagali hydropower and interconnection projects", www.afdb.org.

¹⁶³ AfDB, The Independent Review Mechanism, Annual Report 2013, www.afdb.org.

¹⁶⁴ *Bujagali Dam, Uganda*, International Rivers www.internationalrivers.org, *Dwellers Protest Dam Blasts [Uganda]*, Franck Mugabi, October 2010, Business and Human Rights Resource Center <http://business-humanrights.org/en/dwellers-protest-dam-blasts-uganda>. BIC, "Over Priced Bujagali Dam to Raise Power Costs", 30 October 2009, www.bicusa.org.

¹⁶⁵ *2013-2015 Review of the IRM's Policy*, Accountability Counsel, www.accountabilitycounsel.org.

ADDITIONAL RESOURCES

- African Development Bank (AfDB)
www.afdb.org
- Bank Information Center (BIC)
 - African Development Bank
www.bicusa.org
 - Examining the African Development Bank: A Primer for NGOs, May 2007,
www.bicusa.org
- International Rivers
www.internationalrivers.org
- The Independent Review Mechanism of the African Development Bank, Human Rights & Grievance Mechanisms Project, SOMO and Accountability Counsel, September 2013
<http://grievancemechanisms.org>

E. Asian Development Bank

The Asian Development Bank (ADB) is a regional development bank established in 1966 in Manila to promote economic and social development in Asian and Pacific countries through loans and technical assistance. It is owned by 67 members, 48 from the region and 19 from other parts of the globe. According to its stated mission, its objectives should be aimed at helping its developing member countries reduce poverty and improve the quality of life of their citizens. ADB provides assistance to governments and private enterprises in its developing member countries based on a member's priorities.¹⁶⁶

On 29 May 2003, the ADB approved a new accountability mechanism to address the concerns of persons affected by ADB-assisted projects. A revision of the Accountability Mechanism was conducted between 2010-2012, including through public consultations,¹⁶⁷ and the new Accountability Mechanism policies entered into force in May 2012.¹⁶⁸

The Accountability Mechanism consists of **two separate but related functions**:

- A **problem-solving function** led by the Special Project Facilitator (SPF), and focusing on finding satisfactory solutions to problems caused by projects supported by the ADB; and

¹⁶⁶ ADB, *About ADB*, www.adb.org/about/main

¹⁶⁷ 2010-12 ADB AM Policy Review, Accountability Counsel, www.accountabilitycounsel.org.

¹⁶⁸ ADB, *Accountability Mechanism Policies 2012*, www.adb.org.

- A **compliance review function** composed of the independent Compliance Review Panel (CRP), that focuses on compliance with ADB's operational policies and procedures.

Complainants can request a Problem-solving, a Compliance Review, **or both**.

A complaint that requests Problem Solving will not be accepted if the matter has already been considered by the SPF (unless the complaint includes new information that was not previously available). A complaint that requests Problem Solving after a Compliance Review process has already occurred will not be accepted unless the CRP found the complaint ineligible.¹⁶⁹

🕒 What are the issues that can be dealt with?

ADB activities are governed by its Operational Policies which also include Operational Procedures that spell out procedural requirements and guidance on the implementation of development projects. In July 2009, ADB's Board of Directors approved a new Safeguard Policy Statement (SPS) governing the environmental and social safeguards of ADB's operations. It entered into force on 20th January 2010 and includes two main documents: the Safeguard Policy Statement (SPS) and a corresponding section in the ADB Operations Manual. The SPS describes policy principles, a policy delivery process, and roles and responsibilities.

The SPS includes safeguard requirements in **four areas**¹⁷⁰:

- *Environment*, which encompasses environmental assessment, environmental planning and management, information disclosure, consultation and participation, a grievance redress mechanism, monitoring and reporting, unanticipated environmental impacts, biodiversity and sustainable natural resource management, pollution prevention and abatement, health and safety, and physical cultural resources;
- *Involuntary resettlement*, which includes compensation, assistance and benefits for displaced persons, a social impact assessment, resettlement planning, negotiated land acquisition, information disclosure, consultation and participation, a grievance redress mechanism, monitoring and reporting, unanticipated impacts and special considerations for Indigenous Peoples;
- *Indigenous Peoples*, which includes consultation and participation, a social impact assessment, information disclosure, a grievance redress mechanism, monitoring and reporting, and consideration of unanticipated impacts;

¹⁶⁹ Extract from *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development, Accountability Counsel*, 8th edition, August 2015, p 27, available at www.accountabilitycounsel.org.

¹⁷⁰ ADB, *Safeguard Policy Statement*, June 2009, www.adb.org/Documents/Policies/Safeguards/default.asp

- Special requirements for different finance modalities are outlined in the “Appendices” section of the SPS. They are designed to ensure that ADB staff will apply **due diligence** to ensure borrowers comply with the requirements both during the project preparation and its implementation.

A consolidated Operations Manual section includes procedures for ADB staff for due diligence, review and supervision of projects. General specifications on safeguard requirements include consultation and participation, such as the necessity for the borrower to undertake meaningful consultation with affected Indigenous Peoples. It is worth mentioning that **the SPS refers to the UN Declaration on the Rights of Indigenous Peoples and explicitly mentions the need to ascertain the consent of affected indigenous peoples’ communities** in case projects financed by the ADB affect their cultural resources and knowledge, and/or involve the exploitation of natural resources on traditional lands and thereby impacting their livelihoods or cultural, ceremonial, or spiritual uses of the lands, and/or leading to their physical relocation from traditional and customary land. In the SPS, consent refers to a collective expression of broad community support.¹⁷¹ The requirements notably include the necessity to undertake a social impact assessment, to disclose information of key documents to the ADB, including corrective action plans, and to plan for the establishment of grievance redress mechanisms and monitoring and reporting measures.

Civil society criticisms

Despite the fact that some important improvements in the language of the content of the Operations Manual have been made over earlier drafts, civil society groups remain deeply concerned by the fact that the Operations Manual may not adequately protect vulnerable groups and the environment. In particular, civil society groups criticise the lack of clear consultation requirements for non-indigenous affected populations, the absence of reference to common property resources and the lack of gender issues analysis and instructions given to staff on how to implement the gender policy of the Bank (now main-streamed in the 2009 new safeguard policy).¹⁷²

Regarding environmental procedures, civil society groups remain concerned over the lack of transparency – especially when it comes to environmental classification of projects – as well as by the consultation process, which is still considered insufficient. NGOs who have been involved in the review process also criticise the narrow definition given to involuntary resettlement. The procedure has also been criticised for the weakness of its evaluation process, deemed to insufficiently address the need to design and implement action plans to remedy any damage caused.

¹⁷¹ ADB, *Safeguard Policy Statement*, article 33

¹⁷² For an analysis on women’s experiences in ADB funded projects, see (notably) NGO Forum on ADB, “They Drive Faster, We Walk Longer: a case study featuring the impacts of the ADB-funded Highway One Project in Cambodia on women”, 2010

In light of these criticisms and of the current review process of the WB's safeguards, the ADB has recently conducted an evaluation of its own policies, of which the report was published on 16 October 2014¹⁷³. Two interesting elements were pointed out to make the ADB's safeguards more efficient. First, the Bank should be alert to the implementation of its environmental and social policies for **all** risky projects, no matter their different likeliness to adversely impact the environment and/or human rights. Second, the Bank should improve follow-up in the implementation of its safeguards with supporting the countries' existing environmental and social frameworks, when those are equivalent to its own policies¹⁷⁴.

② Who can file a complaint?

- Any group of two or more people who are directly, materially, and adversely affected by an ADB assisted project;
- A local representative of affected people;
- In exceptional cases, a non local representative of affected persons, where local representation cannot be found and the Special Project Facilitator or Compliance Review Panel agrees.

If a complaint is made through a representative, it must clearly identify the project-affected people on whose behalf the complaint is made and provide evidence of the authority to represent such people.

② Under what conditions?

- The **direct and material harm must be the result of an act or omission of the ADB** in the course of the formulation, processing, or implementation of the ADB-assisted project. For a Compliance Review, the harm must relate to non-compliance by ADB of its operational policies and procedures;
- The complaint must be filed within two years of the grant or loan closing date;
- Attempts to resolve the issues through the ADB's Operations Department must be made prior to filing the complaint;
- Certain matters are excluded from the accountability mechanism, including complaints that are not related to ADB's actions or omissions, procurement matters, allegations of fraud or corruption, matters concerning projects for which a project completion report has been issued, the adequacy or suitability of ADB's existing policies and procedures, and non-operational matters such as finance and administration.

¹⁷³ Asian Development Bank, *Safeguards Operational Review : ADB Processes, Portfolio, Country Systems, and Financial Intermediaries*, www.adb.org.

¹⁷⁴ *Ibid.*

HOW TO FILE A COMPLAINT?¹⁷⁵

- Complaints must be submitted in writing, preferably in English or in any of the official or national languages of ADB's developing members. The identity of the complainant will be kept confidential if requested, but anonymous complaints will not be accepted.
- Complaints must be addressed to the Complaints Receiving Officer, who will forward the complaint either to the Office of the Special Project Facilitator (problem-solving function) or the Office of the Compliance Review Function, depending on complainants' request. The complaint letter must specifically state if complainants are directly requesting a compliance review by the Compliance Review Panel.
- A sample Complaint letter and a complaint form is available at www.adb.org.
- Complaints must be sent to any ADB office or directly by mail, fax, email or hand delivery to:

Complaints Receiving Officer
Asian Development Bank (ADB)
6 ADB Avenue
Mandaluyong City 1550
Philippines
Tel: (+632) 632-4444
Fax: (+632) 636 2086
Email: amcro@adb.org
- Complaints must include:
 - A description of the direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely by the ADB-assisted project;
 - A brief description of the ADB-assisted project, including the name and location if available;
 - The desired outcome or remedies that the project-affected people believe ADB should provide or the help expected to be obtained through the accountability mechanism;
 - The identity of the complainant (and of any representatives) and contact information, and if applicable, a request for confidentiality;
 - If a complaint is made through a representative, identification of the project-affected people on whose behalf the complaint is made and evidence of authority to represent them;
 - A description of the complainant's good faith efforts to address the problems directly with the operations department concerned before using the ADB accountability mechanism.

¹⁷⁵ ADB, *Complaints Receiving Officer, How to file a complaint*, www.adb.org.

② Process and Outcome

Once the complaint has been sent to the Complaints Receiving Officer, it is forwarded either to the Problem solving function through the Special Project Facilitator (1), or to the Compliance review function through the Compliance review panel (2).

Problem-Solving Function

If the SPF determines the complaint is eligible, it conducts an assessment, which could include one or more site visits and meetings with the person submitting the complaint and other relevant parties. Based on the assessment and comments received from the parties, the SPF will decide whether to proceed with problem-solving.

Generally, the objective of the Problem-Solving Function is to bring the parties together and come to an agreement about how to address the problem without determining whether a breach has occurred.

Once a problem-solving process has begun, either party can withdraw at any time, and you can request a compliance review. At the end of the process, the SPF will issue a public report that includes a summary of the complaint, steps taken to resolve the issues and any decisions made by the parties. The SPF will monitor the implementation of any agreement reached.¹⁷⁶

Compliance Review Function

If the Office of the CRP that oversees the Compliance Review Function determines that a case is eligible, it will issue an eligibility report for consideration and approval by the Board. If the Board approves the report, the CRP will conduct an investigation that may include one or more site visits, meeting with relevant parties and desk reviews. There is no timeline for an investigation. The review will assess whether the ADB failed to comply with its policies and whether serious harm has happened or could happen. To conclude the investigation, the CRP will issue a report with its findings.

If the CRP finds that the ADB violated its policies, ADB Management will propose ways to bring the project into compliance. The CRP will provide comments on Management's proposed actions, and then the report will be submitted to the Board for final consideration. The CRP's report will be made public after the Board approves any remedial actions, and the CRP will monitor any remedial actions.¹⁷⁷

¹⁷⁶ Extract from The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel, www.accountabilitycounsel.org.

¹⁷⁷ Extract from The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel, *op cited*

The Accountability mechanism in action

By 2015, the Office of the Special Project Facilitator (OSPF) had received 51 complaints.¹⁷⁸

➔ Community empowerment for rural development project (CERDP) in Indonesia

On 9 March 2005, the SPF received the complaint from 3 NGOs – Yayasan Cakrawala Hijau Indonesia (YCHI) in Banjarbaru, Lembaga Kajian Keislaman & Kemasyarakatan (LK3) in Banjarmasin, and Yayasan Duta Awam (YDA) with offices in Solo, Central Java – together with populations from 5 villages concerning the Community Empowerment for Rural Development Project (CERDP) in Indonesia. This project, which is supported by the ADBank, intended to improve the standards of living in rural communities. Indeed, three issues had been identified: rural poverty, poor people's lack of access to services, and the need to promote the role of women in development. The goal of the CERDP was to empower communities by building the capacity of rural communities and supporting local investment activities. It was implemented with a US\$ 170, 2 million dollar budget and started on 15 March 2001.

The issues raised in the complaint relating to this project were the lack of villagers' participation in planning and design before the construction of rural roads, bridges and water supply began which turned out to be unsatisfactory and which subsequently negatively impacten the agricultural productivity. The complaint was declared eligible on 23 March 2005.

According to the SPF, the implementation of the project violated 5 principles: acceptability, transparency, accountability, sustainability and integration. The project did not respect the approach agreed upon, that is to say: participatory, partnership, public real demand, autonomy and decentralization as well as increasing the role and capacity of women. The project's management did not respect either local knowledge and practices, human rights ("the right to a feeling of security and the right to freedom from fear") and good governance principles.

An agreement was reached in September 2005, and an action plan was agreed¹⁷⁹. According to the SPF, most of the villagers' requests were accepted, especially those concerning their lacking involvement in planning, implementing and supervising the project, their training for the maintenance of the infrastructures, and the necessary repairs to the damaged buildings.¹⁸⁰

¹⁷⁸ ADB, Accountability Mechanism, Problem Solving Function, Complaints Registry by Year, www.adb.org.

¹⁷⁹ ADB, "Final Report of the Special Project Facilitator on the Community Empowerment for Rural Development project in Indonesia", December 2005, www.adb.org.

¹⁸⁰ NGO Forum on ADB, "Community Empowerment for Rural Development (CERD)", South Kalimantan, Indonesia", www.forum-adb.org/inner.php?sec=13&ref=extras&id=20.

➔ Rehabilitation of the Railway in Cambodia project¹⁸¹

The case concerns communities who have been involuntarily resettled to make way for the rehabilitation of Cambodia's railway system. The resettled families are experiencing severe hardships, including unmanageable indebtedness, loss of income and lack of access to basic services, as they are made to bear the externalized costs of this major infrastructure project. The Asian Development Bank (ADB) is financing the project through a USD 84 million concessional loan.

On August 28, 2012, IDI submitted a request for investigation of the resettlement process to the Compliance Review Panel (CRP), the ADB's internal accountability mechanism, on behalf of affected families who have asked IDI to represent them through the process.

The complaint describes a litany of problems and non-compliance with the resettlement process that have inflicted hardships on hundreds of poor families. It calls for a number of remedies from the ADB including reimbursement for the actual costs of replacing lost assets, at least enough compensation to build an adequate home and meet basic needs, debt relief, adequate basic services at the relocation sites, and support to get their children back into school. The complaint was registered by CRP on September 4, 2012.

After a 17-month investigation, the CRP issued a scathing report, which found that the ADB failed to comply with its policies and procedures, leaving a substantial number of affected households worse off and impoverished. The Panel found that families affected by the Railway project "suffered loss of property, livelihoods, and incomes, and as a result have borne a disproportionate cost and burden of the development efforts funded by ADB." According to the Panel, ADB's "inadequate attention to addressing the resettlement, public communications and disclosure requirements of its own policies...has led to significant yet avoidable adverse social impact on mostly poor and vulnerable people."

The Panel emphasized: "the need for an urgent, firm, and clear message to ADB Management that resettlement, environmental, and public disclosure issues should be taken seriously and accorded the priority consideration they deserve." It found that in this case, as in other cases that it had reviewed, these issues were treated by ADB as "mere add-ons." The Panel concluded that: "ADB operational, sectoral, and regional staff must undergo a mind shift in the treatment of resettlement, environment, and public disclosure and consultation. Their perspective must be based on the recognition already existing in ADB's safeguard policies that involuntary resettlement is a development opportunity, intrinsic to achieving the developmental goals of projects."

The Panel made a number of recommendations for remedies, including establishing a \$3–\$4 million 'compensation deficit payment scheme'; improving facilities at resettlement sites; extending and expanding the income restoration program; establishing of a debt workout

¹⁸¹ Authorized extract from Inclusive Development International, *Cambodia: ADB and Australia-financed railway project*, available at www.inclusivedevelopment.net.

scheme for highly indebted households; improving the functioning of the grievance redress mechanism; capacity-building for the Cambodian authorities responsible for resettlement; and adopting specific safeguards for the development of a freight facility which respects the land rights of families in the “Samrong Estate” area.

On January 30, 2014, ADB’s Board of Directors approved the Panel’s findings and slightly modified recommendations.

IDI, Equitable Cambodia and the affected communities who brought the complaint welcomed the CRP’s report and the Board’s decision and have called upon ADB Management to develop a robust remedial action plan to operationalize the decision.

On August 30, 2015, 22 representatives of families remaining along the railway tracks filed another complaint to the CRP with support from IDI and Equitable Cambodia. The complaint presents new evidence of ADB acts and omissions that threaten material harm to the complainants which were not previously addressed by the CRP in its earlier investigation.

* * *

Civil society organisations who have tried to seize the mechanism have raised numerous concerns about the process and have expressed serious doubts about the Bank staff’s real power to address controversial matters with the Bank management or Board. Moreover, communities that have attempted to seize the ADB mechanism report to have been intimidated when seeking confidentiality and to fear reprisals.¹⁸² In the past years, the Bank has witnessed an important increase in the number of complaints received, mostly due to greater awareness amongst civil society organisations on the existence of this mechanism. It is to be hoped that complaints filed will contribute to ensure that projects supported by the ADB comply with the Bank’s policies, do not negatively impact on human rights and that its accountability mechanism can effectively address human rights concerns of affected people, which still remains to be seen.

¹⁸² *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, p 30, *op. cited*.

ADDITIONAL RESOURCES

- Asian Development Bank
www.adb.org
 - Compliance Review Panel
www.compliance.adb.org
 - Inclusive Development International (IDI)
www.inclusivedevelopment.net
 - International Accountability Project,
www.accountabilityproject.org
 - ASrIA (Asia)
www.asria.org
 - NGO Forum on ADB
www.forum-adb.org
 - The Asian Development Bank's Accountability Mechanism, SOMO and Accountability Counsel,
www.accountabilitycounsel.org
-

* * *

In conclusion, if all development banks do now have policies in place that deal with issues related to human rights, in practice, they are still being largely criticised for not taking into account their own policies when financing projects and for too often acting as private banks.

The mechanisms available within the financial institutions are mostly focused on dialogue, and since they do not have adjudicative power, the decisions taken by the different bodies are not legally binding upon the parties.

However, they represent powerful administrative mechanisms that have the advantage of treating complaints relatively quickly. They can also contribute to ensure that procedures are respected and safeguards are in place in the design and execution of projects. In certain cases, they can be instrumental in providing some form of reparation for individuals and communities. Available complaints mechanisms of financial institutions still remain largely unknown to many, including affected people, borrowers and even consultants working for these banks. Awareness raising on the existence of these mechanisms is therefore necessary to ensure that different groups can subsequently make use of bank policies and mechanisms to ensure projects financed by these banks comply with human rights standards. Complaints registered can also be used as a powerful lobby tool.

In some regions, fear of reprisals from oppressive governments and the lacking confidentiality in these mechanisms', as well as their inability to provide a remedy

will prevent affected people from taking advantage of the complaint mechanisms. Although they major shortcomings, a case-by-case evaluation should be undertaken to evaluate potential usefulness of using these mechanisms. Despite the fact that the recommendations resulting from these complaints processes are non-binding, the use of these mechanisms as an advocacy tool may contribute to halt a project or alter its consequences on populations. In parallel, continuous advocacy for human rights norms to be fully integrated by these institutions is needed.

Two new players have appeared on the stage of multilateral development banks, Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB). It remains to be seen whether the environmental and social policies that will develop will be in line with those of other multilateral development banks, and if efficient recourse mechanisms for those affected by the projects they will finance will be established.

The Asian Infrastructure Investment Bank (AIIB) was created in October 2014 with an initial capital of \$50 billion. This new multilateral development institution launched on China's initiative should count at least 21 member States and respond to Asia's huge financing needs for investments in infrastructure projects. According to the Asian Development Bank, Asia's investment infrastructure needs could reach \$750 billion per year between 2010 and 2020. The main concern regarding the creation of this multilateral development bank is its ability to put in place and implement efficient environmental and social standards, and the U.S. did not hesitate to express its scepticism on this point. Probably for similar reasons, South Korea and Australia did not react to the invitation to join the new financial institution¹⁸³. In September 2015, the AIIB released draft environmental and social safeguards, which are opened for consultation. NGOs are closely monitoring this process and have already formulated criticisms.¹⁸⁴

Similar concerns as to the design of efficient environmental and social policies have been expressed regarding the creation of the New Development Bank (NDB) in July 2015, on the initiative of five emerging countries commonly known as the BRICS (Brazil, Russia, India, China and South-Africa). Civil society organisations and social movements are urging the institution to commit to basic principles of sustainable development and respect for human rights.¹⁸⁵ With an initial capital of \$50 billion, the new multilateral development bank's goal is to finance infrastructure and sustainable development projects in these countries, although other states willing to obtain financing will be able to apply¹⁸⁶.

¹⁸³ The Diplomat, *Asian Infrastructure Investment Bank : An Idea Whose Time Has Come?* <http://thediplomat.com>.

¹⁸⁴ NGO Forum on ADB, *Gaps in AIIB's ESF Further Highlighted in Forum's Updated Submission*, 5 Novembre 2015, <http://forum-adb.org>.

¹⁸⁵ Conectas, *Four Principles for the BRICS Bank*, www.conectas.org.

¹⁸⁶ The Washington Post, "What the new bank of BRICS is all about", www.washingtonpost.com. See notably Conectas, *Four Principle for the BRICS bank*, www.conectas.org.

➤ Comparative table of the IFIs' mechanisms

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINT MECHANISM AND THE EUROPEAN OMBUDSMAN	
Financial Institutions' members	International Bank for Reconstruction and Development (IBRD) International Development Association (IDA)	International Finance Corporation (IFC) Multilateral Investment Guarantee Agency (MIGA)	European Investment Bank (EIB)	
Parties permitted to submit a request	<ul style="list-style-type: none"> - A community of persons (not an individual) living in the territory of the borrower State and believing they are suffering or may suffer harm from a WB-funded project, that the WB may have violated its operational policies or procedures with respect to the project, and that the violation is causing the harm. - Another person if provide documentation authorizing them as representatives who represents the complainant; - a local NGO - a foreign NGO, but only where local representation is not available 	<ul style="list-style-type: none"> - Any individual, group, or community directly impacted or likely to be impacted by social or environmental impacts of an IFC or MIGA project. - Representatives of an affected group may submit a complaint on their behalf if they provide their names and authorisation of representation. 	<ul style="list-style-type: none"> - Any natural or legal person affected, or feeling affected, by a decision of the EIB which relates to maladministration of EIB group in its action or omission. - For the European Ombudsman: EU citizens or a person residing or having its registered office in an EU country (at possibly non-EU nationals at the discretion of the Ombudsman, non-EU nationals) 	
Subject of the complaints	Non-compliance with WB policies or procedures, including environmental assessment, indigenous peoples and involuntary resettlement; and current or future harm stemming from a project with at least some funding from the World Bank's IBRD or IDA.	Non-compliance with IFC and MIGA Performance Standards including social and environmental assessment, labour and working conditions, land acquisition and involuntary resettlement, biodiversity conservation, indigenous peoples. These operational policies are undergoing a review process that should be finalised in early 2015."	Non-compliance with EIB' standards, including environmental and social standards, consultation, participation and disclosure standards as well as standards related to indigenous peoples, climate change and cultural heritage; and non-compliance to Applicable law, Internationally recognized human rights, or Principles of good administration.	

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S IPROJECT COMPLAINT MECHANISM (PCM)	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - INDEPENDENT REVIEW MECHANISM (IRM)	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND ACCOUNTABILITY MECHANISM (SPECIAL PROJECT FACILITATOR (SPF) AND COMPLIANCE REVIEW PANEL (CRP))
European Bank for Reconstruction and Development (EBRD)	Inter-American Development Bank (IADB) Inter-American Investment Corporation (IIC) Multilateral Investment Fund (MIF)	African Development Bank (AfDB)	Asian Development Bank (ADB)
<ul style="list-style-type: none"> - In case of Problem solving Initiative: one or more individual(s), located in an impacted area, or who has or have an economic interest in an impacted area. - In case of Compliance Review: one or more individual(s) or organisation(s) (including an NGO if it is registered in a member country of the Bank) in relation to a project that has been approved for financing 	<ul style="list-style-type: none"> - One or more persons, groups, associations, entities or organisations whose rights or interests have been or are likely to be directly and materially adversely affected by an action or omission of the Bank as a result of a failure of the Bank to follow its policies. - Authorized representative 	<ul style="list-style-type: none"> - Any group of two or more persons or organisations, associations in the country or countries where the Bank Group-financed project is located who believe that as a result of the Bank Group's violation of its policies and/or procedures, their rights or interests have been, or are likely to be, adversely affected in a direct and material way or; - A duly appointed local representative. - Foreign representation is allowed only when local representation cannot be found. The Boards of Directors can also refer a project to IRM to conduct a compliance review 	<ul style="list-style-type: none"> - Any group of two or more persons (such as an organisation) in a borrowing country where an ADB-assisted project is located or in a member country adjacent to the borrowing country, or a local representative of the affected group; and believing they are or are likely to be, directly affected materially and adversely by an ADB-assisted project - local authorized representative - non-local representative only where local representation is not available
Non-compliance with EBRD's Environmental and Social Policy (2014) and the bank principles such as environmental sustainability, health, safety and community issues and compliance with applicable regulatory requirements and good international practice.	Non-compliance with the IDB's Relevant Operational Policies, including environmental safeguards, gender policies and information disclosure policies.	Violation of policies/ procedures including non-compliance with its environmental and social impact, poverty reduction, gender, integrated Water Resources Management; and involuntary resettlement.	Non compliance with ADB procedures and policies including the Safeguard Policy Statement (including on Environment, Involuntary Resettlement and Indigenous Peoples) and the Sector Policy Papers (including Energy, Forestry and Water).

➤ Comparative table of the IFIs' mechanisms (continued)

MECHANISM	WORLD BANK INSPECTION PANEL	WORLD BANK COMPLIANCE ADVISOR OMBUDSMAN	EUROPEAN INVESTMENT BANK COMPLAINT MECHANISM AND THE EUROPEAN OMBUDSMAN	
Time limits for complaints	Complaints must be submitted before the project is closed and before 95 percent of the funding has been disbursed. Complaints may also be submitted before the Bank has approved financing for the project or program.	Not stated time limit	Within one year from the date after which the respondent could be in a position to acknowledge the facts upon which the allegation is grounded.	
Type of mechanism and outcome	<p>The Panel decides whether to recommend an investigation. If it decides so, the Panel will complete an investigation and issue a report of their findings.</p> <p>The Bank Management is required to respond and to indicate how it will address the findings with an action plan.</p> <p>The Board makes a final decision which is made public.</p>	<p>The CAO will investigate the complaint and will determine how to move forward.</p> <p>For Dispute Resolution the CAO will facilitate a process designed to address the issues in the complaint with the goal of reaching a mutually agreeable solution.</p> <p>For Compliance the CAO conducts an appraisal and may conduct a full compliance investigation. Compliance investigation reports are made public, and the CAO monitors changes until the IFC/ MIGA take steps to resolve noncompliance.</p>	<p>If the complaint is eligible, the Office will conduct an investigation using a flexible approach, which may include compliance review and/ or problem-solving. The Office concludes its work by issuing recommended corrective actions in its Conclusions Report.</p> <p>The complainant can appeal the EIB Complaints conclusions or ask for a follow up on implementation of EIB conclusions by submitting a confirmatory complaint. He/she can also turn to the European Ombudsman if the complainant is not satisfied with the EIB process.</p>	

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT'S IPROJECT COMPLAINT MECHANISM (PCM)	INTER-AMERICAN DEVELOPMENT BANK INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM	AFRICAN DEVELOPMENT BANK - INDEPENDENT REVIEW MECHANISM (IRM)	ASIAN DEVELOPMENT BANK OFFICE OF SPECIAL PROJECT FACILITATOR (OSPF) AND ACCOUNTABILITY MECHANISM (SPECIAL PROJECT FACILITATOR (SPF) AND COMPLIANCE REVIEW PANEL (CRP))
For Problem-Solving Initiative: 12 months from last disbursement. For Compliance Review: no more than 24 months after the date on which the EBRD ceased to participate in the project.	Within 24 months after the last disbursement of funds by the Bank.	Up to a year after the final disbursement of the loan or physical completion of the project.	Up to two years after the loan or grant closing date.
<p>- In case of Problem solving Initiative: the aim is to restore dialogue between the complainant and the client. If an agreement is reached, the PCM will conduct any necessary monitoring.</p> <p>- In case of Compliance Review: the aim is to determine if the EBRD has complied with its policies.</p> <p>Possible outcomes include a report with recommendations for corrective action. The PCM can also monitor changes arising from the compliance review process.</p>	<p>In Consultation Phase, MICI conducts an assessment and facilitates dialogue between the parties. If an agreement is reached, MICI monitors its implementation.</p> <p>In Compliance Review Phase, MICI investigates whether the IDB failed to comply with its policies and thereby harmed complainants. MICI presents its report to the Board, which determines what action to take, including whether Management should develop an Action Plan to address any noncompliance. The report is released to the public along with the Board's decision. MICI will monitor implementation of the Action Plan or other agreed remedial actions.</p>	<p>After examination of the complaint, the Unit will decide if it is more efficient to conduct a problem-solving process and/or a compliance review. The panel submits a report to be approved by the President or the Board and which includes findings and recommendations, as well as a designated person to monitor the implementation of proposed changes.</p>	<p>The Complaints Receiving Officer forwards complaint to the Problem Solving or Compliance Review functions.</p> <p>In Problem Solving, the SPF attempts to facilitate an agreement between the parties involved, and monitors the implementation of this agreement.</p> <p>In Compliance Review, the CRP conducts an investigation into whether the ADB has complied with its policies and procedures. The CRP presents its findings to the ADB Board, which decides whether to take action.</p>

Extracts from: *Accountability Resource Guide, Tools for Redressing Human Rights & Environmental abuse in International Finance and Development*, Accountability Counsel, 8th edition, August 2015, *op cited*.

Human Rights & Grievance Mechanisms Brochures, SOMO and Accountability Counsel, *op cited*.

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
Using Financial Institutions' Mechanisms
and Engaging with Shareholders

PART II

Export Credit Agencies

Export Credit Agencies (ECAs) are national public institutions that offer private companies three different kinds of support: direct credit (1), credit insurance (2) and/or guarantees (3). This support which is guaranteed by the state allows companies to reduce the financial risk when signing contracts abroad especially in fragile developing countries. Some of these agencies are governmental, such as the ECGD (Export Credits Guarantee Department) in the United Kingdom, whereas others are private organisations working on behalf of the state, such as COFACE in France. Most industrialised countries have at least one official Export Credit Agency. Their aim is to support the establishment of national industries abroad. The agencies help finance high risk projects (dams, mining, pipelines, chemical projects,...) which due notably to their environmental or social impact could not be carried out without this support¹⁸⁷.

In 1963, the OECD established the “Working Party on Export Credits and Credit Guarantees” (ECG) which is in charge of carrying forward the work of the OECD concerning export credits. Its objectives are to analyse export credit and guarantee policies, to determine potential problems and to resolve or mitigate these through multilateral discussions.

Civil society criticisms of the ECAs

Civil society organisations often criticize ECAs either for not (or else very rarely) applying human rights, social and/or environmental standards in their decision making processes. Since these agencies are state organs, the states may be violating their obligations under international human rights law if they do not make sure that the ECAs act in conformity with human rights standards. According to Transparency International¹⁸⁸, these agencies actually contribute to reinforce the corruption in developing countries in which they invest (bribes for civil servants to see through contracts and projects). In its 2011 annual report, Mr. Cephas Luminas, then UN Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, affirmed

¹⁸⁷ ECA Watch - International NGO Campaign on Export Credit Agencies, www.eca-watch.org

¹⁸⁸ ECA Watch, *Exporters fail on pledge to curb on bribery: Transparency International*, www.eca-watch.org.

that “a significant number of the projects supported by export credit agencies, particularly large dams, oil pipelines, greenhouse gas- emitting coal and nuclear power plants, chemical facilities, mining projects and forestry and plantation schemes, have severe environmental, social and human rights impacts.”¹⁸⁹

Progressive integration of social and environmental considerations into the ECAs

Due to growing criticism from civil society, Export Credit Agencies have been showing more willingness over the past few years to integrate human rights standards into their work. However, the pace at which they are changing their policies and attitudes is still very slow. Some agencies, such as the Export Development Canada (EDC) (see example below) have defined policies or made declarations concerning their social responsibility. On 13 May 2004, Eksport Kredit Fonden, the Danish export credit agency, was the first to adopt the Equator Principles which were developed by private sector banks (see Part III on the Equator Principles)¹⁹⁰ and then followed by the Canadian export credit agency. In 2003, the Coface (France’s ECA) adopted environmental guidelines; however, these were the subject of severe criticism owing to the fact that they do not apply to all of the project categories. Some agencies have established complaint mechanisms (see Canada and US below).

In June 2000, 347 NGOs criticized the persisting inadequacies of the ECAs (absence of transparency, corruption, absence of follow up investigations, etc.) and published the **Jakarta Declaration**¹⁹¹ directed at the OECD member states with the aim of reforming the rules governing export credit agencies. This document demands, among other things, more transparency, public access to information, consultation with civil society and with those affected by the projects, as well as the adoption of guidelines in conformity with environmental and human rights standards.

In June 2007, within the framework of the Working Party on Export Credits and Credit Guarantees (ECG), the OECD Council adopted a revised version of its 2003 Recommendation which calls for the implementation of stricter environmental rules and regulations¹⁹². This Recommendation also includes social impact assessments. One of its main objectives is to contribute to **sustainable development** by insuring **coherent policies** that export credit agencies will be required to adhere to and which are in accordance with international instruments. Through the adoption of the Recommendation, the OECD members have accepted to apply the International Finance Corporation’s (IFC) social and environmental standards (themselves

¹⁸⁹ Mr. Cephas Luminas, *UN Independent Expert on the effects of foreign debt on the full enjoyment of all human rights*, 5 August 2011, UNGA, A/66/271

¹⁹⁰ The Equator Principles, *Eksport Kredit Fonden adopts the international “Equator Principles” guidelines*, The Equator Principles, 13 May 2004, www.equator-principles.com.

¹⁹¹ *Jakarta Declaration*, May 2000, available at www.eca-watch.org.

¹⁹² OECD, *OECD Adopts Stronger Environmental Common Approaches for Export Credits*, available at www.oecd.org.

criticized by NGOs, see Part I, Chapter I) to their ECAs¹⁹³. This recommendation was updated in June 2012¹⁹⁴.

Although not explicitly mentioned in their statute or their policies, a few agencies publicly state that they take into consideration the human rights issues through their due diligence process. However, the reality is still characterised by the absence of legally binding instruments which would oblige the export credit agencies to consider human rights standards, the absence of control over their functioning, and by a lack of transparency in the way they conduct business. Regrettably, the present state of affairs does not require agencies to undertake public environmental and social impact assessments or even to consult with communities affected by the projects.

Examples of agencies with complaints mechanisms...

CANADA – Export Development Canada (EDC)

The Export Development Agency is autonomous, functions like a corporation and is entirely owned by the Canadian government¹⁹⁵. The EDC financially supports companies with the aim of developing the Canadian export market and to profit from the possibilities and opportunities offered by the international marketplace¹⁹⁶. The EDC has implemented a complaints mechanism which is run by the **Compliance officer**.

② What are the issues that can be dealt with?

Although human rights standards are not mentioned anywhere in its statute or its regulations, the EDC has implemented a declaration covering its social responsibilities¹⁹⁷. The **five main principles** governing social responsibility are embedded in the organisation's policies and, in a nutshell, they cover the following:

- *Business Ethics*: establishment of a code of conduct, code of business ethics and an anti-corruption program;
- *Environment*: EDC is committed to the environment by facilitating and encouraging exports of Canadian environmental solutions to review the environmental

193 OECD, Working Party on Export Credits and Credit Guarantees, *Revised Council Recommendation on common approaches on the environment and officially supported export credits*, TAD/ECG (2007) OECD Adopts Stronger Environmental Common Approaches for Export Credits, *Op. cit.*

194 OECD Recommendations (Common Approaches), *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* (the “Common Approaches”), as adopted by the OECD Council on Thursday 28 June 2012, www.oecd.org.

195 EDC, *Introduction to Corporate Information*, Supporting Canadian Exports and Foreign Direct Investments, www.edc.ca.

196 EDC, Mandate and Role, EDC's mandate, www.edc.ca.

197 EDC, *Corporate Social Responsibility at EDC*, www.edc.ca.

- impacts of prospective projects;
- *Transparency*;
- *Employee Engagement*; and
- *Community Investment*

Every year since 2004, the agency publishes an annual report concerning its corporate social responsibility (CSR). The agency has established a consultative council which is in charge of advising the agency on its CSR and helps to improve its social and environmental practices.

EDC adopted a “**statement of commitment on human rights**” in which the agency affirms its respect for human rights and recognises the need to be coherent with Canada’s international obligations, including the Universal Declaration of Human Rights and the necessity for financial institutions to evaluate potential negative impacts of their activities on human rights¹⁹⁸. The agency furthermore confirms that it will undertake impact assessments to evaluate the impact of its projects on human rights. EDC uses international standards in its review of prospective clients, including the IFC performance standards and the Equador principles. However it remains unclear whether EDC requires that its clients comply with these standards.¹⁹⁹ Unfortunately the EDC does not make its methodology or results public²⁰⁰. **EDC is been criticized for funding numerous controversial projects**²⁰¹.

② Who can file a complaint?

Any individual, group, community, entity or other party “can request a review on issues relating to EDC’s public disclosure of information, environmental reviews, human rights and business ethics. If a request is being made on behalf of another party, that group should be identified and evidence of authority to represent that group provided.

② Under what conditions?

There is no particular deadline for filing a complaint. The complaint must be in writing in either English or French.

¹⁹⁸ EDC, *EDC statement on human rights*, www.edc.ca.

¹⁹⁹ Above Grand, *FAQs on Export Credit Agencies*, www.aboveground.ngo

²⁰⁰ K. Keenan, *Export Credit Agencies and the International Law of Human Rights*, *Halifax Initiative Coalition*, January 2008.

²⁰¹ See notably ECA Watch, www.eca-watch.org.

HOW TO FILE A COMPLAINT?

The complaint must include the following:

- The name of the complainant, as an anonymous complaint cannot be accepted. However, material to support the complaint can be submitted confidentially.
- If a third party is representing a complainant, contact information has to be provided and the relevant documents justifying the third party representation must be included.
- A clear statement describing the policies, guidelines or procedures which in the opinion of the complainant have not been respected by the EDC.
- What has been done to solve the problem, including any previous contact with EDC.
- Background information on the complaint, including the names of any person the complainant may have dealt with in an attempt to resolve the issue or raise the concerns.
- Complaints can be sent to:

Compliance Officer
Export Development Canada
151 O'Connor Street,
Ottawa ON K1A 1K3
Fax: (613) 597-8534
E-mail: complianceofficer@edc.ca

- You can also fill in a request for review form online: https://www19.edc.ca/edcsecure/eforms/csr/request_review_e.asp.
-

➤ Process and outcome

“EDC’s Compliance Officer (“CO”) provides a mechanism for resolving complaints either through dispute resolution and mediation or through a compliance audit to determine if EDC is following its corporate social responsibility practices and policies. Within a “reasonable” amount of time, the Compliance Officer will let you know whether your complaint is eligible. If eligible, the Officer will use a preliminary assessment to determine which method to use to handle the complaint (such as dialogue, facilitation or negotiation). If the issue is not resolved, the Compliance Officer can make a recommendation to EDC’s Board of Directors about future action that should be taken to address the concerns raised in the complaint. If a compliance audit is recommended, the audit will be performed by the EDC’s internal auditor or an external third party at the oversight of the Compliance Officer.²⁰²” The Compliance officer can decide to end the dispute if he or she considers that the matter has been resolved satisfactorily.

The Compliance officer can also make recommendations to the Board of Directors and become in charge with the follow up of their implementation.

202 Extract from Accountability Counsel, *Export Development Canada*, www.accountabilitycounsel.org.

Recommendations made by the Officer are not binding on EDC. However, the Compliance Officer reports quarterly to the Audit Committee of the Board of Directors of EDC on the highlights of recommendations made during the quarter and the status of these recommendations. According to the official website²⁰³. The Compliance officer can decide to end the dispute if he or she considers that the matter has been resolved satisfactorily.

The Compliance officer can also make recommendations to the Board of Directors and become in charged with the follow up of their implementation.

According to civil society actors, such as Above Ground EDC's due diligence process remains inadequate.

ADDITIONAL RESOURCES

- Above Ground, FAQs: Export Credit Agencies www.aboveground.org
 - Accountability Counsel, Export Development Canada's Co, www.accountabilitycounsel.org.
 - Halifax Initiative, Counter Current, Forum Suape, Both Ends and Movimiento Ríos Vivos, Export Credit Agencies and Human Rights: Failutre to Protect, 2014, www.aboveground.ngo.
 - ECA Watch, EDC, www.eca-watch.org.
-

USA – Overseas Private Investment Corporation (OPIC)

The **Overseas Private Investment Corporation (OPIC)**²⁰⁴ is a US government agency which works in over 150 countries. OPIC has established an independent Office of Accountability (OA) which has two main functions: Problem-Solving and Compliance Review²⁰⁵. The next section mainly looks at the process which follows the compliance review, although it is worth noting that the problem-solving mechanism works in a similar fashion.

② What are the issues that can be dealt with?

The compliance review process assesses and reports on complaints regarding OPIC's compliance with its policies related to environment, social impacts, worker rights and human rights under an OPIC-supported project. These policies include sections 231 (n), 231A, 237(m), 239(g) and 239(i) of the 1961 Foreign Assistance Act, as amended, as well as tnd OPIC's Environmental Handbook, that was published – February 2004²⁰⁶. Most of the OPIC's policies are based on the policies

²⁰³ See EDC, *EDC's Compliance Officer Steps to Resolution*, www.edc.ca.

²⁰⁴ OPIC – Overseas Private Investment Corporation, www.opic.gov.

²⁰⁵ OPIC, Office of Accountability, *Overseas Private Investment Corporation*, www.accountabilitycounsel.org.

²⁰⁶ Extract from OPIC, *Compliance Review*, www.opic.gov.

and standards of financial institutions such as the IFC (the International Financial Corporation, which is part of the World Bank Group). The US Code requires the OPIC to issue a “comprehensive set of environmental, transparency and internationally recognized worker rights and human rights guidelines with requirements binding on the Corporation and its investors that shall be consistently applied to all projects, funds and sub-projects supported by the Corporation (...)” (22 U.S. Code, paragraph 2291b – Worker rights and human rights guidelines)²⁰⁷.

According to its policies, the OPIC must ensure the respect of:

Strict Environmental and Social Norms

Such norms are described in the OPIC Environmental Handbook. The Handbook²⁰⁸ is intended to provide guidance to OPIC’s investors, as well as the interested public, with respect to the environmental and social standards. The Handbook also presents the assessments and monitoring procedures that the OPIC applies to prospective and ongoing investment projects. Furthermore, it contains a section on the publication of information concerning, for example, the number of potentially displaced persons, the impacts on lifestyle as well as the level of general acceptance and consent for the project (identification of affected people, consultations, etc.).

Worker’s Rights

The OPIC may operate in countries if they currently have, or are taking steps to adopt and implement, laws that extend internationally recognized worker’s rights. The OPIC cannot provide assistance to any program, project, or activity that contributes to the violation of “internationally recognized workers rights”, including the freedom of association and collective bargaining, the prohibition of forced labour, the respect of the minimum employment age and of acceptable conditions of work²⁰⁹. The OPIC includes a clause on the respect of workers’ rights in every contract it signs. Exceptions can be made by invoking sections 231A (3) and 231A (4) of the 1961 Foreign Assistance Act if a solid justification is provided which supports the need to stimulate the economic situation of a country.

Human Rights

The OPIC human rights clearance process is designed to ensure that OPIC-supported projects meet their statutory requirements, and thus comply with the 1961 Foreign Assistance Act. The latter states that no assistance can be given to projects in countries in which serious and systematic human rights violations are taking place, such as torture and abduction, or in which the right to life, liberty and security of individuals are endangered²¹⁰.

²⁰⁷ Referred to in the *Report of the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, A/HRC/14/27, 9 April 2010.

²⁰⁸ OPIC, *OPIC Environmental Handbook 2004*, www.opic.gov.

²⁰⁹ OPIC, *Worker & Human Rights*, www.opic.gov.

²¹⁰ Children’s rights are also mentioned. See the *Foreign Assistance Act*, section 116 as amended, 1994.

Economic Analysis

The project should not have a negative impact on the US Economy. For example, OPIC will not finance projects which favour the outsourcing of the production chain. Furthermore, restrictions are in place for the tobacco, gaming, and alcohol and arms industry.

Development Impact in the Host Country

The OPIC undertakes a development impact analysis in each country and takes social practices and corporate social responsibility into account.

Projects that are likely to have significant adverse environmental or social impacts are disclosed to the public for a comment period of 60 days²¹¹.

In October 2010, the OPIC adopted a framework for the evaluation and the monitoring of its environmental and social policies, called the Environmental and Social Policy Statement (ESPS).²¹² Currently, in order to ensure that the policy remains an effective tool, a revision process is taking place. The final version of the ESPS will be adopted by fall of 2016. Following this revision updated procedures will be developed accordingly.

② Who can file a complaint?

- Member/s of the local community affected by adverse environmental, social, worker rights or human rights impacts of an OPIC-supported project, or their authorized representative
- The OPIC’s President & CEO
- The OPIC’s Board of Directors

② Under what conditions?²¹³

The request must relate to a project for which the OPIC has concluded a financial agreement or insurance contract with the sponsor responsible for the project and the OPIC maintains a contractual relationship with the project.

HOW TO FILE A COMPLAINT?

- The content of the request must include:
- The requester’s identity and contact information.
- The identity, contact information and credentials of any representative, and evidence of the nature and scope of the representative’s authority.

²¹¹ They are available for consultation in the section “Investment Policy / Environment”: www.opic.gov.

²¹² OPIC, Environmental and Social Policies, www.opic.gov/content.

²¹³ OPIC, Who We Are, Compliance Review www.opic.gov.

- Whether the requester wishes his/her identity and/or information provided to the office of accountability to be kept confidential, and the reasons why if applicable.
- The nature and location of the project that is the subject of the request, the identity of the project sponsor, and whether the project is supported by the OPIC.
- A clear statement of evidence (or perceived risk) of adverse environmental, social, worker rights or human rights outcomes attributed to the project.
- if possible, the identification of the OPIC statutes, policies, guidelines or procedures related to environmental, social, worker rights or human rights of which the violation is alleged.
- A complaint, problem-solving or compliance review, can be sent via e-mail to: accountability@opic.gov
- or by post to the director:

Office of Accountability
Overseas Private Investment Corporation
1100 New York Ave., NW
Washington DC 20527
Tel. 1-202-336-8543
Fax 1-202-408-5133

➡ Process and Outcome

At the time of publication of this guide, the OA conducted three compliance reviews. The the cases and reports are available on the website²¹⁴.

The office of Accountability in action

➡ **Baku-Tbilissi-Ceyhan Pipeline Project (BTC) – Azerbaijan, Georgia and Turkey**

In March 2006, Manana Kochladze, a Georgian national, and the NGO Central and Eastern European Bankwatch Network filed a request for a compliance review concerning the Baku- Tbilissi-Ceyhan Pipeline Project (Azerbaijan – Georgia – Turkey). The allegations brought forward concerned the environmental obligations of the public agency. In its report, the Office of Accountability (OA) assessed that due diligence processes were followed and respected in all areas apart from the anticipated date for the audit²¹⁵.

➡ **Cœur d’Alene Mines corporation - Bolivia**

In April 2008, an indigenous community affected by the Cœur d’Alene Corporation Mining project, the biggest silver mine in the world, filed a request for a compliance review. The complaint concerns violations of the public agency’s policies and procedures concerning

²¹⁴ OPIC, Who We Are, Public Registry of Cases, www.opic.gov.

²¹⁵ Office of Accountability, Compliance Review of OPIC’s Environmental Due Diligence and Monitoring of the Baku-Tbilisi-Ceyhan Oil Pipeline Project, Overseas Private Investment Corporation, 12 February 2007

relocation of indigenous people. The report concluded that the agency had indeed violated its policies. The report recommended continuing the dialogue in order to establish a sustainable relocation and development plan for the affected indigenous population²¹⁶.

The OPIC has been recently criticised for its failure in being diligent when it comes to the assessment of the social and environmental risks of a project seeking its financing. In 2011, protests against the construction of a hydroelectric plant in **Mexico** that was causing serious harm in the area of residents led to its shut-down²¹⁷. In 2012, a biomass project in **Liberia** collapsed as a result of bad working conditions and impacts on Liberian farmers, charcoal producers and workers, including sexual abuse by company employees of local women. NGOs such as Somo, Accountability Counsel and Green Advocates took action to denounce such institutional failures²¹⁸. OPIC later published an independent investigation confirming the agency's role in harm to communities and with actions to address accountability gaps.²¹⁹ These are only some examples illustrating serious shortcomings of the U.S. Export Credit Agency.

CSO's recommendations to improve ESPS include: stronger environmental and social risk identification and management; stronger engagement with local communities and civil society organizations, conductive comprehensive analyses of project alternatives; public disclosure of all relevant documentation necessary to determine compliance; and a requirement for the Office of Accountability to be fully staffed with highly qualified personnel at all times.

Other ECAs in action

➔ Turning around the situation: the Ilisu Dam - Turkey

The Ilisu Dam is an extremely controversial project due to its social, environmental, cultural and political impact. Various companies such as the Swiss company Alstom and the Austrian company Va Tech – that is now part of Siemens – banks and export credit agencies from diverse countries (Germany, Austria and Swiss) helped finance the project. Initially the governments made assurances that the project respected international standards. However an expert report published in July 2008 claimed the contrary saying that forced migration threatened 78000 Kurds, archaeological sites were being buried among others. Following the report, the German, Austrian and Swiss export credit agencies decided to abandon the project, as they recognised that Turkey was not respecting the social and environmental standards demanded

²¹⁶ Office of Accountability, Bolivia Coeur d'Alene Mines/ San Barolome Reports, Overseas Private Investment Corporation, 24 February 2009.

²¹⁷ Associated Press, *US-Backed Mexico Dam Project Triggered Protest, Rare Defeat*, DailyMail, 30 January 2015, www.dailymail.co.uk.

²¹⁸ SOMO, *Independent Report Confirms U.S. Agency's Role in Harm to Communities in Liberia*, 17 October 2014, <http://somo.nl>.

²¹⁹ OPIC, OA Review: Buchanan Renewable Energy Projects in Liberia, September 2014, www.opic.gov.

for the project²²⁰. Although this withdrawal does not illustrate a general tendency of all ECAs, it does show their increasing consideration for social and environmental standards. This is most likely due to the pressure they have faced from the critics. However and despite this relative success, expropriations without compensation are said to be continuing and the Turkish government has voiced its intention to move forward with the project.²²¹

* * *

As of today, only a few ECAs consider the human rights impacts of the projects they support²²². Most export credit agencies such as COFACE in France²²³, Ducreux in Belgium and Euler Hermes Kreditversicherungs-AG in Germany, still do not have complaint mechanisms in place. Furthermore, the existing mechanisms have no legally binding powers. Victims can only hope that the recommendations in their favour are seriously taken into consideration by the agencies. Since the mechanisms are based on dialogue, they cannot offer any compensation or reparation to the victims. Yet export credit agencies can be used as a powerful tool to exercise public pressure. The withdrawal of the export credit agencies from the Ilisu Dam project demonstrates the positive impact that civil society may have.

The ECAs are facing increasing pressure from the international community. NGOs argue that by failing to protect human rights in the operations of ECAs, States fail to respect their duty to protect human rights.²²⁴

ADDITIONAL RESOURCES

- ECA Watch (International NGO campaign on export-credit agencies)
www.eca-watch.com
 - Accountability Counsel
www.accountabilitycounsel.org
-

220 ECA, German, Swiss and Austrian ECAs confirm cancellation of Ilisu credits, What's New?, ECA, vol. 8, n°7, July 2009

221 Stop Ilisu Campaign, www.stopilisu.com.

222 Report of the Special representative of the Secretary-general on the issue of human rights and transnational corporations and other business enterprises, A/HRC/14/27, §29.

223 The French Finance Ministry recently considered to give the mandate held by Coface to the public investment bank Bpifrance. See the following newspaper article published on 23 February 2015 in *Les Echos*: www.lesechos.fr#

224 Halifax Initiative, Counter Current, Forum Suape, Both Ends and Movimiento Rios Vivos, *Export Credit Agencies and Human Rights: Failure to Protect*, 2014, www.aboveground.ngo See also for instance reports on ECA in Sweden: www.amnesty.se

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
 Using Financial Institutions' Mechanisms
 and Engaging with Shareholders

PART III

Private Banks

Private Banks' responsibilities: the Equator Principles

The Equator Principles²²⁵ (the “Principles”) were established in 2003 by a group of private banks led by Citigroup, ABN AMRO, Barclays and WestLB and can be defined as voluntary environmental and social standards to be respected by private banks in project financing. The corporate projects are, in most cases, limited to major projects such as mining, dams and telecoms. Hence the Equator Principles do not apply to general, mainstream loans to companies.

The first version of the Principles (EP I) only applied to projects exceeding 50 million dollars US and concerned only around a dozen international banks. The second version adopted in July 2006 (EP II) is based on criteria developed by the IFC (International Finance Corporation), as the World Bank Group institution in charge of the private sector. The last version of the Principles (EP III) has been effective from June 2013 and applicable to all new transactions entered into from 1 January 2013²²⁶. In February 2016, 83 financial institutions in 37 countries have adopted the Equator Principles Financial Institutions (EPFIs). In 3 years (from January 2013 to February 2014), 11 new financial institutions adhered to the Equator Principles, which highlights the growing interest for responsible financing.

① What is the scope of the Principles?

The EPFIs are actually committed to provide loans only to projects supporting sustainable development, the protection of health, of cultural heritage and of biological diversity, the prevention and control of pollution, and to consider the impact the projects may have on indigenous populations and communities.

²²⁵ The Equator Principles, A financial industry benchmark for determining, assessing and managing social & environmental risk in project financing, www.equator-principles.com/principles.shtml

²²⁶ Equator Principles III, www.equator-principles.com.

The 10 Equator Principles are guidelines intended to assist the banks in deciding which projects to finance. They apply “globally and to all industry sectors”²²⁷ and to four different financial products²²⁸:

- Project Finance Advisory Services (for projects with a total capital cost of at least US\$10 million)
- Project Finance (for projects with a total capital cost of at least US\$10 million)
- Project-Related Corporate Loans in certain circumstances²²⁹
- Bridge Loans (short-term loan advanced to cover the period between the termination of one loan and the start of another²³⁰)

The application of the Principles for Project-Related Corporate Loans and Bridge Loans was excluded in EP I and EP II. The latter only applied to project-financing, which represents about 1% to 2% of corporate and investment banks’ activities.

EP III state²³¹:

Principle 1: Review and Categorisation

When a project is proposed for financing, the EPFI will, as part of its internal social and environmental review and due diligence process, categorise the project based on the magnitude of its potential impacts and risks in accordance with the environmental and social screening criteria of the IFC.

Principle 2: Environmental and Social Assessment

For each project assessed, the borrower is required to conduct an Environmental and Social Assessment to address the relevant social and environmental impacts and risks of the proposed project. The Assessment should also propose relevant mitigation and management measures appropriate to the nature and scale of the proposed project.

Principle 3: Applicable Environmental and Social Standards

The assessment of environmental and social risks will refer to the applicable IFC Performance Standards revised in 2011, to the applicable Industry Specific Environmental, Health and Safety Guidelines (“EHS Guidelines”), but also to the host country environmental and social laws and regulations.

²²⁷ Equator Principles, June 2013, p. 3, www.equator-principles.com.

²²⁸ *Ibid.*

²²⁹ *Ibid.* (for more details about these circumstances)

²³⁰ Business Dictionary, www.businessdictionary.com

²³¹ Equator Principles, June 2013, *Op. cit.*, p. 5 -11

Principle 4: Environmental and Social Management System (ESMS) and Equator Principles Action Plan

For each project assessed, the borrower is required to develop or maintain an Environmental and Social Management System (ESMS) to deal with the social and environmental risks involved by the implementation of the project.

Such ESMS will be completed with the development by the borrower of an Environmental and Social Management Plan (ESMP) describing the actions needed to implement mitigation measures, and monitor the measures necessary to manage the impacts and risks identified during the assessment process.

If compliance of the project with the applicable standards is still not considered satisfactory by the EPFI, the latter will agree on an Equator Principles Action Plan (AP) with the borrower to outline gaps and commitments to meet EPFI requirements in line with the applicable standards.

Principle 5: Stakeholder Engagement

For each project assessed, the EPFI will require the borrower to demonstrate its effective engagement with all stakeholders of the project. An Informed Consultation and Participation Process will have to be conducted by the borrower for all projects with a potentially adverse impact on communities. Such process will have to be realised in a culturally appropriate manner, and tailored to the language preferences and decision-making processes of the affected communities, as well as to the needs of their most vulnerable groups. Projects affecting indigenous peoples will be subject to a similar consultation process and require **Free Prior and Informed Consent (FPIC)** consistently with IFC Performance Standard 7, to establish whether they have adequately incorporated the concerns of these communities.

Principle 6: Grievance Mechanism

For each project assessed, the borrower will establish a grievance mechanism as part of the above-mentioned ESMS to receive and facilitate resolution of concerns and grievances about the project's social and environmental performance raised by individuals or groups from among project-affected communities. Such mechanisms will need to be scaled to the risks and adverse impacts of the project

Principle 7: Independent Review

For project financing, an Independent Social and Environmental Consultant not directly associated with the borrower will review the risk assessment documentation including the ESMS and the Equator Principles AP, as well as the consultation process documentation in order to assist EPFI's due diligence, and assess Equator Principles compliance.

For project related corporate loans, the Independent Social and Environmental Consultant will need review only projects with potential high-risk impacts including damage to indigenous peoples, critical habitats impacts, significant cultural heritage impact, and large-scale resettlement, inter alia.

Principle 8: Covenants

Where a borrower is not in compliance with its social and environmental covenants, EPFI will work with the borrower to bring it back into compliance to the extent feasible, and, if the borrower fails to re-establish compliance within an agreed upon grace period, EPFI reserve the right to exercise remedies, as they consider appropriate.

Principle 9: Independent Monitoring and Reporting

For project-finance, either the Independent Environmental and Social Consultant or a qualified and experienced external expert appointed by the borrower will have to monitor and assess project compliance with the Equator Principles.

The same process will have to be followed **for projects-related corporate loans** requiring an independent review under Principle 7.

Principle 10: Reporting and Transparency

Each EPFI adopting the Equator Principles commits to report publicly at least annually on its Equator Principles implementation processes and experience, taking into account appropriate confidentiality considerations.

In August 2009, a best practice guidebook to EPFI on incorporating environmental and social considerations into loan documentation was published. This best practice includes guidelines concerning the establishment of action plans which conform to the IFC standards²³².

The Equator Principles, changes and criticisms

EP III are considered as an improvement of the old principles. This is mainly due to the fact that they now encompass more projects because their applicability is no longer limited to project financing. In terms of commitment to respect international environmental and social standards, one can only welcome the explicit engagement to address human rights in the preamble of the new principles, especially through the reference to the Guiding Principles on Business and Human Rights, Implementing the UN Protect, Respect and Remedy Framework. EP III's new preamble also explicitly expresses the commitment to address climate change issues, and project reporting requirements on greenhouse gas emission levels have been included in the EP framework. Despite these important and positive changes, the principles

²³² Equator Principles, *Guidance to EPFIs on Incorporating Environmental and Social Considerations into Loan Documentation*, August 2009, www.equator-principles.com/bestpractices.shtml.

remain criticised mainly for their vagueness (a) and the fact that they do not include a recourse mechanism (2)²³³.

Vagueness in the formulation of the principles

Many NGOs demand a review of the principles and of their application with denouncing the imprecision and vagueness of their formulation²³⁴. Banktrack²³⁵ criticises the principles notably for their lack of transparency - they did not take up IFC's policy of disclosure - and the fact that there are no provisions made for compensation to those affected by the projects.

Lacking independent review or recourse mechanism

Any bank can adopt the Principles but it should be noted that the EPFI have not implemented any control or review mechanisms to ensure that the Principles are being adhered to. The review of the Equator Principles is carried out on a voluntary basis by one of the member banks on another member bank involved in a project. No doubt this lack of transparency leads to a conflict of interests or to a situation in which favours are exchanged. Moreover the Principles have not implemented any recourse mechanisms for affected communities. Despite the lack of an official complaint mechanism, it is possible to alert the equator principles' Board of violations.

The Equator Principles in Action

➔ Nine NGOs press charges against Calyon

On 18 May 2006, nine NGOs including Amis de la Terre (Friends of the Earth France) and BankTrack pressed charges against Calyon, a subsidiary of the Crédit Agricole Group, for violating the Equator Principles in the Botnia Paper Pulp Factory project in Uruguay. Due to the absence of an official complaints mechanism, the NGOs directly addressed the Crédit Agricole Group. The NGOs rejected an internal expert considered to be barring the participation of the local community. The charges were rejected by the Crédit Agricole who claimed the Principles were not applicable in this case, because they maintained that they were not doing 'project financing'. Considering that financing a project involves gathering and structuring various financial contributions necessary for large scale investments and considering that in this case Calyon financially supported a Finnish factory in Uruguay, there is no doubt that this response renders this bank's commitment to the Principles highly questionable and taints the usefulness of the Principles in general.

²³³ See part I, criticism of the Performance Standards of the IFC which are also applicable to the Equator Principles.

²³⁴ Novethic, Le financement des industries extractives: les principes d'Equateur mis à mal, Novethic, (only available in French) www.novethic.fr.

²³⁵ BankTrack, About BankTrack, www.banktrack.org.

ADDITIONAL RESSOURCES

- **Equator Principles**
www.equator-principles.com/principles.shtml
 - **Bank Track** (global network of civil society organisations and individuals tracking the operations of the private financial sector)
www.banktrack.org
 - Fair Finance Guide International,
www.fairfinanceguide.org
-

* * *

In addition to the Equator Principles, civil society organisations can look for environmental and social standards and complaint mechanisms that may be present within other private banks. For instance, the China Banking Regulation Commission (CBRC) issued in 2017 the Chinese Green Credit Guidelines. The Guidelines were revised in 2012. Sometimes called directives²³⁶ they require Chinese banks to “effectively identify, measure, monitor and control environmental and social risks associated with their credit activities, establish environmental and social risk management system, and improve relevant credit policies and process management.”²³⁷

²³⁶ Friends Of The Earth. *Assessing China's commitment to greening its overseas finance, one year later*, March 2013, www.foe.org.

²³⁷ CBRC. *Notice of the CBRC on Issuing the Green Credit Guidelines* (Article 4), February 2012, www.cbrc.gov.cn.

➤ EPFI members per country²³⁸

Argentina	Banco Galicia
Australia	ANZ National Australia Bank Westpac Banking Corporation Export Finance and Insurance Corporation (EFIC)* Commonwealth Bank of Australia
Bahrain	Ahli United bank B.S.C
Belgium	KBC Group
Brazil	Banco Bradesco Banco do Brasil Caixa Economica Federal Itaú-Unibanco S/A
Canada	BMO Financial Group Canadian Imperial Bank of Commerce Export Development Canada (EDC)* Manulife Royal Bank of Canada Scotiabank TD Bank Financial Group
Chile	CORPBANCA
China	Industrial Bank Co., Ltd
Colombia	Bancolombia S.A.
Denmark	Eksport Kredit Fonden*
Egypt	Arab African International Bank
France	BNP Paribas Crédit Agricole Natixis Societe Generale
Germany	DekaBank KfW IPEX-Bank* UniCredit Bank AG
India	IDFC
Italy	Intesa Sanpaolo
Japan	Mizuho Corporate Bank, Ltd. SMBC The Bank of Tokyo-Mitsubishi UFJ, Ltd Sumitomo Mitsui Trust Bank
Mauritius	Mauritius Commercial Bank
Mexico	Banco Mercantil del Norte and the CIBAnco

Morocco	Banque Marocaine Du Commerce Extérieur (BMCE Bank)
Nigeria	Acces Bank PLC Fidelity Bank
Norway	DNB Eksportkreditt Norway
Oman	BankMuscat S.A.O.G.
Panama	CIFI
Peru	Banco de Crédito
Portugal	Banco Espírito Santo S.A.
South Africa	Absa Bank Ltd. Nedbank Group Standard Bank Group FirstRand Ltd.
Spain	BBVA S.A. Caixa Bank Banco Santander Banco Sabadell Banco Popular Español
Sweden	Nordea SEB
Switzerland	Credit Suisse Group
Togo	Ecobank transnational Inc.
The Netherlands	ABN Amro Group ASN Bank NV FMO ING Group NIBC Bank Rabobank Group
United Kingdom	Barclays plc HSBC Holdings plc Lloyds Banking Group plc Standard Chartered Bank UK Green Investment Bank
United States	Bank of America Citigroup Inc. Ex-Im Bank JPMorgan Chase & co. Wells Fargo N.A.
Uruguay	Banco de la República Oriental del Uruguay

*Official export-credit agencies

²³⁸ Source: www.equator-principles.com.

SECTION IV
WHO IS FUNDING THE PROJECT OR OWNS THE COMPANY?
USING FINANCIAL INSTITUTIONS' MECHANISMS
AND ENGAGING WITH SHAREHOLDERS

PART IV

Engaging with Shareholders of the Company

More and more, companies' shareholders are being proactive in questioning the management of companies regarding alleged human rights and environmental abuses. Indeed, shareholders of companies can exert a lot of influence due to their capacity to question the company's board and their influence on management through the threat to disinvest.

If a company's shares are traded on a stock exchange, the company must abide by the laws and regulations of the country of jurisdiction applicable to the said stock exchange. Most countries around the world have implemented common laws to protect shareholders' interests which range from financial reporting to disclosure of information. Each shareholder is a joint owner of the company in which he/she owns shares. Shareholders may be individuals, shareholder associations, institutional shareholders, NGOs, managers of socially responsible investment funds, etc. Over the past few years, many shareholders have shown growing concern for the social and environmental practices of the companies in which they invest. Religious groups which are important investors have played a pioneering role in the development of socially responsible investment or investing (SRI). For instance, the group Interfaith Center on Corporate Responsibility which is based in New York and represents more than 275 institutional shareholders (syndicates, religious groups, etc.) has been particularly influential in the United States.

Socially Responsible Investment (SRI) takes into account ethical, social and environmental criteria in financial management. Over the last couple of years, the interest in SRI has increased considerably especially in the United States, Canada and Europe. Institutional investors, particularly pension funds, were among the first to exert pressure to take ethical criteria into consideration when investing. Financial scandals, the changes in legislation concerning the disclosure of information as well as the concern shown by investors explain the growth of socially responsible investment funds²³⁹.

²³⁹ Umlas, Investing in the workforce: social investors and international labour standards, ILO, Geneva, 2009.

SRI can take different forms:

- the adoption of principles and codes of conduct which favour responsible investing;
- SRI or sustainable development funds;
- funds with a negative screening element;
- Shareholder advocacy or activism;
- Thematic funds.

1. Adoption of principles and codes of conduct that support responsible investment

United Nations Principles for Responsible Investment (PRI)

Following the establishment of the Global Compact in 2000 that aimed at encouraging the private sector to commit for environmental, social and human rights issues with taking seriously their social responsibility, the UN upon the initiative of its Secretary General, invited a group of the world's largest institutional investors to join a multistakeholder process and develop the Principles for Responsible Investment (PRI). The PRI are aimed at pension, insurance and institutional investors. They are based on six main principles which require investors to consider environment, social and corporate governance issues (ESG) in their management of investment portfolios²⁴⁰:

- Incorporating of ESG issues into investment analysis and decision-making processes;
- Becoming active owners and incorporate ESG issues into the ownership policies and practices;
- Seeking disclosure on ESG issues in corporations in which investments have been made.
- Promoting acceptance and implementation of the Principles within the investment industry
- Promoting collective work to enhance effectiveness in the implementation of the Principles
- Reporting activities and progress towards implementing the Principles.

There are 3 categories of signatories: asset owners, investment managers and professional service partners. As of February 2016, there are 1488 signatories²⁴¹ and they all pledged to respect the aforementioned principles. Signing the PRI/Global Compact remains a voluntary commitment to the principles and does not put the signatories under any legal obligation. The only obligation signatories have is to answer the annual questionnaire concerning the measures taken to implement the six principles. In August 2009, the Secretariat dismissed 5 signatories (DESBAN, Christopher Reynolds Foundation, Foresters Community Finance, Oasis Group

²⁴⁰ PRI, The six Principles, www.unpri.org.

²⁴¹ PRI, Signatories to the Principles for Responsible Investment, www.unpri.org.

Holdings and Trinity Holdings), as they did not fulfil this one and only condition. Such principles for responsible investment are all the more relevant that there has been a growing tendency from pension funds to divest from high risks situations. For example, investors have announced withdrawal from Israeli banks and companies operating in Israeli settlements in the Occupied Palestinian Territory (OPT). In January 2014, The Dutch pension fund PPGM that divested from five Israeli banks operating in Israeli settlements²⁴². Although it stated its intentions to remain invested in three Israeli banks related to settlements in the OPT, APB, another Dutch pension fund also decided in July 2014 to divest from two Israeli arms companies (Aryt Industries Ltd and Ashot Ashkelon Industries, respectively manufacturing detonators and operating in the aerospace and defence sector)²⁴³. In Luxembourg, the pension fund FDC decided to excluded investments in the five major Israeli banks, as well as in several top Israeli companies for their involvement in settlements in the OPT. In July 2014, 17 EU Governments (Austria, Britain, Belgium, Croatia, Denmark, Finland, France, Germany, Ireland, Italy, Greece, Luxembourg, Malta, Portugal, Slovakia, Slovenia and Spain) made statements warning companies against doing business with or investing in Israeli companies involved in the settlements in the OPT²⁴⁴.

Private Equity Council's Guidelines

On 10 February 2009, a year after having signed the PRI, the Private Equity Council, an advocacy, communications, research organisation and resource centre for the private equity industry, adopted a code of conduct based on the PRI. The Private Equity Council requires that all members apply this code of conduct when taking over other firms/companies. The code of conduct expects investors to be more aware of environmental, public health issues, workers' rights and social issues throughout the evaluation of companies in which the private equity funds invest. The private equity funds finance the purchase of companies which sometimes results in the private equity fund becoming heavily indebted. NGOs and public institutions among which the European Commission, have heavily criticised these funds, as they are accused of having allowed the development of debt bubbles in the financial markets. It is considered today that private equity funds and hedge funds, as well as some other types of funds and financial instruments, need to be more closely regulated.

242 REUTERS, UPDATE 1, Major Dutch pension firm divests from Israeli banks over settlements, www.reuters.com.

243 Middle East Monitor, Dutch pension fund APB divest from two Israeli arms companies, www.middleeast-monitor.com.

244 Middle East Monitor, 17 EU countries warn against doing business with Israeli settlements, www.middleeastmonitor.com.

2. SRI funds or sustainable development

These funds are made up of shares and bonds of companies or states which have been chosen due to their track records concerning environmental, social and corporate governance (ESG) criteria. Non-financial rating agencies have specialised in classifying companies according to their environmental, social and corporate governance policies. Each agency has developed its own methodology and research criteria as no standards concerning sustainable development have so far been established globally. The main agencies are Vigeo (France) and which has now merged with EIRIS (UK), Innovest (US and Canada), Ethiscan (Canada), and SiRi Company (international network based in Switzerland)²⁴⁵.

3. Funds with a negative screening element

These funds apply a negative screening and exclude companies which provide services and products in business sectors such as weapons, gaming and the tobacco industry and companies that do business with corrupt regimes.

An insight into...

The Norwegian Government Pension fund Global (formerly Petroleum Fund)

As Norway is the sixth biggest oil producer and the third biggest oil exporter in the world, the Norwegian Government Pension Fund (founded in 1990) is financed by the revenues from the country's oil and gas exploitation. At the end of June 2015, aggregate market value of the Government Pension Fund was 7,093 billion Norwegian kroner.²⁴⁶ The fund belongs to the government and is managed by Norway's Central Bank, Norges Bank. The Norwegian government developed ethical guidelines which the fund management has to abide by concerning the observation and exclusion of companies from the portfolio of the Government Pension Fund.

The fund has exclusion criteria:

- produce weapons that violate fundamental humanitarian principles through their normal use;
- produce tobacco;
- sell weapons or military material to states that are subject to investment restrictions on government bonds.

²⁴⁵ FIDH has for its part develop its own methodology which it applies to its ethical investment fund "Libertés & Solidarité", www.fidh.org.

²⁴⁶ Government Pension Fund, Market Value, www.regjeringen.no.

The fund may also exclude companies if there is an “unacceptable risk that the company contributes to or is responsible for:

- serious or systematic human rights violations, such as murder, torture, deprivation of liberty, forced labour and the worst forms of child labour
- serious violations of the rights of individuals in situations of war or conflict
- severe environmental damage
- gross corruption
- other particularly serious violations of fundamental ethical norms.²⁴⁷

This ethical management, active since 2004, gave rise to various decisions to disinvest. It is useful to look at the annual reports produced by the Council on Ethics for the Fund.

To ensure the application of the ethical guidelines, a committee comprised of five persons, the Council on Ethics for the Government Pension Fund – Global was established. The Council’s task is to study the companies and industries to exclude and to report back to the Finance Ministry once a year.

Currently the fund holds shares in approximately 9000 companies in 82 countries, and divested from 49 companies in 2014 due to environmental, social and government issues²⁴⁸.

HOW TO GET IN TOUCH WITH THE FUND?

- Any individual can share information with the fund or submit questions via the following email address: postmottak@fin.dep.no
- Or by writing to the following postal address:

Etikkrådet for Statens pensjonsfond - Utland
Postboks 8008 Dep
0030 Oslo

➔ The Norwegian Government Pension fund in action

Exclusion of various companies producing arms:

Due to the exclusion criteria, almost 20 companies throughout the world have been excluded from the fund. Amongst those are: EADS, Lockheed Martin Corp (USA), Safran SA (France), BAE Systems Plc (United Kingdom) and Hanwha Corporate (South Korea).

²⁴⁷ Guidelines for Observation and Exclusion from the Government Pension Fund Global, adopted 18 December 2014, www.regjeringen.no.

²⁴⁸ Council of Ethics for the Government Pension Fund Global, Annual Report 2014, www.nbim.no/en/the-fund.

The Exclusion of Wal-Mart

In 2006, Wal-Mart, the global retail leader (US), was excluded from the fund following recommendations by the Council on Ethics. The decision was based on allegations of serious and systematic workers' and human rights violations (child labour, unpaid overtime, gender discrimination concerning salaries and various violations of freedom of association). This exclusion led to the sale of the funds tied up in Wal-Mart and amounted to a total value of 415 million dollars.

Before excluding Wal-Mart, the Council on Ethics had sent Wal-Mart a letter asking the company to explain the various violations mentioned earlier, but Wal-Mart never replied. Hence the fund judged that obtaining a promise of commitment from Wal-Mart would not contribute to reducing the risk for the fund of violating its ethical guidelines.

Mining companies excluded due to their environmental degradation

In January 2009, the company Barrick Gold (Canada) was excluded due to the pollution generated by its mining activities in Papua New Guinea²⁴⁹. In October 2014, the Peruvian and Chinese companies Volcan Compañía Minera and Zijin Mining Group were also excluded because of severe environmental risks related to their activities had been assessed²⁵⁰.

4. Thematic funds

Thematic funds refer to funds that are tied up in companies whose activities contribute to sustainable development. These funds are mainly involved in sectors such as renewable energy, water and waste management or the health sector. It is worth noting, however, that these funds do not systematically conform to the ESG (environment, social and corporate governance) principles which are generally taken into account by other responsible investment funds. Novethic, a French resource centre on corporate social responsibility (CSR) and socially responsible investment (SRI), identified 7 thematic funds which also include all the ESG criteria: Parworld Environmental Opportunities (BNP PAM), FLF Equity Environmental Sustainability World (Fortis IM), CA Aqua Global (I.DE.A.M) Sarasin Oekosar Equity Global (Sarasin), Living Planet Fund (Sarasin), Sarasin new Power fund (Sarasin) and UBS Equity Fund-Global Innovators (UBS GAM)²⁵¹.

5. Shareholder activism or advocacy

Shareholders can participate and be active in different ways: some shareholders attempt to influence the management team whilst others attempt to influence the policies of the company with writing to the directors of the company and by their participation at the Annual General Meeting (AGM). At the AGM, individual shareholders can make formal proposals to all of the shareholders which could,

²⁴⁹ Ministry of Finance, Companies excluded from the Investment Universe, www.regjeringen.no.

²⁵⁰ Government. no, Decisions about active ownership and divestment, www.regjeringen.no.

²⁵¹ Novethic, Le Media Expert du Développement Durable, www.novethic.fr.

as a result of a vote, require the company directors to implement socially just and environmentally responsible policies. Shareholders can also oppose or make amendments to resolutions put forward by the board of directors. Regrettably the responsible shareholders' holdings in the company, and therefore number of votes, generally only represent a very small proportion of the total number of shares in large companies.

NGOs can also exercise influence on a company by either becoming shareholders themselves or by putting pressure on shareholders who have a large stake in the company. Votes on the various issues can often be submitted online through the Internet. Active shareholders, who wish to influence the proposals submitted at the AGM, need to be fully informed on the company's policies and developments prior to the AGM.

The various ways in which a shareholder can exercise influence on a company will often depend on the country where the company has its headquarters.

In Canada, the shareholders of a company can ask questions during the time devoted to questions during the AGM. Shareholders can also submit written proposals according to the established procedure under Canadian law (article 137 and following of the 1985 Canada Business Act). To be eligible to submit a proposal, a person²⁵²:

A contradictory amendment to a resolution proposed by the Board of Directors can be proposed. This is more difficult as this depends on the agenda of the AGM:

The adoption of one

- must be, for at least the prescribed period, the registered holder or the beneficial owner of at least the prescribed number of outstanding shares of the corporation; or
- must have the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation.

If the information to be provided²⁵³ and the proof required have been given²⁵⁴, the company must include the proposal either as an appendix or a separate document in the notice of the meeting according to article 150²⁵⁵.

252 Canada Business Corporations Act, (R.S.C., 1985, c. C-44), art 137, <http://laws-lois.justice.gc.ca/PDF/C-44.pdf>,

253 *Ibid.*, §1.2.

254 *Ibid.*, §1.4.

255 *Ibid.*, §2.

In the United states, shareholders participation in the activities of a company has been a part of the national business culture for longer than in most other countries; the rules governing shareholders' rights in the US tend to be more flexible than in other countries. Shareholders can submit resolutions' proposals more easily in the US. For more information, go to the website of the "Securities and Exchange Commission"²⁵⁶.

➔ Shareholder activism in action

In December 2015, 20 institutional investors managing over £352 billion in assets under management joined forces to call on some of the world's largest companies to commit to using 100% renewable power.

The investors called on companies to demonstrate their commitment to clean energy by signing up to join RE100.²⁵⁷ RE100 is a collaborative business initiative that supports companies that make a public pledge to switch to 100% renewable electricity for their international operations by an agreed date.

The RE100 initiative is being coordinated by ShareAction, a UK-based Responsible Investment charity. The initiative's founding members include Aviva Investors, Strathclyde Pension Fund, Environment Agency Pension Fund, French pension fund ERAFP, Norwegian fund KLP and Menhaden Capital. Companies from all over the world and from a wide range of industrial sectors – from telecommunications and IT to retail and food have joined the initiative, including Google, Pearson and BMW Group at the end of 2015.

The new investor engagement programme, supported by ShareAction, sees investors engaging with companies through letters, meetings and AGMs, to encourage them to switch to 100% renewable energy. ShareAction has also developed an online platform through which savers can email the person managing their savings at their pension fund, asking them what they are doing to support renewable energy.²⁵⁸

➔ The British oil company BP sees its annual report rejected by a coalition of "socially responsible" investors²⁵⁹

An international coalition of 10 minority shareholders refused to approve the annual report of BP during one of their general meeting held on 14 April 2011. These investors consider that the reaction of the company to the explosion of the oil platform Deepwater Horizon, which it was operating, is insufficient. They also oppose the re-election of certain directors of the

²⁵⁶ US Security and Exchange Commission, Shareholder Proposals, www.sec.gov.

²⁵⁷ See <http://there100.org/>

²⁵⁸ For more information see <http://shareaction.org>

²⁵⁹ Ethos, "Ethos opposes BP's Annual Report and Accounts", 7 April 2011, www.ethosfund.ch.

committee who deal with corporate security questions. According to the investors of the coalition, this committee does not communicate seriously on the strategy of the company, especially on the oil exploration in sensitive zones, which requires strict control measures that must be presented to the shareholders.

Concerning the annual report, the “responsible investors” coalition considers that it does not allow to estimate to what extent the risk management was evaluated, enhanced and controlled following the catastrophic oil spill in the Gulf of Mexico. Finally, the report does not address in detail the “transition to a low carbon economy”, while, according to the oil company, this is an aim at the heart of its strategy. Thus, they regarded the report as “incomplete”.

* * *

Shareholder participation can prove to be a useful and influential tool. Although it is not an easy task, companies can be forced to react and modify their policies with respect to human rights as a result of the financial pressure that shareholders can exercise. The results of this kind of activism is often more efficient if it is combined with advocacy actions.

Following closely the work of institutional investors and advocating for greater inclusion of ESG (environmental, social and governance) criteria in their investment strategy, can also represent a powerful point of leverage. NGOs are increasingly using this strategy to call on companies to take measure to address human rights and climate change issues.

ADDITIONAL RESOURCES

- ShareAction, The Movement for Responsible Investment
www.shareaction.org
 - See in particular: Capital Markets Campaigning: A short guide for NGOs, Unions and Civil Society
www.shareaction.org/capitalmarkets
 - Human Rights and Grievance Mechanisms
<http://grievancemechanisms.org/>
 - Interfaith Centre on Corporate Responsibility
www.iccr.org
 - Social Investment Organisation (Canada)
www.socialinvestment.ca
 - US SIF (USA)
www.socialinvest.or
 - Eurosif (Europe)
www.eurosif.org
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