



A meeting called at the village of Tebban to discuss opposition to the proposed 775 MW Luhri Dam on the Sutlej River in Himachal Pradesh, India. Photo by International Rivers.

## Who Makes Dam Standards?

**B**efore we describe what we consider to be the strongest social and environmental standards at each stage of a dam project, we should examine the multiple definitions of what a “standard” actually is. First, it is critical to know what laws govern the construction and operation of a dam. Project developers sometimes commit to meeting “international standards” to assure people that the dam will be well built and operated to the highest standard, but their use of this term can be vague. Thus, it is important to: (a) understand what the developer means when it commits to meeting “international standards”; (b) determine whether these standards are sufficient to protect the rights of affected communities and the environment; and (c) whether these standards are voluntary or mandatory, and if enforceable, by whom.

In the following section, we describe various possible meanings of the word “standard.”

## NATIONAL LAWS AND POLICIES

The most relevant “standards” throughout any stage of dam building are national laws and policies. National laws set the requirements with which dam builders and financiers are expected to comply. For example, if a national law on water quality exists, then a dam proponent will be expected to meet the requirements of that law, and if the law is violated, the developer is penalized.

Some national laws are stronger than others. For example, laws governing biodiversity in Germany are stronger than others, while the laws governing land acquisition in India are stronger than others. These examples of national laws might varyingly be referred to as “standards” in the sense that they provide a blueprint for best practice across different legislative contexts. National laws set a benchmark for performance domestically, and they guide the behavior of companies operating abroad.

Examples of national laws include:

- United States' National Environmental Policy Act (NEPA) of 1969
- China's Environmental Protection Law of 1989
- Brazil's Law of Environmental Crimes (Law of Nature) of 1998
- India's Biological Diversity Act of 2002
- Germany's Water Management Act of 2010
- Bolivia's Law of the Rights of Mother Earth of 2010

Companies are generally expected to follow whatever has been promulgated into national law. Yet, even if laws exist on paper, they are not always implemented; corruption, political interests, or lack of institutional capacity can cause disruptions. Corruption may undercut the efficacy of national laws to assure requirements are being met. Political interests can cause a government to grant an exception to or suspend national law, as often happens in investment treaties. Or, governments simply may not have the budget or technical capacity to monitor implementation. As a result, enforcement of national law is often complicated by other factors.

## INTERNATIONAL LAWS AND INSTRUMENTS

The term “standards” could also refer to those legal instruments developed by international bodies. Outside of national law, various types of policies exist, such as international covenants and declarations. UN covenants, statutes, protocols and conventions create binding obligations for those States that ratify or accede to them,<sup>6</sup> and are often incorporated into national legislation. Countries must, at minimum, respect these conventions and not contribute to violating them, regardless of whether or not they comply with their obligations. However, companies operating in countries that have ratified these covenants are not directly bound to them. Rather, it is the binding “duty” of the government to comply with the covenants through national law, while it is the non-binding “responsibility” of companies to implement the laws that refer to these covenants. Some international agreements such as the UNFCCC and ILO anticipate company involvement in their wording. Yet, this is an exception to the general trend.

Examples of international laws include:

- The Conventions of the International Labor Organization (ILO)
- The Kyoto Protocol
- The UN Guiding Principles on Business and Human Rights
- The UN Principles on Development-Induced Displacement
- International Human Rights Conventions<sup>7</sup>

Some UN declarations, principles, guidelines, standard rules and recommendations have no binding legal effect, but have an undeniable moral force and provide practical guidance to states in their conduct. Usually, declarations are binding for states that have signed onto them, but their language is aspirational rather than mandatory. Ideally, declarations should be enacted through national legislation or constitutions. Companies developing dam projects could then fulfill those obligations by complying with national laws where investments are made.

Examples of international declarations include:

- The Universal Declaration of Human Rights (UN, 1948)
- The American Declaration of the Rights and Duties of Man (OAS, 1948)
- The Declaration on the Right to Development (UN, 1986)
- The Declaration on the Rights of Indigenous Peoples (UN, 2007)
- The UN Declaration on Sexual Orientation and Gender Identity (UN, 2008)

### FINANCIAL INSTITUTION POLICIES

Financial institutions have their own standards apart from national and international law, which allow them to independently assess and manage the risks associated with financial transactions. These standards are often requirements that financial institutions expect the borrower to meet in order to obtain funding for a project. Many are project-level compliance measures expected to be fulfilled before financing is granted, while some are broader expectations of borrower performance, tying financing to borrower implementation of best or good practice principles.

One benefit of financial policies is that they outline key outcomes, such as respect for rights and environmental protection, that must be achieved throughout the life of a project. These policies help financial institutions calculate the environmental, social, governance, and other risks involved in financing a project, and often lead the financial institution to support the borrower in creating plans to mitigate impacts.

Some financial institutions, especially multilateral development banks, created their own accountability mechanisms to provide access to recourse in response to grievances from affected communities. The World Bank, for example, created the Inspection Panel in 1993 as an independent fact-finding body that investigates grievances filed over World Bank operations.<sup>8</sup> The Panel reports directly to the World Bank Board of Executive Directors. Similarly, the Compliance Advisor Ombudsman (CAO) was established in 1999 to provide access to recourse for people affected by operations of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency

(MIGA), the two private sector lending branches of the World Bank.<sup>9</sup> The CAO reports directly to the President of the World Bank Group.

Examples of financial standards include:

*National banks:*

- KfW Bankengruppe's Sustainability Guidelines
- The Brazilian National Development Bank's Política Socioambiental
- The China Green Credit Guidelines created by the China Banking and Regulatory Commission
- China's Environmental Protection Guidelines for Foreign Investment Cooperation<sup>10</sup>

*Multilateral banks:*

- The World Bank Group Performance Standards
- The Asian Development Bank Safeguard Policies
- The Inter-American Development Bank Sustainability Standards

*Private banks:*

- The Equator Principles (based on the IFC Performance Standards)

### Export credit agencies

Export credit agencies are often government institutions that provide financial credits and guarantees for exports for use in dam projects and associated facilities. Since their guarantees provide insurance against risks that could affect each project, these agencies often have their own social and environmental standards that developers must meet in order to qualify for a loan or guarantee.

Examples of export credit policies include:

- The US Export-Import Bank's Environmental Policy<sup>11</sup>
- The US Overseas Private Investment Corporation Environmental and Social Policies<sup>12</sup>
- The OECD Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence

## CORPORATE POLICIES

Dam builders may have their own corporate policies that orient their sustainability practices and performance. These types of policies are mostly statements that outline a corporation's commitments to social responsibility, and can include policies in areas such as pollutants, social benefit-sharing, or resource efficiency plans adopted at the business' headquarters or branches. Often, dam builders will commit to International Standards Organization (ISO) standards that apply to their industry (see box). Alternatively, dam builders may commit to the sustainability principles of the United Nations Global Compact<sup>13</sup> or the Global Reporting Initiative,<sup>14</sup> two voluntary platforms for corporate sustainability.

Corporate sustainability policies may or may not be applicable to a dam builders' portfolio. When they are, these policies still have no binding force. If a dam builder voluntarily commits to ISO standards or international principles that are not required by national law, there is no way to hold the company accountable in case violations are committed.

### ISO Standards

The International Standards Organization (ISO) is the world's largest developer of voluntary international standards. The ISO standards give specifications for products, services and good practice, aiming to help to make industry more efficient and effective. They are most frequently organized as technical standards across a wide variety of sectors.

Many of the standards that this guide may be advanced by compliance with ISO standards. For example, ISO 14000 outlines practices in environmental management, ISO 14064 refers to greenhouse gas emissions, and ISO 26000 refers to practices in social responsibility and is useful to human rights performance.

However, some countries' national regulations do not require adherence to ISO standards. As a result, adherence is usually voluntary at the level of corporate policy. Meanwhile, ISO standards may not actually address the rights concerns of external stakeholders such as affected communities. ISO standards are by and large technical in nature, and when used, are often only used internally by dam builders. While they may be useful as policies for technical procedures, they will not guarantee the rights of dam-affected communities.

Examples of Corporate Social Responsibility policies include:

- Sinohydro's Environmental Sustainability Policy<sup>15</sup>
- Eletrobras' Sustainability Policy<sup>16</sup>
- Statkraft's Sustainability Statement<sup>17</sup>
- GDF Suez' Ethics and Compliance Statements<sup>18</sup>

## MULTILATERAL GUIDELINES, RECOMMENDATIONS AND AUDITING TOOLS

Guidelines, recommendations, and audits are voluntary and non-binding, and they often contain principles, recommendations, and/or refer to other international conventions and declarations.<sup>20</sup> Some are organized as a framework for corporate policies, while some may be adopted into laws or financial standards. They are useful in the sense that they may compile existing obligations related to a single topic into one document. Many relate to social and environmental impacts of dams, but they differ in their coverage of specific issues.

Examples of guidelines and recommendations include:

- The Guidelines and Recommendations of the World Commission on Dams
- The OECD Guidelines for Multinational Enterprises
- The Multilateral Finance Institutions Working Group on the Environment (MFI-WGE) "Common Framework for Environmental Impact Assessment"
- ISEAL Credibility Principles

Auditing tools are voluntary, non-binding, and incentives-based. They are designed for the purpose of screening and measuring a plan or a project, based on specific criteria relating to environmental and social risk management. In the realm of international auditing tools related to dams, the International Hydropower Association (IHA) developed a project-specific auditing tool called the Hydropower Sustainability Assessment Protocol (HSAP) for dam builders to internally assess their performance against a number of social and environmental topics. Similarly, WWF, the Asian Development Bank, and the Mekong River Commission developed the Rapid Basin-wide Sustainability Assessment Tool

# The UN Global Compact

The UN Global Compact<sup>19</sup> is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment and anti-corruption. With over 10,000 corporate participants and other stakeholders from over 130 countries, the UN Global Compact is the largest voluntary corporate responsibility initiative in the world.

The UN Global Compact's ten principles in the areas of human rights, labor, the environment and anti-corruption enjoy universal consensus and are derived from:

- The Universal Declaration of Human Rights
- The International Labour Organization's Declaration on Fundamental Principles and Rights at Work
- The Rio Declaration on Environment and Development
- The United Nations Convention Against Corruption

The UN Global Compact asks companies to embrace, support and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment and anti-corruption:

## Human Rights

- Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and

- Principle 2: Make sure that they are not complicit in human rights abuses.

## Labor

- Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- Principle 4: The elimination of all forms of forced and compulsory labor;
- Principle 5: The effective abolition of child labor; and
- Principle 6: The elimination of discrimination in respect of employment and occupation.

## Environment

- Principle 7: Businesses should support a precautionary approach to environmental challenges;
- Principle 8: Undertake initiatives to promote greater environmental responsibility; and
- Principle 9: Encourage the development and diffusion of environmentally friendly technologies.

## Anti-Corruption

- Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

(RSAT), as a basin-level tool to measure hydropower development specific to the Mekong basin. The HSAP has so far been utilized mostly by hydropower companies who are members of the IHA, while the RSAT has mostly been used by governments in the Mekong basin. Both tools employ a “sustainability scoring” approach to promote stakeholder dialogue about performance relative to good and best practice.

Examples of auditing tools include:

- The Hydropower Sustainability Assessment Protocol (HSAP)
- The Rapid Sustainability Assessment Tool (RSAT) in the Mekong basin region

## A RIGHTS-BASED APPROACH

“Given the significance of rights-related issues as well as the nature and magnitude of potential risks for all parties concerned, the Commission proposes that an approach based on ‘recognition of rights’ and ‘assessment of risks’ (particularly rights at risk) be developed as a tool for guiding future planning and decision-making. This will also provide a more effective framework for integrating the economic, social, and environmental dimensions for options assessment and the planning and project cycles.”

– *The Recommendations of the World Commission on Dams*

Dam development changes the lives of affected people in dramatic and often unforeseen ways. It also intrinsically changes the ecological composition of river basins, altering ecological services and natural processes in ways that may be irreversible. Such a combination of profound changes to social and environmental systems is often the result of dam builders externalizing the costs and risks of hydropower infrastructure onto affected communities and the environment upon which they depend. Recognition of the gravity of these changes invokes a responsibility to protect affected people’s rights and minimize the risks to their ecosystems and livelihoods. In this sense, a rights-based approach to dam standards is likely to produce better outcomes for all parties.

What does it mean to take a rights-based approach to dam standards? When a person has a “right” it means that they have been born with that right, independent of whether a government has granted a recognition of that right. In all situations, human beings have

### What is Enforceable?

It is important to keep in mind that no matter what kind of standard is produced by each institution, some of the above policies are voluntary, while others are mandatory. For those that are mandatory, it is important to know who might be able to enforce the provisions and how hard it is to enforce them. It is often only the government that has the right to enforce a standard governing construction of a dam, for example.

To determine whether a standard is mandatory, one needs to determine whether the developer is bound by the legal instrument creating the standard, and whether the provision is obligatory. For example, if a law says a developer “shall” do something, that is a good indication that the standard might be binding. The next question is whether the community can enforce the standard. These are all questions that should be answered by a local lawyer.

the capacity to insist their rights be respected. If a right is not respected, access to justice and remedies for grievances should still be available. Additionally, whenever someone has a “right” it means that someone else has a corresponding “duty.” In this case, it is the duty of governments, and the responsibility of businesses, to respect rights. So a rights-based approach clearly insists that people must have access to both justice and remedies, while it defines the duties and responsibilities of all actors involved: the host governments, the financiers, the developers, the consulting firms, and others.

A rights-based approach differs from a voluntary, best practices approach in that developers must actively uphold their responsibility of protecting affected people’s rights and avoiding risks in a way that is satisfactory to external stakeholders. This differs from simply making an internal commitment to reform or from incorporating technical changes into project designs.

Finally, understanding dam standards from the lens of rights, duties, and responsibilities helps us to identify which standards should be promoted, and what should happen during their implementation. This guide argues that the highest dam standards are those that create the best outcomes. They are discussed in detail in the section that follows.