

Human Rights Require Accountability

Why German development cooperation needs a
human rights complaints mechanism

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Imprint

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The original German version was first published in December 2013.

The English version contains updates concerning key developments.

Translation: Melanie Newton

Layout: Da-TeX Gerd Blumenstein, Leipzig

Printed by: Druckerei Bunter Hund, Berlin

Policy Paper No. 28
February 2015

ISBN 978-3-945139-58-5 (PDF)
ISBN 978-3-945139-59-2 (Print)

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The Institute

The **German Institute for Human Rights** is the independent National Human Rights Institution in Germany. It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organizations. It is supported by the German Federal Ministry of Justice and Consumer Protection, the Federal Foreign Office, the Federal Ministry for Economic Cooperation and Development and the Federal Ministry of Labour and Social Affairs. The National Monitoring Body for the UN Convention on the Rights of Persons with Disabilities was established at the Institute in May 2009.



On Terminology

The countries with which Germany engages in development cooperation are referred to here as "partner countries" (or partner country in the singular), as this has become the generally accepted term, and from a human rights point of view cooperation is a worthwhile goal. The author is aware that the word "partnership" suggests cooperation between equals, which for various reasons is not always the case in development cooperation.

The term "donors" is used for development partners offering financial or technical cooperation to partner countries.

The author would like to thank Rebecca Walter for her helpful support in compiling this paper; Korinna Horta, Heike Rabe and Anna Würth for their valuable comments; and various members of civil society, the Ministry for Economic Cooperation and Development, the GIZ and the KfW Development Bank for their inspiring discussions.

Summary

Development cooperation is intended to further human rights. While it often does, it does not do so by default. There have been complaints about development programmes in partner countries supported by German development cooperation, often because of alleged forced resettlements which do not comply with international human rights. Some of the complaints have been dealt with before the United Nations Committee on Economic, Social and Cultural Rights. The Committee has recommended that the German government ensure its development cooperation policies promote economic, social and cultural rights and do not result in their violation.

Governments of countries supported by development cooperation are primarily responsible for the human rights compliance of their development programmes. However, donor countries contribute financial or technical resources to these programmes without which the countries in question would not be able to implement them at all. This implies that donor countries share responsibility for the impact and side-effects of development cooperation and for its compliance with human rights. Unlike development banks, for example, Germany does not have a central, independent and transparent mechanism to investigate complaints arising from its bilateral development cooperation and to publish the results of such investigations. Such a mechanism would give those affected by development cooperation a voice. In addition, it would enable the outcomes to which donors have contributed to be assessed from a human rights point of view. This is what distinguishes a human rights-based complaints mechanism from evaluations or preliminary impact assessments, which examine the extent to which programmes have achieved development goals and are usually initiated by the donors themselves.

This publication argues that human rights considerations require the introduction of such a complaints mechanism because it would close the existing ac-

countability gap in German bilateral development cooperation. From a human rights perspective, a complaints mechanism for development cooperation is grounded in extraterritorial human rights obligations and the ensuing obligation of states to provide for effective redress. Demands for donor accountability have become a central issue, as underscored by the proposal of the German CSO umbrella organisation Forum Menschenrechte for a human rights complaints mechanism for bilateral development cooperation as well as by discussions concerning post-2015 development goals.

In terms of development policy, such a mechanism would lead to more ownership by allowing control of impacts at the local level. Feedback from affected parties would also enable donors to address the risks of their engagement early on in the process and adapt their programmes accordingly. Thus, a complaints mechanism would ideally be an instrument of preventive risk management, hence helping to ensure that human rights infringements do not occur in the first place. Furthermore, a complaints mechanism might also facilitate dialogue with civil society, both in Germany and in partner countries, and hence raise the debate about the opportunities and limits of development cooperation to a qualitatively new level. In addition, a systematic analysis of individual cases could also further the legal debate about the scope and limits of donor states' extra-territorial obligations. Doubts arising among partner institutions in the partner countries are challenges that human rights-based development cooperation must face and address.

The current standard procedure consists of two stages. First, a problem-solving process conducted in the country where a development cooperation project is being implemented; and second, a centralised, independent and transparent human rights compliance review. While the former is a kind of confidential mediation process, the latter is an independent proce-

procedure whose steps and outcomes are documented in a transparent manner. The former provides development organisations with the opportunity to search expeditiously and in good faith for a jointly acceptable solution. The latter is resorted to in cases where the parties concerned fail to reach agreement or where human rights infringements are irreversible. According to their own statements, the implementing agencies, the GIZ and the development bank of the KfW, both have confidential internal mechanisms for dealing with complaints. These could be further developed into problem-solving mechanisms.

The **German Institute for Human Rights** recommends to the Federal Ministry for Economic Cooperation and Development that it establishes such a complaints mechanism, including an independent, transparent and public compliance review, by the middle of the eighteenth legislative term. It encourages the **implementing agencies**, in particular the GIZ and the KfW, to make use of the opportunities such a complaints mechanism would offer and to work constructively towards its establishment. Concurrently the agencies should structure their own internal procedures so as to include a problem-solving process in line with international good practice and Germany's human rights obligations. Last but not least, it recommends to the **German Bundestag's Committee on Economic Cooperation and Development** and the **Committee on Human Rights and Humanitarian Aid** to request from the German Ministry for Economic Cooperation and Development an annual report summarising complaints arising from Germany's development programmes and to discuss this report in a joint public committee session.

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Human Rights Require Accountability

Why German development cooperation needs a human rights complaints mechanism

1 Current State of Affairs

The first binding human rights concept in German development cooperation policy was issued by the German Federal Ministry for Economic Cooperation and Development (BMZ) in May 2011. It establishes accountability as a component of a human rights based approach. Accountability is considered to promote cooperation between civil society and state structures and hence yield better development outcomes.¹ While the call for accountability is directed first and foremost at Germany's partner countries, the BMZ does not exempt itself from this endeavour. Based on the experiences of other donor countries, the BMZ has set out to examine whether a human rights-based complaints mechanism can be implemented with a view to furthering accountability.²

A complaints mechanism of this kind would allow people in partner countries to lodge complaints directly with Germany as a donor country in cases where they have been negatively affected by German development cooperation programmes or if they have good reason to fear that this would be the case in the future. Article 2 of the International Covenant on Civil and Political Rights obliges states to ensure that anyone whose rights have been violated "shall have

an effective remedy". It is recognised that states acting outside their own territories, in other words, with respect to populations of third countries, are fundamentally bound to observe human rights.

The realisation of these extra-territorial state obligations is a matter of some urgency: in the German state report on the Convention on Economic, Social and Cultural Rights 2010/2011,³ German civil society organisations (CSOs) criticised German development cooperation with Cambodia.⁴ Following the report, the UN Committee on Economic, Social and Cultural Rights called on Germany to organise its development cooperation to ensure that it furthered rather than violated human rights.⁵ In 2012 the BMZ asked the German Institute for Human Rights to carry out an independent, human rights-based assessment of land rights in the German-Cambodian programme. It concluded with recommendations for future programmes, including the enshrinement of complaints mechanism.⁶

Since 2011 the German Institute for Human Rights (GIHR) has outlined its position on the necessity and value of establishing such a mechanism, what form it should take and where it might be located. It has also held discussions with CSOs, the BMZ and imple-

1 BMZ (2011), *Human Rights in German Development Policy. BMZ Strategy Paper*, p. 12. http://www.bmz.de/en/publications/type_of_publication/strategies/Strategiepapier305_04_2011.pdf (PDF, 484 KB) [accessed 28.08.2013].

2 Ibid., p. 21. "Mechanisms of accountability which can be accessed by individuals or groups if they consider that their human rights have been infringed, play an important role in human rights implementation. This applies in the context of development cooperation in the partner countries as well as in Germany. For that reason, and also drawing on experience gained by other donors, the possibility of setting up a human rights complaint mechanism is being considered by BMZ. The assessment will focus on strengthening ownership by the partner countries and safeguarding access for civil society organisations."

3 Committee on Economic, Social and Cultural Rights (2011), 46th session, UN doc. E/C.12/2011/SR.10, nos. 6 and 14.

4 *Parallel Report to the 5th Periodic Report of the Federal Republic of Germany on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICESCR/icescr_state_report_germany_5_2008_parallel_Alliance_en.pdf (PDF, 646 KB) [accessed 27.08.2013].

5 Committee on Economic, Social and Cultural Rights (2011), 46th session, UN doc. E/C.12/2011/SR.10, no. 11.

6 German Institute for Human Rights / Monika Lüke (2013), *Human Rights Assessment of the German-Cambodian Land Rights Program*, http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Study_Human_Rights_Assessment_of_the_German_Cambodian_Land_Rights_Program.pdf (PDF, 4,7 MB) [accessed 19.11.2013].

menting agencies.⁷ Chapter 2 of this policy paper presents the GIHR's thoughts on this matter from a human rights and development policy perspective, while Chapter 3 outlines the human rights basis upon which such a complaints mechanism might be established. Chapter 4 considers the possible challenges that German development cooperation might encounter in introducing such a mechanism and how these could be addressed. Chapter 5 proposes how such a mechanism might be structured, while Chapter 6 concludes with recommendations for action to the German government, development organisations and the German parliament.

2 Why a Complaints Mechanism?

Why should donors who voluntarily donate funds for the development of foreign countries also be held accountable for the consequences of these payments? Doesn't the partner country bear sole responsibility for the use of development funds and the consequences thereof?

It is indeed the governments of partner countries who are responsible for development projects, with donor countries contributing financial resources or supporting the process by means of technical assistance. But in many cases specific projects are only made possible at all through these external resources. It thus follows that donors carry partial responsibility for the effects and side-effects of development projects.

2.1 The need for a complaints mechanism

Good intentions do not always produce good results. Development cooperation ought to benefit the devel-

opment of a country, and in many cases it does, but it does not do so by default.

The realisation of a human rights-based approach to development cooperation that can link human rights and development cooperation at both a conceptual and a practical level illustrates how development cooperation at its best can substantially support human rights – and conversely how human rights can strengthen good, sustainable development cooperation.

Yet some development cooperation projects do little to promote human rights even if they do not necessarily violate them. Contrary to a widely held view, not every road-building project promotes the rights of women simply because they use that particular road from time to time.

Finally, some projects may indeed result in human rights violations. The complaints received in recent decades through the complaints mechanism of the World Bank (referred to henceforth as the Inspection Panel), show that major infrastructure projects in particular often have an extremely negative impact on human rights – for example through forced resettlement or damage to health caused by environmental pollution. A number of similar complaints have been received in connection with other development projects involving German funding.⁸ Two of them have already been examined by the Committee on Economic, Social and Cultural Rights of the United Nations.

In 2001 and 2011 German CSOs identified human rights infringements in Ghana and Cambodia, respectively, in two reports to the UN Committee on Economic, Social and Cultural Rights.⁹ In the case of Ghana, German development cooperation agencies

7 See the proposal submitted by the German human rights umbrella CSO Forum Menschenrechte in October 2012: Forum Menschenrechte (2012), *Proposal for a Human Rights Complaint Mechanism for German Development Cooperation*, http://www.forum-menschenrechte.de/cms/upload/PDF/ab_02_2012/1210_FMR_Proposal_HR_Complaint_Procedure_Dev_Coop.pdf (PDF, 55 KB, not barrier-free) [accessed 24.10.2013].

8 Since there are no independent studies and no examinations of blog discussions in the secondary literature on this subject, I refer here and elsewhere to blogs. As well as the cases of Cambodia, Ghana and Namibia described in this publication, see also, for example, the publication of the German CSO urgewald e.V. on KfW's involvement in a waste-burning project to in Beijing: *Entwicklungspolitik online/urgewald, KfW soll Müllverbrennung in Peking nicht finanzieren* [Internet] Deutschland. 30.8.2012 [cited on 6.11.2013]. http://www.epo.de/index.php?option=com_content&view=article&id=8717:kfw-soll-muellverbrennung-in-pekings-nicht-finanzieren&catid=28&Itemid=70 [accessed 6.11.2013].

9 Brot für die Welt/FIAN (2001), *Parallel Report to the 4th Periodic Report of the Federal Republic of Germany to the UN Committee on Economic, Social and Cultural Rights. Germany's Fulfillment of Its International Obligations in accordance with the International Covenant on Economic, Social and Cultural Rights (IPwskR). Focus: The Right to a Proper Diet*, http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICESCR/icescr_state_report_germany_4_2000_parallel_de.pdf (PDF, 433 KB) [accessed 27.08.2013]; Brot für die Welt, FIAN Deutschland, GegenStrömung, Deutsche Kommission Justitia et Pax, MISEREOR, urgewald (2011), *Parallel Report in Response to the 5th Periodic Report of the Federal Republic of Germany on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Pakte_Konventionen/ICESCR/icescr_state_report_germany_5_2008_parallel_Alliance_en.pdf (PDF, 647 KB) [accessed 27.08.2013].

had provided gold mine operators with loans via the Deutsche Entwicklungsgesellschaft (DEG). In Cambodia the GIZ supported the Cambodian government and administration in the technical and administrative implementation of land management policy. It also helped to prepare the legal basis for the project and to establish and qualify some of the institutions concerned with land questions.

In both cases the projects resulted in forced resettlement, something which in no way conformed with the provisions of the Convention on Economic, Social and Cultural Rights concerning proportionality, prior consultation and appropriate compensation. Those who were resettled had no access to effective legal redress.¹⁰

Even though donors take various steps to try to avoid human rights infringements in development cooperation projects and to achieve their development cooperation goals, it is always possible that projects will lead to such human rights infringements. This can happen in a number of different ways, as the following categories of cases show:

Cooperation partners are chosen who are involved in restricting human rights. Such an accusation, for example, was levelled by a group of Azerbaijani CSOs against the U.S. development agency USAID. The group claimed that in 2012 USAID had given 1.5 million U.S. dollars to an Azerbaijani organisation that, though formally registered as a CSO, was actually headed by the chairman of the Committee of the Azerbaijani Parliament on Legal Policy and State Building. The chairman of this committee was – like most members of the parliament – a member of the governing party. It was chiefly this committee that

had been responsible for passing laws restricting civil and political rights in Azerbaijan.¹¹ Similar accusations were levelled at the German Interior Ministry's support for the Mexican police as well as at the contractual relationship between the DEG and its Honduran business partners. Since then the DEG has ceased making loan payments to these partners.¹²

The responsible agencies of the partner country use development cooperation money to strengthen the ruling party. This was the finding of a Human Rights Watch report on Ethiopia in 2010. The report traced how social programmes had been used to give preferential treatment to members of the governing party and exclude members of the opposition from social benefits.¹³

Private service providers cause human rights infringements: Private service providers usually have a contractual relationship with the cooperation partner or agency in the country in question. Possible consequences of such arrangements might be, for example, that a private land surveying agency receives bribes to carry out surveys that favour particular parties. Another example might be private security companies whose employees harass local populations.

Failure to properly assess possible consequences during the planning phase: In this case, development cooperation professionals underestimate the impact of their development concept or else fail to take steps to reduce the risk of human rights infringements. Sometimes it is necessary to take risks, of course, but then an assessment of the possible human rights consequences must be performed that outlines not only the desired effects but also the possible negative impact. The assessment should suggest how these might

10 On Cambodia, see also Lüke (2013), see note 6.

11 On USAID and Azerbaijan see the following blogs: Ali Huseynov, In Mutatione Fortitudo, "1.5 million dollars of US taxpayers' money granted to Azerbaijani GONGO" [Internet]. Baku, Azerbaijan, 28 November 2012 [cited on 26.08.2013]. <http://blog.novruzov.az/2012/11/15-million-us-taxpayers-money-granted.html> [accessed 24.10.2013]; Turan News Agency. Interview: "U.S. Funds Pro-government Structures in Azerbaijan" [Internet]. Baku, Azerbaijan, 1 May 2013 [cited on 26.08.2013]. <http://www.contact.az/docs/2013/Politics/050100034617en.htm#.UmkN5iFohJg> [accessed 24.10.2013]; USAID (2013), press release: "Human Rights Discussion Promoted in the Regions". <https://www.usaid.gov/azerbaijan/press-releases/human-rights-discussion-promoted-regions> [accessed 26.08.2013]. On the use of blogs see note 8.

12 See the blog contribution on amerika 21.de. News and analyses from Latin America and the Caribbean. Mexico, "Deutsche Polizeihilfe könnte organisiertes Verbrechen fördern" [Internet], Berlin, 05.05.2011 [cited on 26.08.2013]. <https://amerika21.de/meldung/2011/05/29611/polizeihilfe-deutschland-mexiko> [accessed 24.10.2013]. On the use of blogs see note 8. Germany's aid to the Mexican police was the subject of a minor interpellation in the Bundestag: Deutscher Bundestag (2012), Antwort der Bundesregierung auf Kleine Anfrage: "Gewalteskaltung und Menschenrechtsverletzungen in Mexiko". Document no. 17/9116. <http://dipbt.bundestag.de/dip21/btd/17/091/1709116.pdf> (PDF, 235 KB) [accessed 26.08.2013] FIAN Deutschland, "DEG reagiert und stoppt Kredit an honduranischen Palmölproduzenten – FIAN begrüßt die menschenrechtskonforme Entscheidung", 14.4.2011, <http://www.fian.de/artikelansicht/2011-04-14-deg-reagiert-und-stoppt-kredit-an-honduranischen-palmoelproduzenten-fian-begruesst-die-menschenrechtskonforme-entscheidung/> [accessed 10.12.2013].

13 See the Human Rights Watch report (2010), *Development without Freedom*, <http://www.hrw.org/reports/2010/10/19/development-without-freedom-0> [accessed 26.08.2013]

be reduced and establish critical thresholds at which development cooperation agencies should halt or withdraw from projects.

Even though the project has been well planned and financial resources have already been pledged, infringements occur at the implementation stage: This often happens when the German government's negotiating partners are not the same people who are later responsible for implementation and subordinate authorities or other ministries take their place. This, at any rate, was what happened in the Cambodian project mentioned above.¹⁴ CSOs in Namibia suggest that the state of affairs is similar in that country.¹⁵ In this case the GIZ is helping the land ministry to carry out a land reform and to allocate land titles. Decisions about who among the indigenous populations is actually entitled to a land title are, however, taken by a different ministry. As a consequence of the land reform, not only did those deemed ineligible not receive any land titles, but in some cases they were forced to cede them to new owners.

The last-mentioned situation is probably the most common: at the point when negotiations were conducted with the partner government, the human rights infringements could not have been foreseen, since they only occurred at the implementation stage. They were perpetrated by actors with whom Germany had neither negotiated nor had access to their policies and implementation practices. Often a considerable amount of time elapses between the planning of a project and its implementation, meaning that human rights infringements sometimes ensue as a result of changes in the institutional, economic or political context.

The question of responsibility may be different if a donor participates in programmes in which – although unintended by the donor – infringements of human rights occur with the donor's knowledge. In this case it might be said that the donor is "tolerating" the infringements. Would a donor be able to justify his actions in such cases by claiming that he had withdrawn to an unproblematic field – in the cases of Cambodia and Namibia to administrative support

for the land registry system, which did indeed secure property ownership for many people? And how should we judge cases in which donors have underestimated the impact on affected parties? Or cases in which measures initiated by donors to compensate certain disadvantaged groups fail to have as comprehensive an impact as intended?

2.2 What are the origins of human rights infringements through development cooperation?

The causes of human rights infringements during implementation of development cooperation programmes lie not only in the programmes' conception and implementation. Usually they are also based on unvoiced discursive assumptions and the real-life conditions in which development cooperation policy is put into practice. These create a particular perspective on development or establish incentives that can lead to the inadequate consideration of human rights or to affected parties being insufficiently heard – or indeed not heard at all – during project implementation:

The prevailing understanding of development is one-sided: the word "development" conjures up notions of progress and improvement – which is measured based upon the average outcome for all concerned. These might take the form of more environmentally friendly energy generation, legal security provided by the introduction of a land registry or the provision of an adequate water supply. Most of the time people are less aware that these goals – as desirable as they may seem after considering all possible aspects – may result in infringements against certain individuals, groups of people or regions that are disproportionate to the benefits and that these are not adequately addressed by the governments of Germany's partner countries. Building a dam, for example, may well make it necessary to resettle populations. Introducing land registries and demarcating property may ignore collective ownership claims and land use rights or even interfere with nomads' way of life. A water supply system could even be restructured in

14 In Cambodia the German government negotiated with the Cambodian Rehabilitation and Development Board at the Council for the Development of Cambodia (CRDB/CDC). The implementation partner was the Ministry of Land Management, Urban Planning and Construction. German development cooperation was not directly involved in human rights infringements, but acted as a technical, administrative and legal consultant and supported the establishment of the participating institutions.

15 See the blog by Rebecca Sommer, Minority Voices Newsroom. "Namibia: German GIZ Directly Engaged in Dispossessing Indigenous Peoples of Their Lands and Territories" [Internet] Namibia, 30 March 2013 [cited on 26.08.2013]. <http://minorityvoices.org/news.php/fr/1402/namibia-german-giz-directly-engaged-with-dispossessing-indigenous-peoples-of-their-lands-and-territo> [accessed 24.10.2013]. On the use of blogs see note 8.

such a way that in absolute terms the poor pay more for water than the middle classes.

Development projects tend to be viewed from a technical or economic perspective. Projects like building a hospital or a road, however, cannot be assessed independently of the general human rights situation. The Inspection Panel of the World Bank made it clear in its report on the oil pipeline between Chad and Cameroon that, given the major restrictions on freedom of expression and freedom of assembly in those countries, it was questionable whether the free and informed consultations stipulated by the World Bank could be conducted in the manner desired.¹⁶

State development cooperation procedures focus on supporting state structures in the partner country. Human rights infringements often have their origins in the partner country's faulty planning and/or implementation of the project. The reason for this may be a lack of capacity or else simply a lack of political will. Development project planning and implementation and political dialogue are, however, based on the assumption that the governments of partner countries will ensure sufficient participation, that they will as a rule act in the interests of their own populations and that they will cease to practice policies that violate human rights when suggested to do so by the donor countries. This ignores the fact that it is precisely those in responsible positions in partner governments who may have little interest in safeguarding human rights, making them unreceptive to advice in this respect. Donors may well fail to see this initially. They might simply underestimate the problems or else give the partner country's government the benefit of the doubt. Alternatively they may even accept such violations because of their own economic or security policy interests.¹⁷

International development policy establishes incentives for projects with high risks for human rights,

particularly in emerging economies. Donors have declared on several occasions that they wish to spend 0.7 percent of GDP on development cooperation in the long-term. This would include anything that qualifies as official development assistance (ODA), primarily contributions that donors provide themselves. In recent years, however, various forms of "mixed financing" have become more prevalent, including interest-subsidised loans. Here, for example, the BMZ channels funds to the KfW development bank, which in turn arranges a loan to the government of the partner country out of the KfW's market funds. The money from the BMZ allows the interest rate to be pushed so far below the market rate that the entire loan counts as ODA. Put another way, a contribution from the BMZ of, say, 20 million euros will allow a loan to the partner country that is three to six times higher to be counted as ODA.¹⁸ This kind of funding is of particular interest for projects in threshold countries, which are capable of taking out and repaying loans, rather than countries to which development funds are given without any repayment obligation. Also attractive are finance-intensive, major infrastructure projects, which can visibly increase a donor country's ODA share. The prospect of having such infrastructure projects, such as for example energy generation projects – which tend to carry risks for human rights – classified as ODA projects may be so attractive that human rights considerations recede into the background during planning and implementation. This may be the case for the BMZ, as the politically responsible body, as well as for the implementing agencies.

2.3 How a complaints mechanism could address this situation – and its other advantages

A complaints mechanism could further high-quality development cooperation and facilitate its communication both in Germany and abroad. It would al-

16 See Maartje Van Putten (2008), *Policing the Banks. Accountability Mechanisms for the Financial Sector* (Montreal: McGill-Queen's University Press), p. 41; World Bank Inspection Panel (2001), *Chad-Cameroon Petroleum Development and Pipeline Project* (Loan 4558-CD), *Management of the Petroleum Economy Project* (Credit 3316-CD); and *Petroleum Sector Management Capacity Building Project* (Credit 3373-CD), XVII, Paragraphs 26, 37, [ewebapps.worldbank.org/apps/ip/PanelCases/22-Investigation%20Report%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/22-Investigation%20Report%20(English).pdf) (PDF, 928 KB, not barrier-free) [accessed 10.02.2015].

17 On the subject of cooperation in the security sector, see the response of the German federal government to the minor interpellation of 26 Oct. 2011. Drucksache 17/7470. <http://dip21.bundestag.de/dip21/btd/17/074/1707470.pdf> (PDF, 247 KB) [accessed 27.08.2013].

18 See the BMZ website, *Innovative Finanzierungsinstrumente. Einsatz von Marktmitteln in der finanziellen Zusammenarbeit*, http://www.bmz.de/de/was_wir_machen/themen/entwicklungsfinanzierung/innovativefinanzierung/marktmittel/index.html [accessed 4.11.2013] as well as the following CSO publication: Jens Martens (2012), *Die Wirklichkeit der Entwicklungspolitik 2012. Eine kritische Bestandsaufnahme der deutschen Entwicklungszusammenarbeit*. Twentieth report – part 2; published by Deutsche Welthungerhilfe and Terre des Hommes Deutschland. http://www.welthungerhilfe.de/fileadmin/user_upload/Mediathek/welthungerhilfe-wirklichkeit-entwicklungspolitik-20-2012-teil2.pdf (PDF, 1 MB, not barrier-free) [accessed 10.02.2015].

low those who are often excluded from national and international development cooperation processes – namely, the populations of partner countries – to have their say.

2.3.1 Risks can be prevented

Complaints do not represent burdensome meddling but a valuable instrument that allows both the BMZ and the implementing agencies to become aware of weaknesses or risks early on in the process, enabling them to remedy problems and thus encourage sustainable development. "Development processes cannot be planned on the drawing board but are subject to many different influences that those involved can control only partially, if at all", was the assessment of a recent KfW publication produced on the occasion of the World Bank's 2014 World Development Report.¹⁹ Every risk, it went on, also represented an opportunity; it concluded that, most importantly, risks should be consciously and efficiently addressed. The objectives of a mechanism for dealing with complaints could hardly have been described more aptly.

Nevertheless, it is the partner country that retains primary responsibility for human rights infringements occurring in the context of a development project. German development cooperation agencies – i.e. the BMZ as the politically responsible authority and the implementation agencies who bear responsibility in the field – can, however, influence whether and how donor funding is used. But it is essential to carefully assess the human rights risks in advance, something which would then help define the framework for development cooperation engagement. This requirement is now clearly formulated in the BMZ's guidelines. If complaints reveal weaknesses, these must be addressed in a timely fashion using all available legal and practical means. Whether and to what extent the legal options open to the BMZ and the implementing agencies need to be changed – in financial cooperation, for example, this might be the rules governing the provision of funds – can be clarified in a dialogue with all those involved.

Ideally a complaints mechanism should not only address complaints but should also offer a learning experience. This would help to avoid grave infringements of human rights or participation in such infringements in the future. To what extent the involvement of a donor constitutes legal liability, which would imply that compensation has to be paid, has yet to be clearly legally determined for all the possible development cooperation constellations. Given that the legal footing is not always clear and that state development cooperation generally has a purely supportive function, legal liability and pursuant compensation claims are likely to be applied only in exceptional and particularly extreme cases.²⁰ None of the existing mechanisms set up by multilateral banks provides for such compensation. The transparent handling of a large number of individual cases via a complaints mechanism would provide a basis for systematising and clarifying legal questions – at least in the future.

2.3.2 Local populations control development measures and their impact

If a partner country fundamentally believes it has an obligation to safeguard human rights and if its administration is sufficiently powerful to do this, then donors are likely to be able to make the necessary changes to development projects by entering into dialogue. Where this is not the case and where national complaint channels are inefficient or inaccessible to the population, a complaints mechanism instituted by the donor would give affected parties an opportunity to draw attention to failures in the conception and implementation of development projects. Development banks already have mechanisms in place in order to ensure that the banks' self-imposed due diligence standards are met. These mechanisms oblige the staff of such banks to undertake risk assessments when funding development projects, to ensure the informed participation of affected sectors of the population and also to check whether all alternatives to forced resettlement have been explored and whether affected parties have received appropriate compensation. The banks' mechanisms are not a substitute for

19 Felix Povel (2013), "Weltentwicklungsbericht 2014: Effektives Risikomanagement fördert Entwicklung!" In: KfW-Development Research, *Entwicklungspolitik Kompakt*, no. 17. https://www.kfw-entwicklungsbank.de/PDF/Download-Center/PDF-Dokumente-Development-Research/2013-10-07_EL_WDR-2014_neu.pdf (PDF, 67 KB, not barrier-free) [accessed 24.10.2013].

20 The only court ruling pertaining to development cooperation known to the author concerns the link between British development cooperation and the arms trade, which the court judged to be impermissible. See the following blog with further references: Alexander Gordy (2004), "The implications of the Pergau dam scandal in terms of the power-play of commercial and developmental interests in the allocation of Aid-and-Trade Provision (ATP) funding". http://pergaudam.blogspot.de/2006_02_01_archive.html [accessed 1.11.2013]. On the use of blogs see note 8.

the jurisdiction of the partner countries, nor do they interfere with this. Rather they serve as an internal accountability mechanism for the donors themselves. Yet even if this mechanism is aimed at providing a formal review of the development banks' conduct, the findings also provide information about the state of affairs in the partner country.

CSOs can also make use of this independent public review and the findings it yields for their own work, particularly when it comes to demanding more participation for affected parties in the decision-making and implementation processes surrounding development projects.

A complaints mechanism provides an instrument for target groups and those affected by development cooperation that they themselves can set in motion. This can help them achieve a stronger position, for it is they who decide whether proceedings should be instituted. The rules of procedure define the criteria for determining whether a complaint is admissible. This is designed to prevent abuse of the complaints mechanism and to limit complaints to relevant cases. A mechanism of this kind differs from project progress monitoring and evaluation, which are usually initiated by donors. Ultimately a complaints mechanism gives a voice to those whom development cooperation is supposed to benefit: the population of the partner country. Complaints ensuing from human rights infringements can ensure a hearing for people who are often excluded from state development cooperation procedures, for development cooperation is usually negotiated between partner governments, and development professionals engaged in state development cooperation tend to focus on working together with state institutions – as opposed to the public – in the partner country.

2.3.3 Making development cooperation more effective

The experience of development banks with complaints mechanisms has shown that complaints can improve efficacy in development cooperation in the partner country. If, for example, affected parties report problems early on in the implementation process, adjustments can be made while it is still in progress.²¹ In addition, an overall view of the reported shortcoming may also indicate systemic weaknesses in a donor organisation's procedures and operations, which can then be dealt with in a more timely manner.²² It thus complements the remedial mechanisms that already exist in the partner country by providing an instrument that focuses on the donor's responsibilities. "Practice what you preach" is the guiding principle according to which donors make clear that they subject themselves to the same standards that they apply in their development policy and cooperation.

But even in situations where the authorities in partner countries lack the political will, a complaints mechanism can still have an exemplary function. If a partner government is aware of possible human rights infringements and has simply accepted them, then an independent transparent investigation would make these deficits visible to the public eye in the partner countries. In countries where there is no guarantee that governments enjoy broad legitimacy or act in the interests of their populations, this allows donors to create an additional, albeit limited, space for civil society and the population in the partner country to be included in the political and economic decision-making process – particularly when it comes to the question of how donor funding to their government should best be spent.²³

21 See Special Rapporteur on adequate housing Raquel Rolnik (2013), *Mission to the World Bank*. UN Doc. A/HRC/22/46/Add.3, no. 25: In an IFC project on the Philippines the agency found another solution after IFC insisted that due diligence obligations be observed. This meant that no more resettlements were necessary.

22 See The Inspection Panel (2009), *Accountability at the World Bank. The Inspection Panel at 15 years*, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf> (PDF, 10,1 MB, not barrier-free) [accessed 10.02.2015], pp. 13, 47 f.; Collaborative Learning Projects (2011), *Feedback Mechanisms in International Assistance Organizations*, <http://www.hapinternational.org/pool/files/cda-report-feedback-mechanisms-in-international-organisations.pdf> (PDF, 586 KB) [accessed 27.08.2013].

23 On the question of what donors should focus on in cooperation with governments that do not enjoy broad social legitimacy, see Simon Hartmann (2011), *Geberverhalten in der internationalen Entwicklungspolitik. Schwierigkeiten beim Umgang mit dem Spannungsfeld Rechenschaftspflichten*, Working Paper no. 26, Österreichische Forschungsstelle für internationale Entwicklung, http://www.oefse.at/fileadmin/content/Downloads/Publikationen/Workingpaper/WP26_Geberverhalten.pdf (PDF, 288 KB, not barrier-free) [accessed 10.02.2015]

2.3.4 Benefits at home

CSOs' demands for donor accountability have become a key issue in both donor and partner countries. This is underscored by the German CSO umbrella organisation Forum Menschenrechte's proposal for a human rights complaints mechanism for bilateral development cooperation and highlighted in discussions concerning the post-2015 development goals. The issue also appears in the complaints about development projects made to the Inter-American human rights system as well the publication of the Maastricht Principles on Extra-territorial Obligations of States. In her latest report, the UN Special Rapporteur on the situation of human rights defenders addressed the impact of large-scale development projects on the situation of human rights activists and called on donors to support or establish effective mechanisms for human rights-based accountability or redress.²⁴

A complaints mechanism will also help donors to better manage their own risks and reputation. Merely by establishing a complaint, a donor demonstrates its will to subject its own actions to legal standards. Provided the donor's recommendations are taken seriously and their implementation is recognised by CSOs, this may facilitate dialogue between the state and CSOs about the challenges and continuing dilemmas of development cooperation. As well as raising the public debate about development cooperation and what it can or cannot achieve to a qualitatively higher level, an independent public complaints mechanism would, via the complaints it receives, further clarify and define the extent of the donor's human rights obligations in the context of international development cooperation as well as the division of roles between donors and partner countries.

2.3.5 Closing the accountability gap in development cooperation

A complaints mechanism would serve to complement other aspects of accountability in development cooperation, which should ideally include effectiveness, transparency²⁵ and independent evaluation. The review carried out by a central, independent mechanism can be complemented by establishing or strengthening a confidential problem-solving process in the partner countries themselves, or at least within the projects in question.

Evaluations, even independent ones, are no substitute for a complaints mechanism, although both can take on a preventive and programme-shaping function. The difference is that a complaints mechanism is set in motion by the affected party and must respond more quickly than an evaluation programme, which usually follows consultations in Germany. An evaluation, on the one hand, follows the logic of the development project and is aimed at assessing its efficacy and whether it has achieved its goals. A complaints mechanism, on the other hand, focuses on the issue of human rights infringement. Since affected parties may in some cases lodge complaints about a project that has already been assessed by an evaluation team, these two functions should be separated.

Accountability vis-à-vis German citizens, the German parliament and the population in the partner country can and should be linked via parliamentary control. The need for development projects to be flexible so that they can react to political or social change precludes detailed ex ante control of each individual programme by the parliament, making comprehensive ex post accountability all the more important.²⁶ Part

24 Forum Menschenrechte (2012), *Proposal for a Human Rights Complaint Mechanism for German Development Cooperation*, http://www.forum-menschenrechte.de/cms/upload/PDF/ab_02_2012/1210_FMR_Proposal_HR_Complaint_Procedure_Dev_Coop.pdf (PDF, 55 KB, not barrier-free) [accessed 24.10.2013]. OHCHR (2013), *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*, <http://www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf> (PDF, 1,8 MB, not barrier-free) [accessed 27.08.2013]; petition of the Global Initiative for Economic, Social and Cultural Rights et al. in the Name of the Survivors of the Rio Negro Community and other Communities Affected by the Chixoy Damm before the Inter-American Commission for Human Rights (2011) <http://globalinitiative-esqr.org/advocacy/guatemala-holding-the-world-bank-accountable-for-human-rights-violations/> [accessed 10.02.2015]; Maastricht Principles on the Extra-Territorial Obligations of States in the Field of Economic, Social and Cultural Rights (2012) [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=62](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=62) [accessed 28.08.2013]; United Nations Special Rapporteur for Human Rights Defenders (2013), *Situation of Human Rights Defenders*, United Nations General Assembly A/68/262, nos. 70–76, 84, <http://www.un.org/Docs/journal/asp/ws.asp?m=A/68/262> [accessed 22.11.2013].

25 See the International Aid Transparency Initiative <http://www.aidtransparency.net/> [accessed 27.08.2013].

26 See Hannes Grimm (1992), "Parlamentarische Kontrolldefizite der deutschen Entwicklungszusammenarbeit?" In *Die öffentliche Verwaltung*, January 1992, no. 1, p. 24.

of the parliamentary ex post accountability process should consist of open sessions attended by CSOs and representatives of state development cooperation institutions. Here the Committee for Economic Cooperation and the Committee for Human Rights and Humanitarian Aid would present reports containing information from the BMZ and the implementation agencies detailing complaints received and how they have been addressed.

2.3.6 German development cooperation moves forward on human rights

Establishing complaints mechanisms is part of an international trend. They are now obligatory for climate protection projects, for example. Alongside multilateral international and regional development banks, some bilateral donors have also established such mechanisms.²⁷ At the same time more attention is being devoted to integrating human rights into monitoring criteria, as in the case of the revision of the World Bank safeguards under way since 2012. The IFC's revised Performance Standards also contain rudimentary human rights provisions.²⁸

By envisioning a complaints mechanism based on human rights, German development cooperation has integrated these trends right from the start.

3 Accountability for State Activity Abroad

3.1 Extra-territorial obligations in basic rights and human rights

Donors are not responsible for a partner country's human rights deficiencies, but they are responsible for what happens to the money they donate. From a le-

gal point of view, calls for a human rights complaints mechanism may be based on the principle of extra-territorial responsibility, which states that human rights are binding for a state in everything it does – whether at home or abroad. If states make payments under the auspices of development cooperation and advise partner institutions at the local level, they are fundamentally bound in their actions to observe basic and human rights. This so-called extra-territorial application of human rights is stipulated by Article 2 (1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and was recently defined more concretely by Article 32 of the UN Convention on the Rights of Persons with Disabilities. The German Constitutional Court has ruled that German public authorities are fundamentally bound to observe basic rights, and that the same is true when it comes to the effects of their activities abroad.²⁹ In addition, Article 2 (3) of the International Covenant on Civil and Political Rights obligates states to establish effective complaints mechanisms for those whose human rights are at risk. In keeping with the principle of extra-territorial responsibility, this should apply not only to actions on a state's own territory but also to extra-territorial activities.³⁰ A recent study on international law also comes to the conclusion that the theoretical basis for development cooperation law "still dates from a time in the development of state theory when the authorities guarded the rights of the people, but affected parties were granted no right to seek redress from the state". The principle of the rule of law, the study continues, applies both to donor and partner countries, however. In its recent concluding observations addressed to Austria, the Committee for Economic, Social and Cultural Rights called on the Austrian government to take a human rights-based approach to development cooperation policy and to establish effective complaints mechanisms for cases in which economic, social or cultural rights were violated as a result of development cooperation in target

27 The Japan International Cooperation Agency, for example, offers an objection procedure. For more details on the mechanisms used by bilateral and multilateral institutions see Chapter 5, with further references in note 56. Shortly before going to print, German and international CSOs stated that the Deutsche Entwicklungsgesellschaft (DEG) and its Dutch counterpart the FMO Development Bank intended to set up a complaints mechanism. Update 2015: The mechanism is now operational, see <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/> [accessed 18.1.2015]

28 Safeguards or performance standards are the due diligence measures of the institutions in question.

29 For a comprehensive systematic overview of the rulings of the German Constitutional Court with further documentation, see Dirk Lorenz (2005), *Der territoriale Anwendungsbereich der Grund- und Menschenrechte: Zugleich ein Beitrag zum Individualschutz in bewaffneten Konflikten*, Menschenrechtszentrum der Universität Potsdam, vol. 26, 1st ed. (Berlin: BWW), pp. 129 f.

30 See also Andrea Kämpf and Inga Winkler (2012), "Zwischen Menschenrechtsförderung und Duldung von Menschenrechtsverletzungen? Anforderungen an die Entwicklungszusammenarbeit aus der Perspektive der extraterritorialen Staatenpflichten". In Tessa Debus, Regina Kreide, Michael Krennerich, Karsten Malowitz, Arnd Pollmann and Susanne Zwingel (eds), *Zeitschrift für Menschenrechte. Menschenrechte als Maßstab internationaler Politik*, vol. 6, 2012, no. 2 (Schwalbach: Wochenschauverlag), p. 63.

countries.³¹ The extent of extra-territorial obligations is discussed differently in each of the two covenants. Decisions and rulings pertaining to the Covenant on Civil and Political Rights as well as to the European Human Rights Convention basically limit responsibility for extra-territorial human rights to situations where a third-party state exercises sovereign authority over a territory or a person, for example, in cases of military occupation or detentions abroad. Such constellations are, however, not relevant to development cooperation, since donors are not endowed with nor do they exercise territorial or personal sovereign authority in partner countries. With respect to the Covenant on Economic, Social and Cultural rights, the discussion proposes a more far-reaching responsibility for a state in proportion to the scope of its extra-territorial influence. While the proposals made are still vague, the trend is towards a more concrete definition of extra-territorial obligations – both in the rulings by the European Court of Human Rights and in the Maastricht Principles on the Extra-territorial Application of Economic, Social and Cultural Human Rights. The conclusion is that states must themselves observe human rights even when it comes to their actions abroad as well as protect them and contribute to their fulfilment as far as possible.

Should a violation of international law or of a human rights treaty be identified, and should this violation be attributed to a state, the Draft Articles on State Responsibility for Internationally Wrongful Acts can be applied. Although these articles do not in themselves have a binding legal character, many of their provisions are considered international customary law. Since donor countries involved in development cooperation do not act alone or independently on the territory of the partner country, Article 16 of the International Law Commission's Draft Articles, which cover aid or assistance in the commission of an internationally wrongful act, may apply.³² The crucial point here is where one should draw the boundaries

of a donor state's due diligence obligation: a direct and deliberate intention to violate human rights on the part of donors active in development cooperation will very rarely exist or if it does will not be provable. Should donors, however, learn of human rights infringements or should they be plausibly informed that these could occur, they can no longer claim ignorance of their existence or to have supported them unknowingly. The due diligence obligation binds donors to ensure that their work will not contribute to human rights infringements.³³

The legal basis for a human rights complaints mechanism in development cooperation

Article 2 (1) of the International Covenant on Economic, Social and Cultural rights (referred to henceforth as the ICESCR), Article 4 of the Convention on the Rights of the Child and especially Article 32 of the UN Convention of the Rights of Persons with Disabilities serve as a basis for extra-territorial obligations of states including in the field of development cooperation.

Article 2 (2, 3) of the International Covenant on Civil and Political Rights (referred to henceforth as the ICCPR) obliges signatories to establish effective judicial and administrative complaints mechanisms.

Articles 14 and 15 of the ICCPR formulate requirements for court proceedings, which here can be cited for comparative purposes (access, independence, transparency, standards of review).

Article 25 of the ICCPR formulates a right to take part in the conduct of public affairs, which includes participation in the planning and implementation of measures to promote development.

The ban on discrimination enshrined in all human rights treaties (including Article 2 (1) of the ICCPR and Article 2 (2) of the ICESCR).

- 31 Jaqueline Neumann (2013), "Donor obligations", in *Development and Cooperation*, no. 2, 2013/02, p. 462, <http://www.dandc.eu/en/article/donor-agencies-must-not-only-promote-rule-law-they-must-also-be-held-accountable-it> [accessed 22.11.2013], with reference to Jacqueline Neumann (2013), *Die Förderung der Rule of Law in der Entwicklungszusammenarbeit. Ein Beitrag zur Herausbildung einer völkerrechtlichen Verfassungsnorm* (Münster, 2013), Committee on Social, Economic and Cultural Rights, 68th session, UN Doc. E/C.12/AUT/CO/4, no. 11.
- 32 International Law Commission (2001), Article 16. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (PDF, 72 KB) [accessed 10.02.2015]. The rules governing the responsibility of states can be applied to human rights treaties. See Carmen Thiele (2011), "Das Verhältnis zwischen Staatenverantwortlichkeit und Menschenrechten". In *Archiv des Völkerrechts*, vol. 49, no. 4, pp. 343–372, here p. 356; Philipp Dann (2012), *Entwicklungsverwaltungsrecht: Theorie und Dogmatik des Rechts der Entwicklungszusammenarbeit, untersucht am Beispiel der Weltbank, der EU und der Bundesrepublik Deutschland* (Tübingen: Mohr-Siebeck), p. 285.
- 33 Dann (2012), *Entwicklungsverwaltungsrecht* (see note 32), pp. 286–287; Helmut Philipp Aust and George Nolte (2009), "Equivocal Helpers – Complicit States, Mixed Messages and International Law". In *International and Comparative Law Quarterly*, vol. 58, pp. 1–30, here pp. 13 ff.; Committee of Economic, Social and Cultural Rights (2011), *Concluding Observations on Germany's Fifth Report on Implementation of the ICESCR* (13). UN Dok. E/C.12/DEU/CO/5. The discussion is now guided by the principle of due diligence also used in the context of corporate responsibility. See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (Ruggie Principles)* (2011), UN Dok. A/HRC/17/31.

If a partner country misuses donor payments, the crucial question is then the extent to which the donor payments can be regarded as support and what standards of due diligence can be required with respect to the donor's actions: in other words, to what extent should a donor state be able to predict the consequence of its actions and at what point in time? In defining these due diligence obligations in more concrete terms, it should be borne in mind that a donor's influence on a partner country's actions is not unlimited. It is also important to stress that due diligence obligations should not be so stringently applied that states are discouraged from engaging in international cooperation altogether.³⁴ In cases like those in Cambodia and Namibia described above, the question remains to what extent a donor can excuse its actions and claim to have been involved only in the "unproblematic" – i.e. human-rights conforming – part of a project. In other words, where are the systemic boundaries of development cooperation support that define donor responsibility?

The extra-territorial application of human rights means that the already familiar notions of the state as duty-bearer and the population as rights-holders is now extended further to cover the state and the population of the partner country. What this means for donors is that their accountability vis-à-vis their own population now also extends to the population of the partner country. To date, accountability arrangements between the donor and the population of a partner country have had the weakest footing. Those engaged in state-sponsored development cooperation usually work together with state agencies in the partner country and – at best – foster their accountability vis-à-vis their own population, but see themselves as accountable only to their own constituencies in the

donor country. Thus the mechanisms enabling a partner country's population to lodge complaints about a donor are correspondingly weak. The population usually does not know what the two governments have negotiated or what the government or a subordinate authority has agreed with the implementation agency; hence the population knows neither whom to lodge a complaint with or indeed whether they can lodge a complaint at all. Although there have been instances when implementing agencies have been sued in the partner country, such as in the Democratic Republic of Congo in 2010, such cases have generally concerned civil law issues such as breach of contract or procurement rather than the project's human rights impact.³⁵

In theory, complainants should be entitled to sue Germany before a German court. But how is a Cambodian agricultural labourer, for instance, supposed to gain access to such a legal mechanism? Moreover, how a German court would go about hearing evidence and adequately taking into account the special conditions of development cooperation has yet to be convincingly demonstrated.³⁶

3.2 Legal basis for a complaints mechanism

Donors like the World Bank have laid down certain standards of conduct that cover the nature and extent of activity in which they are likely to be engaged. With the exception of the environmental and social compatibility guidelines established by the KfW, such standards of conduct do not yet exist for German implementation agencies. The political and human rights concepts or the guidelines of the BMZ³⁷ are nowhere near as specific as the safeguards and performance standards of the World Bank and the IFC. It would

34 See also Aust and Nolte (2009), "Equivocal Helpers", see note 33.

35 See Frank Rätther (2010), "Minister Niebel hat ein Problem am Kongo". In *Sächsische Zeitung*, no. 17. September 2010. <http://www.sz-online.de/nachrichten/minister-niebel-hat-ein-problem-am-kongo-265544.html> [accessed 28.08.2013].

36 The same no doubt applies to lodging a complaint through the Petitions Committee of the German Bundestag. The right to petition is granted not only to Germans or to those resident in Germany but to anyone. It is therefore in principle also open to complainants from developing countries. However, access to the website where petitions can be submitted electronically is only accessible in German. See Deutscher Bundestag: Petitionen. Startseite, <https://epetitionen.bundestag.de/> [accessed 29.11.2013]. The Bundestag's English-language website on the Petitions Committee merely outlines the legal basis for petitioning and otherwise refers to the German website, but it does at least give a postal address. See German Bundestag: Petitions Committee, http://www.bundestag.de/htdocs_e/bundestag/committees/a02/index.jsp [accessed 29.11.2013].

37 BMZ (2013), *Neuer Leitfaden*. Hans-Jürgen Beerfeltz, "Menschenrechte bei Entwicklungsprojekten besser schützen", press release of the BMZ dated 14 Feb. 2013, http://www.bmz.de/de/presse/aktuelleMeldungen/archiv/2013/februar/20130214_pm_25_menschenrechte/index.html [accessed 10.02.2015]. The guidelines on the BMZ's website can be found neither via a web search nor via the search function on the website itself. They have, however, been widely distributed in both German and English to German CSOs. For the German version see BMZ (2013), *Leitfaden zur Berücksichtigung von menschenrechtlichen Standards und Prinzipien, einschl. Gender, bei der Erstellung von Programmorschlägen der deutschen staatlichen Technischen und Finanziellen Zusammenarbeit*, www.wikindigena.org/images/temp/4/43/20130513084414!phploGob0.pdf (PDF, 233 KB) [accessed 22.11.2013]. Update 2015: The guidelines are now accessible in German on the website of BMZ, http://www.bmz.de/de/zentrales_downloadarchiv/menschenrechte/Leitfaden_PV_2013_de.pdf (PDF, 346 KB), and also in English on the website of GIZ, http://www.giz.de/expertise/downloads/Guidelines_on_incorporating_human_rights_standards_and_principles.pdf (PDF, 274 KB) [accessed 18.1.2015].

therefore be helpful to introduce such standards of conduct before preparing country concepts or programme proposals, since these would provide guidance for development cooperation staff and would facilitate the prevention of human rights infringements. Therefore German development cooperation organisations should, at least with a view to the future, draft their own standards of conduct and these should be founded on human rights from the very start.³⁸

But even without such standards of conduct the BMZ as a donor must have the complaints it receives examined independently and assume responsibility for them. Until German development cooperation has established its own standards of due diligence, a complaints mechanism could be founded on the provisions of human rights treaties and the BMZ's existing "Guidelines on Incorporating Human Rights Standards and Principles, including Gender, in Programme Proposals for Bilateral German Technical and Financial Cooperation" as well as established international due diligence standards. The BMZ could then systematise these treaties and guidelines for its own use. Rules of procedure aimed at avoiding abuse would establish a framework to determine which complaints would be admissible. The experience gained in this process could then serve as a basis for German development cooperation to prepare its own standards of conduct. Whereas these would not be able to cover all possible circumstances, they would need to take into account the kinds of cases that are typically at risk of producing human rights infringements.³⁹

4 Challenges

The experiences resulting from the development banks' existing mechanisms highlight three main challenges: agreeing to an independent and public complaints mechanism with the partner country and securing the ensuing visiting and inspection rights; ensuring that affected parties have unendangered access to such a mechanism; and integrating the mechanism in the processes and procedures of the donor organisation.⁴⁰

4.1 Acceptance by the partner country

If partner countries reject the inspection powers included as part of a complaints mechanism, they need to be motivated to pay more attention to accountability. This implies that if accountability requirements increase, it may be more difficult for donors to negotiate development cooperation agreements with partner countries and, in extreme cases, may even result in the discontinuation of cooperation in a specific sector. Donors' negotiating position may be weakened if the donor coordination required by the Paris Declaration of the Organisation for Economic Cooperation and Development (OECD) fails to materialise and other donors are content with less stringent human rights standards. Some use this "China argument" to reject any discussion at all about human rights in foreign policy.⁴¹ German development cooperation policy

38 See Human Rights Watch (2013), *Abuse-Free Development. How the World Bank Should Safeguard Against Human Rights Violations*, http://www.hrw.org/sites/default/files/reports/worldbank0713_ForUpload.pdf (PDF, 628 KB, not barrier-free) [accessed 26.08.2013]; Amnesty International (2013), *Submission to the World Bank Safeguards Policies Review and Update April 2013*, <http://www.amnesty.org/en/library/info/IOR80/002/2013/en> [accessed 28.08.2013]; Galit A. Sarfaty (2012), *Values in Translation, Human Rights and the Culture of the World Bank*, 1st ed. (Stanford: Stanford University Press).

39 The World Bank's safeguards policies and the IFC's performance standards have been particularly criticised by CSOs because they do not reflect all human rights, or at least not in any systematic fashion. CSOs also objected to the drafting of standards of conduct for bilateral German development cooperation on the grounds that safeguards or performance standards can never cover all possible cases. While this is true, it should not constitute an obstacle to concrete standards of conduct, which apply to cases with a typically high risk for human rights. Other cases or aspects not covered by such standards can still be judged according to the provisions of human rights treaties.

40 Independent Evaluation Group (2010), *Safeguards and Sustainability Policies in a Changing World. An Independent Evaluation of World Bank Group Experience*. http://siteresources.worldbank.org/EXTSAFANDSUS/Resources/Safeguards_eval.pdf (PDF, 5,3 MB, not barrier-free) [accessed 27.08.2013].

41 See Eberhard Sandschneider (2013), "Raus aus der Moralecke! Die deutsche Außenpolitik sollte der Welt nicht ihre Werte diktieren". In *Zeit Online*, 10 March 2013, <http://www.zeit.de/2013/10/Aussenpolitik-Diskussion-Moral> [accessed 27.08.2013]; Volkmar Deile (2013), "Lasst die diplomatischen Floskeln! Menschenrechte einzufordern ist kein Wahn von Gutmenschen, sondern liegt im Interesse aller Politik". In *Zeit Online*, 30 April 2013. <http://www.zeit.de/2013/18/diplomatie-floskeln-menschenrechte> [accessed 24.10.2013].

should not seek to engage in such a "race to the bottom", nor indeed can it, given its own already existing human rights standards.⁴² Instead, it should have the courage to adhere to its own standards in a coordinated and consistent manner. Using human rights considerations as a concrete standard is a plus and should be communicated as such, for there is hardly a country in the world that would like to be perceived as a violator of human rights.

Development cooperation professionals often argue that an independent public complaints mechanism is perceived as an additional form of control, burdening the relationship of trust between them and their contacts in the institutions of partner countries due to the sensitivities of the latter. This is certainly one of several realistic scenarios, but it is just as plausible that partner countries will deliberately seek German support if they want to demonstrate their will to observe human rights.

As a rule a relationship of trust is based on reciprocity. A donor engaged in human rights-oriented development cooperation should therefore also define the human rights parameters within which it is prepared to work. This does not, however, exclude development cooperation in sectors or countries that pose a risk for human rights; those involved must simply plan a lot of time to bring about necessary change. In such cases, a comprehensive prior evaluation of the human rights consequences as well as close monitoring during implementation are essential.

If development cooperation professionals are to convincingly communicate the merits not only of a complaints mechanism but also of human rights standards as a basis for shaping policy, some thought needs to be given to the requirements they must meet. If they are to bring about change in the human rights situation via dialogue, development professionals need not only technical know-how, an ability to communicate and political skills, but also human rights competence.

An independent, transparent complaints mechanism accords with the central principle of a partner country assuming responsibility for its economic and political decisions. This principle, which is recognised by development policy-makers, is described as "ownership" in the key Paris Declaration of 2005. Since partner countries have regularly ratified important human rights treaties, they are themselves obliged to put them into practice.⁴³ If in such cases donors remind partner countries of their obligation to respect human rights, this is not tantamount to heteronomy. A complaints mechanism of the donor does not constitute interference in the internal affairs of the partner country, since it extends only to the sphere of the donor's responsibility.⁴⁴ The more concrete Accra Agenda for Action following the OECD's Paris Declaration also makes clear, that "ownership" requires not only government approval but also the involvement of parliament and civil society.

Partner countries can be persuaded to become more accountable, as is illustrated by German development cooperation projects such as the introduction of a functioning public redress system in the local authorities in Sri Lanka and the establishment of complaints channels for patients in Cambodia's state healthcare system or for water consumers vis-à-vis water providers in Kenya.⁴⁵

4.2 Access for affected parties

A complaint made by an inhabitant of rural Cambodia, say, first of all needs to actually reach a complaints mechanism in Germany. For this to happen, the person in question needs to have easy access to two pieces of information: Is German development cooperation involved in this case, and if so, how and where can I lodge a complaint? To date, both of these pieces of information have been difficult to obtain for people in partner countries. The first part of call for such information is usually the local German embas-

42 On the German government's own human rights standards see the coalition agreement between the CDU, CSU and FDP (2009), *Wachstum. Bildung. Zusammenhalt.* https://www.bmi.bund.de/SharedDocs/Downloads/DE/Ministerium/koalitionsvertrag.pdf?__blob=publicationFile (PDF, 722KB, not barrier-free) [accessed 10.02.2015], the human rights concept of the BMZ, BMZ (2011), *Human Rights in German Development Policy. BMZ Strategy Paper*, p. 12. http://www.bmz.de/en/publications/type_of_publication/strategies/Strategiepapier305_04_2011.pdf (PDF, 484KB) [accessed 28.08.2013] and the draft coalition agreement for the 18th legislative term: *Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD. 18. Legislaturperiode*, pp.179 f. <http://news.spd.de/go/97az7owb/etk6kzet/49> [accessed 29.11.2013].

43 See also no. 13 c) Organisation for Economic Cooperation and Development (2008), *The Paris Declaration on Aid Effectiveness and the Accra Agenda for Action*, <http://www.oecd.org/dac/effectiveness/34428351.pdf> (PDF, 317KB, not barrier-free) [accessed 10.02.2015].

44 It is becoming increasingly evident in the international law discourse that the sovereignty argument that states use to block outside intervention in human-rights issues is becoming ever more porous.

45 See GIZ (2012), *Human Rights in German Development Cooperation. Examples from the field. Regional Examples: Sri Lanka*, p.7; Cambodia, p.19; Kenya, p.23. <http://www.giz.de/expertise/downloads/Fachexpertise/giz2012-en-hr-in-german-development-cooperation.pdf> (PDF, 3,9MB, not barrier-free) [accessed 6.2.2015]

sy and its website, but often the website contains no information about development cooperation or about specific programmes. Complainants require information in the local language, and it must be possible to lodge a complaint via an intermediary CSO.

More information about German development cooperation programmes can be found on the websites of the BMZ, the GIZ and the KfW. Although this information can be found via a Google search, this assumes detailed knowledge of the German development cooperation landscape as well as a knowledge of German or English. In practice it is practically impossible for an outsider to ascertain where a complaint can ultimately be lodged.⁴⁶ This means that the possibility of lodging a complaint needs to be adequately publicised – including by the implementing agency. In addition to the embassy, a local GIZ or KfW office may therefore be a first point of contact.

Germany is a signatory to the International Aid Transparency Initiative (IATI). This is an international standard that sets parameters for making information about development cooperation projects available, but so far implementation has been very slow.⁴⁷ This is particularly surprising in view of the fact that development policy research has concluded that transparent donors spend their money in a much more targeted fashion that meets the needs of those for whom it is intended and in a way that is better adapted to their institution's abilities.⁴⁸ Even information that meets the IATI standard may, however, still not be sufficient for someone wishing to lodge a complaint, since how the information is presented still assumes a certain minimum of practice and prior knowledge in dealing with information and statistics pertaining to development policy.

Furthermore, the requirements for formulating a complaint must be such that they are readily understandable for complainants and provide the body responsible for making decisions about complaints with an overview of the most important points. For a complaint to be credible the Inspection Panel of the World Bank, for instance, does not require a complainant to specifically cite particular stipulations of the organisation's internal standards of conduct; rather it is sufficient to describe the alleged violation and the damage suffered.

A complainant must also be able to lodge a complaint without fear of repression. In certain cases, this may mean that complaints must be communicated via representatives in order to avoid revealing the complainant's identity to the authorities in their country. Therefore complainants should be able to task individuals or organisations such as local or international CSOs with presenting their case.

4.3 Integrating the complaints mechanism into the project cycle

The causes of human rights infringements may extend beyond individual cases to highlight systemic deficiencies in the donor's procedures or between the donor and the partner country. Ideally donors should be "learning organisations" which treat the outcome of a complaints mechanism as an occasion to take a critical look at their own procedures. The World Bank Inspection Panel regularly identifies such systemic aspects.⁴⁹ In the opinion of the Inspection Panel, it is the organisational culture of the World Bank, in particular the so-called "approval culture",⁵⁰ that can result in a situation where project risks are not properly evaluated: such an "approval culture" instead tends to

46 See also Chapter 5. The procedures of the implementation agencies could not be found via an Internet search. (2013)

47 See the blog by Claudia Schwegmann, "Open Aid. Transparenz, Rechenschaft und Partizipation in der Entwicklungszusammenarbeit: BMZ IATI Umsetzungsplan veröffentlicht!" [Internet] Deutschland. 14 January 2013 [cited on 26.08.2013]. <http://www.openaid.de/de/blog/2013/01/14/bmz-iatl-umsetzungsplan-veroefflicht> [Stand 24.10.2013]. On the use of blogs see note 8.

48 See Jörg Faust, Deutsches Institut für Entwicklungspolitik (2011), *Donor transparency and aid allocation*. Discussion Paper. [http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/%28yndk_contentByKey%29/ANES-8NUE5M/\\$FILE/DP%2012.2011.pdf](http://www.die-gdi.de/CMS-Homepage/openwebcms3.nsf/%28yndk_contentByKey%29/ANES-8NUE5M/$FILE/DP%2012.2011.pdf) (PDF, 397 KB, not barrier-free [accessed 24.10.2013]).

49 See The Inspection Panel (2009), *Accountability at the World Bank. The Inspection Panel at 15 Years*, <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/380793-1254158345788/InspectionPanel2009.pdf> (PDF, 10,1 MB, not barrier-free) [accessed 10.02.2015]. International judicial bodies can rule not only on individual cases but can also make recommendations for structural improvements. See ECHR, Rules of Procedure, Article 61, Pilot-judgement procedure. http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf (PDF, 341 KB) [accessed 10.02.2015].

50 The term "approval culture" was coined in the World Bank's *Wapenhans Report* in 1992. The internal report, which was later leaked, sharply attacked the procedures used by the World Bank, holding its bureaucratic culture responsible for bad decisions on the granting of loans. It claimed that World Bank staff did not use the possible positive or negative consequences of a project as a basis for deciding to grant loans but instead whatever the bank regarded as successful and hence likely to promote a person's career: namely, awarding loans as quickly as possible. The World Bank established its Inspection Panel in 1993. On this see Mac Darrow (2003), *Between Light and Shadow: The World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, 2003), pp. 197 f.

reward spending money quickly and completely without properly assessing the possible negative effects.⁵¹ An analogous situation in German development cooperation would be, for example, if water affordability were consigned to the background because recouping costs was accorded top priority in reforms of the water sector.⁵²

If the outcome of a complaints mechanism is taken into account in the procedures shaping development projects, then it may prove to have a preventive effect. A study has shown, however, that the results of complaints mechanisms are rarely fed back into programme conception and local implementation processes in a structured or systematic fashion.⁵³ Development banks' experience with such mechanisms shows that support for the mechanism by the director of the organisation in question can play a crucial role.

5 The Complaints Mechanism – Internal Problem-Solving and External Review

The suggestions made in this policy paper are based on the experience of international human rights treaty bodies and development banks in dealing with complaints. In setting up its Inspection Panel in 1993, the World Bank played a pioneering role in the establishment of a series of mechanisms in other banks such as the Inter-American Development Bank and the Asian Development Bank. The mechanisms put in place were in each case based on the previous experience of another bank and hence sought to refine and improve preceding mechanisms. In installing these mechanisms, the banks were both responding to strong pressure from CSOs and recognising themselves that they needed to ensure compliance with their internal standards.⁵⁴

The procedures of the human rights treaty bodies in particular can provide important pointers to how to organise rules of procedure. They do not, however, provide a suitable channel for accountability in develop-

ment cooperation, since many states do not recognise procedures such as the individual complaints procedure provided for by international human rights treaties. What is more, such procedures take too long for the architects of development cooperation programmes to respond adequately. Last but not least, human rights treaty bodies are international bodies and as such not specialised in questions pertaining to the development cooperation programmes of individual countries.

A mechanism of this kind may represent a starting point for involving development cooperation projects of other ministries as well as other spheres of foreign policy activity.

5.1 Background: evolution and classification of development bank complaints mechanisms

There are basically two kinds of procedures: the first, described here as a problem-solving procedure with mediation-like character (an example would be the Consultation Mechanism provided for by the Asian Development Bank, ADB); the second is a compliance review in which measures are examined for compliance with internal standards (for example, the Inspection Panel of the World Bank or the Compliance Review Process at the ADB).

The characteristics of each kind of mechanism allow us to draw some rough distinctions. The "first generation" of mechanisms – those introduced by the World Bank and the Inter-American Development Bank (IADB) as well as the predecessor of the current mechanism at the ADB – are designed solely to examine compliance with internal standards without prior use of the problem-solving mechanism. A "second generation" are the ombudsman functions of the International Finance Corporation and the Multilateral Investment Guarantee Agency, which combine problem-solving and compliance review in a single function. The "third generation", introduced by the African, Inter-American and Asian development banks as well as the European Bank for Reconstruction and De-

51 See The Inspection Panel (2009), p. 64. See note 49.

52 Munguti Katui Katua, Ashfaq Khalfan, Malcolm Langford, Monika Lücke (2007), *Kenyan-German Development Cooperation in the Water Sector. Assessment from a Human Rights Perspective* (Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit). http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/mission_report_kenyan-german_dc_in_water_sector.pdf (PDF, 394 KB, not barrier-free) [accessed 24.10.2013], pp. 35 ff.

53 Collaborative Learning Projects (2011), *Feedback Mechanisms in International Assistance Organizations*, <http://www.hapinternational.org/pool/files/cda-report-feedback-mechanisms-in-international-organisations.pdf> (PDF, 586 KB) [accessed 27.08.2013].

54 See Maartje Van Putten (2008), *Policing the Banks. Accountability Mechanisms for the Financial Sector* (Montreal: McGill-Queen's University Press), pp. 63 f.

velopment include both a problem-solving procedure and a compliance review, but these are procedurally and institutionally separate. This development reflects the experience that problem-solving mechanisms are regularly only used seriously by parties if it is clear to both sides – in particular to the stronger of the two – that an independent compliance review will follow if they fail to agree. Consequently the two mechanisms – problem-solving and compliance – should be institutionally, procedurally, financially and politically separate and also independent of the respective operative departments.

The banks' mechanisms only check whether they have followed their own standards of conduct and are hence not a substitute for the jurisdiction of the partner countries nor do they interfere with these.

The United Nations Development Programme, UNDP, recently established a two-stage complaints mechanism required by its participation in programmes such as the climate protection instrument REDD+ (Reducing Emissions from Deforestation and Degradation).⁵⁵ Alongside the multilateral development banks, bilateral donors have also established procedures for dealing with complaints, in particular for the field of foreign trade promotion, but also for technical and financial development cooperation.⁵⁶

None of the mechanisms presented here was originally designed to focus solely on human rights, but this is gradually changing, as demonstrated, for example, by the revised Performance Standards of the World Bank's International Finance Corporation, and it is increasingly being discussed as the World Bank reviews its Safeguard Policies.

5.2 A confidential internal procedure and an independent public procedure

The standard today is a two-part mechanism – consisting first of a problem-solving procedure that takes place at the project location and second, of a central, independent compliance review.⁵⁷ While the first has a mediative character and is generally confidential, the second is an independent process whose stages are documented in a transparent manner. The first gives organisations an opportunity in dialogue with the participants to find a solution quickly and in good faith. The independent public compliance review becomes relevant if the participants have been unable to reach an agreement or if no remedy can be found, because the infringement is already irreversible.

German implementation agencies say they have internal procedures for dealing with complaints: the KfW, for example, has a standard complaints procedure that it follows with respect to complaints received, including those concerning human rights issues. Complaints are usually dealt with within the KfW by the Department responsible for the project in question in consultation with the General Policy Department and where necessary with the Compliance Department and/or Internal Review. The GIZ set up a complaints procedure in the summer of 2012 with its own special email address.⁵⁸ The person responsible for dealing with complaints is the Integrity Advisor of the GIZ, who – where necessary – ensures that complaints are handled confidentially and coordinates the handling of the complaint via an established procedure that involves the complaints as well as the regional and general policy departments. Confidentiality is ensured not only at the beginning of the procedure

55 UNDP has also consulted its compliance mechanism publicly. See International Institute for Sustainable Development (2012), *UNDP launches Consultation on Compliance and Grievance Review Process*, <http://uncsd.iisd.org/news/undp-launches-consultation-on-compliance-and-grievance-review-process/> [accessed 28.08.2013]. See also the website of UNDP's mechanism: Social and Environmental Compliance Review and Stakeholder Response Mechanism, <http://www.undp.org/content/undp/en/home/operations/accountability/secu-srm/> [accessed 6.2.2015]

56 The Japan International Cooperation Agency has a so-called "objection procedure" for technical and financial cooperation. See JICA, *Environmental and Social Considerations*, http://www.jica.go.jp/english/our_work/social_environmental/guideline/ [accessed 10.02.2015]; for a broad overview of the procedures used by both multilateral and bilateral donors see Natalie Bridgeman Fields / Accountability Counsel (2012), *Accountability Resource Guide. Tools for Redressing Human Rights & Environmental Violations by International Financial Institutions, Export Promotion Agencies, & Private Corporate Actors*, <http://www.accountabilitycounsel.org/resources/arg/> [accessed 22.11.2013]. Shortly before going to press German and international CSOs stated that the Deutsche Entwicklungsgesellschaft (DEG) and its Dutch counterpart the FMO Development Bank were planning to establish a complaints mechanism. Update 2015: The mechanism is now operational, see <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/> [accessed 18.1.2015]

57 See the previous section.

58 humanrights@giz.de

but – if necessary or desired – throughout.⁵⁹ Besides the confidential treatment of individual complaints, no information is available to the public either about the existence of the complaints procedure or about the kind or number of complaints received. Neither the procedures of the KfW nor those of the GIZ can be found via a regular Internet search.⁶⁰

Internal confidential procedures, ideally carried out in the place where a development project is actually taking place, should indeed be expanded into problem-solving procedures. The advantage of establishing such procedures locally is that they are more accessible to affected parties and in some cases may also permit the situation to be remedied quickly. Nevertheless, they can still be confidential if desired, but they should not be abused in order to dispose of evidence or to delay programme adjustments.

The existing procedures of the GIZ and KfW should therefore be refined to form the first step in the two-step mechanism described above. In doing so they should be guided by international standards of good practice in this field and by the human rights obligations of Germany and its partner countries. A second procedural step should, however, be established independently of the implementing agencies. A report of the World Bank on the problem-solving mechanisms established in the context of development projects shows that these are often not carried out satisfactorily – if indeed at all.⁶¹ If, however, a central independent mechanism were to exist alongside existing mechanisms, this would secure a complaints channel for affected parties. Publicly documented procedures are generally more suitable as learning experiences and can hence have a preventive effect in the future. Last but not least, the staff of implementation agencies like the GIZ or the KfW not only bear responsibility for supporting and advising development projects in partner countries but often also monitor the effectiveness of this support as well as draft applications to the BMZ for the extension of existing programmes or the launching of new ones. This could lead to conflicts of interest, whereby complaints are dealt with in a way that serves the interests of the institution in order not to endanger the continuation of programmes.

For this reason, a central, independent public compliance review should be created alongside the internal problem-solving procedure. The proposal outlined by the German Institute for Human Rights in this publication addresses this central, independent compliance review.

5.3 Proposal for a central, independent public compliance review

5.3.1 How to structure the review

The review should follow principles derived from existing international human rights treaties.

A fair and objective review will seek to give both the complainant and representatives of German development cooperation an equal voice and an equal hearing. The review must be transparent. German CSOs and, where possible, CSOs in the partner countries should be involved in its conception. Clear rules should be established for determining the admissibility of and the grounds for the complaint. These should be published at the same time as the status of a specific complaint. In order to facilitate access to the review even in rural areas, information should be available in all the languages of the country in question as well as the local languages where relevant.

The review should be adapted to the needs of the complainant, who should be able to lodge complaints without fear of repressions. Complaints should be able to be lodged not only by the affected parties themselves but also by national and international CSOs acting on their behalf. Proof that such organisations have been asked to act on behalf of a party can be furnished in a number of different ways.

As well as potentially affected parties, project agencies in partner countries should be adequately informed about problem-solving procedures and compliance reviews and be obliged to further disseminate these. The structure of the review must be easily understandable and encourage trust in the process. Personnel involved in the compliance review should act

59 The information on the GIZ and KfW mechanisms was provided by the GIZ/Stabsstelle Unternehmensentwicklung und KfW/Kompetenzzentrum Entwicklung und Wissenschaftskooperation in an email exchange in November 2013.

60 A Google search for the keywords "complaint" and "GIZ" turned up GIZ publications on complaints mechanisms in partner countries but no reference to the organisation's internal mechanism. The same applies to an Internet search for "KfW" and "complaint". The website of the GIZ's integrity advisor lacks any indication of how complaints about human rights infringements may be lodged, see GIZ, *Integritätsberater*, http://www.giz.de/de/ueber_die_giz/1790.html [Internet, no date] [accessed on 6.2.2015].

61 World Bank (2013), *Global Review of Grievance Redress Mechanisms in World Bank Projects*, <http://siteresources.worldbank.org/PROJETS/Resources/40940-1366729852427/GlobalReviewofGRMs.pdf> (PDF, 1,5 MB, not barrier-free) [accessed 10.02.2015], p. 14

without undue outside influence and make their independent status externally visible. The review should follow in a timely fashion and address the actual concerns of the complainants.

The review should also take account of the conditions of bilateral German development cooperation with respect to structure, legal basis and framework for action, and relevant policies. It should also refer to complementary mechanisms such as the internal complaints management structures of the implementing organisations and the project reviews and evaluations.

5.3.2 Where to set it up

There are various options for the location of the compliance review: either – as in the case of the banks – it could be located within the BMZ itself or in one of the German development cooperation institutions such as the German Development Institute or the German Institute for Development Evaluation or else externally in an independent institution such as the German Institute for Human Rights (GIHR). Whichever location is chosen, independence must be guaranteed, as must the reporting back of recommendations to the BMZ and to the implementing agencies. The experiences of other donors have shown that the political will of the director of an institution is what decides whether or not recommendations are translated into practice.⁶² Other factors determining the success of such a review are whether the institution is able to portray itself and be perceived as independent. The German national contact point of the Organisation for Development and Cooperation in Europe (OECD), for example, located in the Federal Ministry for Economic Affairs and Energy, is regarded as too strongly dominated by the ministry.⁶³

The response of the Board of Trustees of the GIHR in June 2013 to an enquiry by the human rights department of the BMZ about locating a compliance review at GIHR met with a positive response in principle, although a number of provisos were stipulated.

5.3.3 How to organise the panel of experts and secretariat

The compliance review would consist of a secretariat and a panel of independent experts.

The central point of contact would be a secretariat staffed by two to three employees, including staff with expertise in human rights. With the participation of all state and civil society stakeholders it would draft procedures for selecting the members of the panel, including selection criteria, length of mandate and the possibility of re-election. The three members of the panel would then be elected according to the selection procedure and with the participation of the stakeholders. The panel would meet after the establishment of the secretariat. The members of the panel – up to three – could initially be employed flexibly depending on the number of cases to be dealt with. The banks' experience highlights the advantages of a "standing panel" employed on a regular basis for a limited period of time. This would facilitate finding experts to staff the panel, since members of the panel should not be engaged in German bilateral development cooperation projects while they are on the panel and for a set period thereafter. A compromise solution might be to appoint the head of the panel as a regular employee for a limited period of time. Another argument for a regular, but temporally limited, employment of panel members is that they otherwise might try to encourage affected parties to lodge complaints in order to increase their own volume of work. Ideally the panel should be staffed with people with a range of academic backgrounds and practical experience. The panel should have the power to call in people with more specific expertise on a case-by-case basis.

The secretariat would be responsible for providing comprehensive organisational and substantial support to the panel. Besides operating the mechanism described above, its tasks would include the ongoing development of legal evaluation principles; the processing of complaints received from a legal and practical point of view to provide the members of the panel with the information needed to make decisions;

⁶² See note 22.

⁶³ See European Center for Constitutional and Human Rights (2011), *A Comparison of National Contact Points – Best Practices in OECD Complaints Procedures*, http://www.ecchr.de/ecchr-publikationen/articles/a-comparison-of-national-contact-points-best-practices-in-oecd-complaints-procedures-1327.html?file=tl_files/Dokumente/Publikationen/OECD%2C%20A%20comparison%20of%20NCPs%2C%20Policy%20Paper%2C%202011-11.pdf (PDF, 353 KB) [accessed 24.10.2013]; OECD Watch describes the Dutch National contact point as exemplary; though independent it receives advice from government officials. See OECD Watch (2007), *Model National Contact Point*, http://oecdwatch.org/publications-en/Publication_2223/at_download/fullfile [accessed 4.11.2013], pp. 8 f. On the question of separating the evaluation from the complaints mechanism see Chapter 2.3.5.

designing and maintaining the website; compiling information on the compliance review for various target groups (development cooperation professionals and affected parties); organising visits for panel members to the countries concerned for the purpose of compliance review; and where necessary the selection and recruitment of further expertise.

5.3.4 What the panel may do – competences

The main competence of the panel would be to issue recommendations about the admissibility of a complaint and the implementation of interim measures in order to prevent permanent damage being done. This would include measures to protect the complainants from intimidation and persecution. In addition the panel would examine how well founded a complaint is based on a review of the facts of the case using the existing specifications of the BMZ and other standards, particularly those of the human rights treaties that are binding for Germany. The panel and the secretariat would for this purpose require access to information from the BMZ and the implementing agencies relevant for making a decision, which they would treat confidentially. The current status of proceedings should be publically posted, and the outcome report should be published.

The panel's recommendations would be presented to top-level officials of the BMZ, which would then take a decision concerning their implementation. Both the recommendations and the decision on implementation would be published in the languages relevant for the complainants.

In addition, the panel would be able to track the implementation of the decisions and report publically on this, reinstitute the procedure at the request of the complainants and make systemic or general suggestions for how human rights might be better taken into account in German development cooperation. The panel and the secretariat would have access to rele-

vant documents, including those of the implementing agencies.

6 Recommendations

The German Institute for Human Rights therefore makes the following recommendations

To the German Federal Ministry for Economic Cooperation and Development:

- 1 To establish by the middle of the eighteenth legislative period a human rights complaints mechanism with a central, independent compliance review that meets the requirements for accessibility, independence, objectivity and transparency.

Since Germany adopted its first plan of action on human rights in development policy in 2004, it has continually expanded its explicit human-rights orientation in development cooperation, for which it has received international recognition.⁶⁴ This human rights-based approach has been successively implemented in some of Germany's partner countries since 2005 and human rights has been an important standard of the BMZ and the implementing agencies since 2012. A human-rights complaints mechanism with a central and independent compliance review thus represents a development consistent with this course. It completes an accountability framework of development cooperation embracing effectiveness, transparency and evaluation.

This mechanism is independent both in its operation and in the way it arrives at decisions. Its results should flow into the conception of both new and existing programmes as well as into the development of instruments and into internal procedures. The evaluation criteria and rules of procedure should be produced in collaboration with CSOs, the BMZ and the implementation agencies in a process visible to the public, and its procedures should be organised in such a way as to allow complainants as full access

64 On the German government's own human-rights standards see note 42. In a study of the OECD and the World Bank on safeguarding human rights in development cooperation, German development cooperation is cited as a positive example in its approach to the human rights issue. See OECD/World Bank (2013), *Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges*, p. 167, <https://openknowledge.worldbank.org/bitstream/handle/10986/12800/9780821396216.pdf> (PDF, 2,6 MB, not barrier-free) [accessed 22.11.2013]; in a publication of the United Nations High Commission for Human Rights and the Center for Economic and Social Rights the editors describe the embedding of the MRA in German development cooperation in positive terms: "In many respects Germany has taken the lead in embedding human rights standards into its external development policies", see OHCHR/CESR (2013): *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda*, www.ohchr.org/Documents/Publications/WhoWillBeAccountable.pdf (PDF, 1,8MB, not barrier-free) [accessed 22.11.2013], pp. 48–49

as possible. In the future, the ministry together with the implementation agencies should produce its own human rights-based due diligence standards in dialogue with CSOs.

Human rights require development cooperation to have a complaints mechanism. Various complaints about development projects in partner countries with German involvement have found their way into the German public sphere or come to the attention of international human rights treaty bodies. It can be assumed that the actual need for such a mechanism is much greater in practice. The goal of a human rights complaints mechanism with a central, independent compliance review is above all to institutionalise a feedback mechanism for the populations of partner countries with whose governments and state institutions German development cooperation agrees on and implements development measures. If complaints from the population about infringements of human rights are lodged – complaints which in some cases could not have been predicted at the time the agreement with the partner country was concluded – Germany will be able to make timely adjustments in its development cooperation projects in order to better adapt them to conditions in the partner country.

The legal basis for a complaints mechanism in development cooperation is provided by international human rights treaties, in particular the obligation to establish effective complaints mechanisms stipulated by Article 2 (2, 3) of the International Covenant on Civil and Political Rights and the extra-territorial responsibility of states outlined inter alia in Article 2 (1) of the International Covenant on Economic, Social and Cultural Rights, Article 4 of the Convention on the Rights of the Child and Article 32 of the Convention on the Rights of Persons with Disabilities

The establishment of a complaints mechanism shows not least that Germany wishes to be judged by standards that include human rights and good governance, the same standards that it demands from the countries with which it engages in development cooperation. By establishing a complaints mechanism with a central, independent compliance review, Germany would be assuming a pioneering role in human rights in the face of an international trend towards a demand for more accountability from donors. The annual reports submitted by the BMZ to the Bundestag on

the number and type of complaints received, which are then publically debated in the Committee for Economic Cooperation together with the Committee for Human Rights and Humanitarian Aid, would testify to this transparency and pioneering role.

To the implementing agencies, the GIZ and KfW development bank:

2 To make use of the opportunities offered by an independent complaints mechanism, to constructively support its establishment and to expand their own internal confidential procedures as a prelude to this in line with international good practice.

A human rights complaints mechanism supports good-quality development cooperation: in participating in development projects in partner countries, German development cooperation organisations are subject to a multitude of influences – many of which are outside the control of the BMZ or the implementation agencies. Complaints can show where risks have become manifest and thus contribute to timely adjustments.

The current standard procedure consists of two stages: the first is carried out by those involved in the project in the field and focused on problem-solving; the second stage is a central independent compliance review. Whereas the first tends to have a mediative character and is confidential in nature, the second is an independent procedure whose steps are transparently documented. The first gives organisations the opportunity in dialogue with the participants to try to find a solution quickly and in good faith. The independent public procedure becomes relevant when the participants have failed to reach agreement or are unable to remedy the situation in any other way, because the human rights infringement is already irreversible.

The existing procedures used by the GIZ and KfW should therefore be further developed as the first step in the two-stage procedure described above and guided by international good practice and the human rights obligations of Germany and its partner countries.

However, an additional stage should be established independently of the implementation agencies. In cases where institutions in partner countries adopt a

wait-and-see attitude to such a mechanism, development cooperation professionals would then be able to cite the fact that the complaints mechanism is an independent process and as such not part of their own organisation.

To the Committee on Economic Cooperation and Development and the Committee on Human Rights and Humanitarian Aid in the German Bundestag:

- 3 To request an annual report from the Federal Ministry for Economic Cooperation and Development on complaints about development projects with German participation and to discuss this report in a public joint committee session.

The German Bundestag has an important control function in development policy – when it decides on the allocation of budgetary aid, for example. It must take

on this role with respect to concrete development projects and systematically address possible complaints.

Accountability vis-à-vis the "taxpayer" and accountability to the population in the partner country can and should therefore be connected by means of parliamentary control. Since development cooperation must be able to react quickly and flexibly to political and social changes, prior detailed parliamentary control of each separate programme is unsuitable, something for which ex post accountability of development cooperation must compensate.

Moreover, a public debate about human rights complaints can make the opportunities and limitations of development cooperation more transparent and, in the long term, facilitate communication with civil society both at home and abroad.

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