

# Dams in Nepal Ensuring Compliance

Dialogue on  
**DAMS & DEVELOPMENT:  
NEPAL**

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#### DISCLAIMER

This Dams and Development Strategic  
Priorities Series summaries the find-  
ings and serves as a platform for con-  
tinuing the dialogue on the issues of  
water resources development and dams  
in Nepal. This report can assist in the  
evolution of the policy process, but it is  
not the policy document of any of the  
organizations involved in the specific  
priorities series consultative processes.



# Foreword

It is five years since the first publishing of the report of the World Commission on Dams (WCD) on 2000. Globally, reactions to the report ranged from strong support to serious concerns. Supporters pointed to the opportunities the WCD process provided for finding ways beyond the polarized debates of the past. Others perceived the guidelines as unrealistic, and impractical claiming that they could unnecessarily delay the implementation of projects. The Government of Nepal also expressed reservations about the WCD framework and had taken a critical view of its report. In order to move beyond the polarized debate, IUCN Nepal facilitated a consultative process in January 2003 where representatives of government, private hydropower developers, non-governmental research organizations and people affected by dams participated in the process, which compared Nepal's legal provisions with WCD guidelines. The report of the scoping study suggested that Nepal's legal provisions cover many recommendations made by the WCD. Furthermore, new policies on water and energy development and management have been introduced in a pluralized policy terrain.

The consultative process recommended that the dialogue be continued in a second phase focusing on the strategic priorities. Of the seven strategic priorities, four were prioritized for further consultation and analysis. They were gaining public acceptance, conducting a comprehensive options assessment, recognising entitlements and sharing

benefits, and ensuring compliance. The responsibility for dialogue and analysis were as follows: gaining public acceptance, IUCN Nepal and DBS consultancy with representation from the Department of Electricity Development (DoED), conducting a comprehensive options assessment, Winrock International with representation from Nepal Electricity Authority (NEA), recognising entitlements and benefits sharing by Nepal Water Conservation Foundation (NWCF) and ensuring compliance by Water and Energy Users Federation Nepal (WAFED). IUCN Nepal facilitated the second phase consultative process.

This report summarises the findings of a study on ensuring compliance conducted by WAFED-Nepal. The study reviewed the existing domestic and international policy and legal provisions, institutional mechanisms and available remedies applicable related to hydropower development in Nepal, including those of the World Bank, Asian Development Bank and Japan Bank for International Cooperation. Relevant international human rights instruments ratified by Nepal and access to remedies in case of non-compliance and violations were also analyzed. In addition, some past and present experiences based on the ground reality were also cross-checked. Finally, it has come up with conclusion and recommendations for future course of action related to the construction of large dams in Nepal.

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Sagendra Tiwari  
Acting Country Representative  
IUCN Nepal



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We are highly indebted to Ajaya Dixit, Director of Nepal Water Conservation Foundation (NWCF), for his guidance, review and comments during the whole process of this study. It helped us significantly to define the scope of this study and maintain quality. We are also thankful to Bikash Pandey of Winrock International-Nepal, Dilli B. Singh of the Department of Electricity Development (DoED), and Mohan Ratna Shakya of Nepal Electricity Authority (NEA) for their valuable inputs and suggestions.

Finally, we are thankful to all the members of the Steering Committee for their continued support in making this report a success.

# Acronyms

|        |   |
|--------|---|
| ACRP   | Acquisition, Compensation and Rehabilitation Plan                                 |
| ADB    | Asian Development Bank  |
| CEDAW  | Convention on the Elimination of all Forms of Discrimination against Women        |
| CERD   | International Convention on the Elimination of All Forms of Racial Discrimination |
| CHR    | Commission on Human Rights  |
| CRC    | Convention on the Rights of the Child   |
| DDC    | District Development Committee  |
| DDP    | Dams and Development Project, UNEP  |
| DoED   | Department of Electricity Development   |
| DWIDM  | Department of Water Induced Disaster Management                                   |
| DoI    | Department of Irrigation  |
| EIA    | Environment Impact Assessment   |
| ICCPR  | International Covenant on Civil and Political Rights                              |
| ICESCR | International Covenant on Economic Social and Cultural Rights                     |
| IUCN   | The World Conservation Union  |
| EIA    | Environment Impact Assessment   |
| EPA    | Environment Protection Act  |
| EPR    | Environment Protection Rules  |
| IEE    | Initial Environment Examination   |
| IFIs   | International Financial Institutions  |
| JBIC   | Japan Bank for International Cooperation  |
| KGA    | Kali Gandaki 'A' Hydroelectric Project  |
| LTSF   | Long Term Strategic Framework   |
| NEA    | Nepal Electricity Authority   |
| NGO    | Non Governmental Organisation   |
| NKP    | Nepal Kanoon Patrika  |
| OHCHR  | Office of the High Commissioner for Human Rights                                  |
| PAFs   | Project Affected Families   |
| PIC    | Public Information Centre   |
| PIF    | Public Involvement Facilitation   |
| PIP    | Public Information Package  |
| SPAfs  | Seriously Project Affected Families   |
| UDHR   | Universal Declaration of Human Rights   |
| UNEP   | United Nations Environment Programme  |
| VDC    | Village Development Committee   |
| WAFED  | Water and Energy Users' Federation-Nepal  |
| WB     | World Bank  |
| WCD    | World Commission on Dams  |
| WECS   | Water and Energy Commission Secretariat   |



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1

# Background

A series of overlapping circles formed by grey dots, set against a solid white background. The circles are arranged in a slightly overlapping pattern from left to right, mirroring the design in the top section.

## 1.1 Introduction

This report is based on a literature review, analysis of various national and international legal instruments, guidelines, stakeholder consultations and a national workshop held on August 1-3, 2005 in Kathmandu and Lalitpur. It assesses the existing laws, policies and practices in Nepal relating to ensuring compliance with reference to the World Commission on Dams (WCD) criteria and guidelines, and further makes recommendations for reforms in policy, law and their effective implementation.

The immediate background to this study is the report, *Dams and Development: A New Framework for Decision-Making*, of the World Commission on Dams released in November 2000. There is a growing consensus that the WCD report has provided a framework to move discussion forward, even though deliberations on the precise nature and the details of the implementing mechanisms are on-going. The report has affirmed the need of locally appropriate implementation mechanisms in dam-building. The WCD has recognised that the report would be a starting point for discussion at the local level, which should ultimately lead to agreements on how existing procedures need to be adopted. However, this report has been able to settle several controversial issues surrounding water and energy development. Despite the general agreement on the rights and risks approach, the five core values and the seven strategic priorities continue to evoke differences.<sup>1</sup>

Consequently, in November 2001, the United Nations Environment Programme (UNEP) established a Dams and Development Project (DDP) in response to a request of the final WCD Forum. The UNEP concluded that optimising the impact of the WCD report required a range of actions to be undertaken beyond the initiatives of individual stakeholders. There was consensus that the international nature of the process so far needed to be disseminated at country and institutional levels, taking the debate further through local multi-stakeholder processes where dams are built.

As on-going part of this process, a multi-stakeholder dialogue on dams and development was initiated in Nepal

in January 2003 involving various government institutions, national and international non-governmental organisations (NGOs), academics, private power developers, consumers' associations and local stakeholders. The overall objective of this process was:<sup>2</sup>

“to carry out national consultations on dams and development, to consider the relevance of the recommendations of the WCD and other bodies in the Nepalese context with the ultimate aim of recommending the development and adoption of a national guideline for improved decision making, planning and management of dams and alternatives for Nepal.”

A multi-stakeholder National Steering Committee and a task force were formed, which organised a series of national consultation workshops. The first phase of the dialogue was completed in 2004. The outcome was the publication of two scoping reports with comparative analysis in Nepali and English of relevant policies, laws and guidelines vis-à-vis the WCD recommendations.<sup>3</sup> The second phase of the dialogue focused on detailed analysis of and discussions on the four strategic priorities identified by the WCD report: a) gaining public acceptance; b) comprehensive options assessment; c) recognising entitlements and sharing benefits; and ensuring compliance.

Water and Energy Users' Federation-Nepal (WAFED) took a lead for the analysis and discussion on 'Ensuring Compliance'. A two-day consultation was organised on 1-2 August 2005 with local stakeholders who represented different project sites in Nepal. The agenda of the meeting included access to information, public participation, Environment Impact Assessment (EIA) and mitigation plans, compensation and resettlement as well as benefit-sharing. A one-day national workshop was also organised on 3 August 2005. Representatives of government agencies, private power developers, NGOs and affected people attended the meeting. Although invited to participate in the consultation, Nepal's major lending agencies, mainly the World Bank (WB) and the Asian Development Bank (ADB) were conspicuous by their absence.

<sup>1</sup> The WCD provides a new framework for decision –making on water and energy infrastructure projects based on recognising the rights of, and assessing the risks to, all stakeholders. Those who would be adversely affected should participate in the planning and decision –making process and have a share in project benefits.

The main WCD findings are:

• No dam should be built without 'demonstrable acceptance' of affected people, and without free, prior and informed consent of affected indigenous and tribal peoples.

• Comprehensive and participatory assessments of people's water and energy needs, and different options for meeting these needs, should be developed before proceeding with any project.

• Priority should be given to maximising the efficiency of existing water and energy systems before building new projects.

• Mechanisms should be developed to provide reparations, or retroactive compensation, for those who are suffering from existing dams, and to restore damaged ecosystems.

<sup>2</sup> Information Sheet No. 4.4, UNEP-Dams and Development Project, Nairobi [http://hq.unep.org/dams/files/information\\_sheet\\_4.4.pdf](http://hq.unep.org/dams/files/information_sheet_4.4.pdf).

<sup>3</sup> Dixit, A., et al. (eds), 2004, *Constructive Dialogue on Dams and Development in Nepal*, Nepal Water Conservation Foundation and IUCN - The World Conservation Union, Kathmandu.



2

World  
Commission on

Dams



The WCD was established in 1997 by an international conference organised by the World Bank and IUCN in Gland, Switzerland, in response to the growing opposition to large dams. This meeting brought together 39 participants from governments, private sectors, International Financial Institutions (IFIs), civil society organisations and affected people. The group that had overseen the establishment of this body was enlarged to serve as a consultative body calling itself as the WCD Forum. The 68-member Forum met three times between 1998 and 2000 to provide inputs into the WCD work. In all, 20 affected people's groups and NGOs were represented in the Forum. The consensus proposal that came out of the meeting was for all parties to work together in establishing the WCD with a specific mandate. Its mandate was to review the development effectiveness of large dams and assess alternatives for water resources and energy development and to develop internationally acceptable criteria, guidelines and standards for planning, design, appraisal, construction, operation, monitoring and decommissioning of dams.

The WCD began its activities in May 1998 after setting up its Secretariat in Cape Town, South Africa. Initially, many have felt that the contested nature of issues involved would pull the WCD apart. However, the 12 Commissioners from diverse backgrounds held together despite strains and differences. The WCD as an independent, international, multi-stakeholder process which addressed several controversial issues associated with large dams provided an opportunity to bring into focus many assumptions and paradigms that are at the centre of the search to reconcile economic growth, social equity, environmental conservation and political participation in the changing global context. The WCD conducted dialogue and assessment with government agencies, dam-building companies, private sector, international organisations, NGOs and local stakeholders. It was a significant realisation on the part of the World Bank that no conflict could be resolved without the involvement of groups and persons affected by large dams<sup>1</sup>. Extensive politicking had resulted in the World Bank agreeing to the inclusion of representatives of dam-affected peoples' movements as Commissioners. The result was an innovative structure in examining both existing and planned dams.

## 2.1 General WCD Framework

The WCD report is the outcome of an integrated assessment of diverse process consisting of a review of performance of dams and an attempt to reassess the development paradigm within which dams are envisaged. The report is a milestone in the evolution of dams as a development option. The debate about dams is one about the very meaning, purpose and pathways for achieving development. This report provides the rationale for a fundamental shift in option assessment and in planning and project cycles for water

and energy resources development based on five core values: equity, sustainability, efficiency, participatory decision-making and accountability.<sup>2</sup>



### Box 1: Seven Strategic Priorities

- >> gaining public acceptance
- >> comprehensive options assessment
- >> addressing existing dams
- >> sustaining rivers and livelihoods
- >> recognising entitlements and sharing benefits
- >> ensuring compliance
- >> sharing rivers for peace, development and security

The seven strategic priorities and related policy principles inform the rationale and recommendations of the WCD report<sup>3</sup>. The strategic priorities are presented in Box 1. The WCD has developed 26 criteria and guidelines built upon these strategic priorities to provide a framework that emphasise a structural process incorporating the full range of social, environmental, technical, economic and financial criteria and standards. Guidelines are listed in Box 2.<sup>4</sup>



### Box 2: WCD Criteria and Guidelines

- >> Stakeholder Analysis
- >> Negotiated Decision-making Processes
- >> Free, Prior and Informed Consent
- >> Strategic Impact Assessment for Environmental, Social, Health and Cultural Heritage Issues
- >> Project-level Impact Assessment for Environmental, Social, Health and Cultural Heritage Issues
- >> Multi-criteria Analysis
- >> Life Cycle Assessment
- >> Greenhouse Gas Emissions
- >> Distributional Analysis of Projects
- >> Valuation of Social and Environmental Impacts
- >> Improving Economic Risk Assessment
- >> Ensuring Operating Rules Reflect Social and Environmental Concerns
- >> Improving Reservoir Operations
- >> Baseline Ecosystem Surveys
- >> Environmental Flow Assessment
- >> Maintaining Productive Fisheries
- >> Baseline Social Conditions
- >> Impoverishment Risk Analysis
- >> Implementation of Mitigation, Resettlement and Development Action Plan
- >> Project Benefit-Sharing Mechanisms
- >> Compliance Plans
- >> Independent Review Panels for Social and Environmental Matters
- >> Performance Bonds
- >> Trust Funds
- >> Integrity Pact
- >> Procedures for Shared Rivers

These criteria and guidelines are considered necessary to materialise the strategic priorities for the achievement of equitable and sustainable development. The key messages behind the strategic priorities are elaborated below.

### Gaining Public Acceptance

In general, development is always meant to be for the people in harmony with nature. If this is to be true then any development activity must be publicly acceptable. To assure public acceptance, there must be a free, prior, informed participation and consent of all stakeholders, including indigenous and tribal people, women and other vulnerable groups affected by a project which is not different from other development activities.

Dams are generally built in relatively inaccessible terrain, which are largely inhabited by tribal and indigenous people. Usually, these groups are already marginalised in the course of history and modern ways of life. Their livelihoods depend primarily on the locally-available natural resources. Dams building entails risks to these local resources and poses a threat to livelihood of such people who may be directly and indirectly affected. Even their survival can be at risk if risks not properly addressed by the proponents of dams. At the very least, a confrontation may result between those likely to be affected and proponents while at the very most there may be miscarriage of justice. At all levels, rights must be recognised and respected, including the right to entitlement of all groups and affected persons, particularly indigenous and tribal people, women and other vulnerable community to secured livelihoods and life. When rights are recognised and entitlements are safeguarded, the consensus can be built among these groups resulting in possible public acceptance.<sup>5</sup>

### Comprehensive Options Assessment

One of the key questions is access to safe water, energy and related services. All available alternatives along with assessment of need for water, food and energy must be made before arriving at a decision for adopting any particular dam project. In these assessments, all social and environmental along with economic and financial aspects need to be given equal importance. The selection of the best option is to be made after comprehensive and participatory assessment of all possible options that are better.<sup>6</sup>

### Addressing Existing Dams

Many existing dams do not provide the expected benefits. Various reformatory measures are available which would be beneficial for optimising their performance, addressing

social issues, environmental mitigation and restoration. These measures include modification in water use priorities, physical and land-use changes in river basins, technological developments, and change in public policy on environment, safety and economics. Management and operation practices to address outstanding social costs of existing dams in changing circumstances are essential.<sup>7</sup>

### Sustaining Rivers and Livelihoods

Rivers sustain their own life and provide the basis for the survival and sustenance of other living beings around it. Protection of ecosystem at the river basin level is necessary for the welfare of river and its environment. Harm caused to the health and integrity of a river system has a negative impact on livelihood. Proper site selection and project designing help to sustain rivers and livelihoods.<sup>8</sup>

### Recognising Entitlements and Sharing Benefits

Dam projects adversely affect the lives and livelihood of people in project areas. Negative effects upon the livelihood and quality of life of those people can be detrimental to the implementation of project itself. Recognition of entitlement of the affected people is important, and should include improvement of livelihood and life, mitigation, resettlement and development, which are the responsibility of the state and developer. Legal back up is necessary to ensure these commitments and responsibilities are not evaded.<sup>9</sup>

### Ensuring Compliance

Dam proponents such as governments, developers, regulators and operators must ensure public trust and confidence which requires fulfilment of commitments. Compliance of applicable regulations, criteria and guidelines, and project-specific negotiated agreements is to be guaranteed with the backing of regulatory and non-regulatory measures. Compliance is to be secured at all critical stages and for social, environmental and technical aspects.<sup>10</sup>

### Sharing Rivers for Peace, Development and Security

Rivers and water do not respect regional, national or international boundaries. Trans-boundary rivers and the allocation and diversion of water between and within countries have been a source of conflict throughout human history. If not managed on the basis of regional co-operation and peaceful collaboration, and aimed at peace, development and security, the ensuing tension can escalate into violent conflict.<sup>11</sup>

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<sup>1</sup> For details see 'The World Bank Position on the Report of the World Commission on Dams', [http://www.dams.org/report/reaction/reaction\\_wb2.htm](http://www.dams.org/report/reaction/reaction_wb2.htm).

<sup>2</sup> See World Commission on Dams, 2000, Dams and Development: A New Framework for Decision Making, the Report of the World Commission on Dams, Earthscan Publications Ltd., London.

<sup>3</sup> Ibid., p. 214.

<sup>4</sup> Ibid., p. 278.

<sup>5</sup> Ibid., p. 215.

<sup>6</sup> Ibid., p. 221.

<sup>7</sup> Ibid., p. 225.

<sup>8</sup> Ibid., p. 234.

<sup>9</sup> Ibid., p. 240.

<sup>10</sup> Ibid., p. 244.

<sup>11</sup> Ibid., p. 221.



3

Ensuring

Compliance



### 3.1 Ensuring Compliance as a Strategic Priority

Recent international debate on dams has taken place in the context of a rapidly evolving understanding of and dynamic approach to development and governance. This debate lays increasing emphasis on transparent and participatory decision-making processes. Legitimacy and accountability are recognised as integral to decision-making processes that embrace a multi-stakeholder approach in the adoption of key decisions made on the basis of full access to necessary information and a thorough analysis of technical, economic, social and environmental aspects of proposed projects. Legitimacy, transparency and accountability in decision-making process enhance public trust and confidence. Achieving trust requires measures such as comprehensive monitoring programmes, evaluation procedures and incentive mechanisms. These measures also ensure compliance and fulfil project commitments by developers.

Ensuring public trust and confidence requires governments, developers, regulators and operators meet all the commitments made while the dam is planned, implemented and operated. Compliance with applicable regulations, criteria and guidelines and project-specific negotiated agreements must be secured at all stages in project planning and implementation. A set of mutually reinforcing incentives and mechanisms, both regulatory and non-regulatory, is required for meeting social, environmental and technical requirements. The WCD provides for five key policy principles in ensuring compliance as shown in Box 3.

Box 3: Five Policy Principles in Ensuring Compliance

- » A clear, consistent and common set of criteria and guidelines must be adopted by sponsoring, contracting and financing institutions and compliance is subject to independent and transparent review.
- » A compliance plan is prepared for each project prior to commencement, spelling out how compliance will be achieved with relevant criteria and guidelines and specifying binding arrangements for project-specific technical, social and environmental commitments.
- » Costs for establishing compliance mechanisms and related institutional capacity, and their effective application, are built into the project budget.
- » Corrupt practices are avoided through enforcement of legislation, voluntary integrity pacts, debarment and other instruments.
- » Incentives that reward project proponents to abide by criteria and guidelines are developed by public and private financial institutions.

The WCD suggests five guidelines in ensuring compliance as listed in Box 4:<sup>1</sup>

| <span style="font-weight: bold; font-size: 1.2em; vertical-align: middle;">Box 4: Five Guidelines related to Ensuring Compliance</span> |  |
|---|--|
| WCD GUIDELINES  | SUMMARY OF GUIDELINES  |
| No. 21: Compliance plans  | The developer prepares an overarching compliance plan that sets out technical, financial, social and environmental obligations and commitments and how compliance will be ensured. It includes matters such as levels of in-country institutional capacity, use of performance bonds, and indicators and benchmarks. |
| No. 22: Independent review panels for social and environmental matters  | The principal task of Independent Review Panels (IRPs) is to review assessment of impacts and the planning, design and implementation of social and environmental mitigation plans. The primary reporting responsibility of IRPs should be to national government.   |
| No. 23: Performance bonds   | Performance bonds supported by financial guarantees are used to ensure compliance with commitments and obligations, including social and environmental mitigation measures. Bonds should be carefully targeted to activities and the level of security regularly reviewed.   |
| No. 24: Trust funds   | Trust funds, with independent trustees, could be used for benefit sharing and mitigation measures. The use of trust funds would be most appropriate where the proponent is the state. The role of affected people in managing trust fund needs to be defined.  |
| No. 25: Integrity pacts   | Integrity pacts are voluntary undertakings aimed at reducing corruption that can be used as a component of the Compliance Plan, particularly where regulatory systems are weak.  |

The above guidelines are intended to turn the strategic priorities and underlying policy principles into practices.

### 3.2 Compliance Provisions

There are various measures and standards for ensuring compliance, including available domestic and international framework and guidelines. Compliance with laws, regulations, guidelines or project specific contracts is contingent upon access to information. In other words, the

public must have access to information about technical, financial, social, cultural and environmental aspects of a project, including how the compliance on these issues is planned by the investors. Without such details, monitoring and ensuring compliance with any measures and standards becomes difficult.

For the compliance of related measures, it is essential to foster multi-stakeholder participation, including affected people and groups at all levels of decision-making of a project. Legal instruments, environmental laws and the EIA provide a framework to identify issues related with environment, ecology, rehabilitation, resettlement and compensation specific to a project. Compliance can be made possible by meeting the existing legal requirements and the application of remedial laws.

The WCD has recommended Compliance Plan, Independent Review Panel for Social and Environmental Matters, Performance Bonds, Trust Fund and Integrity Pacts as methods for ensuring compliance. For example, performance bonds provide a secure way of ensuring compliance with commitments and obligations. Such provisions are crucial to ensure the completion of project within the specified time and standards, including social and environmental. Likewise, integrity pacts are voluntary measures founded on contractual rights and obligations. They are related to the procurement process of goods and services with the aim of minimising and eliminating corruption as a component of compliance plan. However, the government needs to provide for an integrity pact in related guidelines as this measure is non-enforceable.

The following section examines some key elements for ensuring compliance. They are derived from the WCD framework, national and international legal instruments, operational policies, guidelines and procedures of the IFIs and various institutional mechanisms as well as existing practices as relevant to Nepal.

### **3.2.1 Access to Information**

The WCD has underlined that a clear, consistent and common set of criteria and guidelines to ensure compliance needs to be adopted by the sponsoring, contracting and financing institutions. Compliance must be subjected to independent and transparent review. This makes access to information and their public dissemination vital. It is the duty of governments, project developers and financiers to ensure availability of information to all stakeholders in a timely manner.

In the case of Nepal, Article 16 of the 1990 (2047 BS) Constitution guarantees the right to information as a fundamental right. It provides for the right to seek and receive information on all matters of public interest. This includes all publicly financed development projects, including dams. No information can be restricted or denied

unless it is provided for by law otherwise.<sup>2</sup> However, Nepal still has not developed a separate implementing legislation on the right to information. Some sectoral laws relating to water, environment and development have some provisions related to compliance but the provisions are not complete. For example, section 6(3) of the Environment Protection Act (EPA), 2054 BS (1996) provides that EIA report should be made public for the soliciting of opinions and comments on related projects. Similarly, the Environment Protection Rules (EPR), 2056 BS (1997) authorises the Ministry of Environment to issue a public notice in a daily newspaper about the EIA study and make it available for general public. Opinions and suggestions coming within 30 days of the public notice will be entertained.<sup>3</sup> The Water Resources Rules, 2050 BS (1993) and the Electricity Rules 2050 BS, (1993) have made provisions for the publication of notice in connection with assessing the impact of any project proposed.<sup>4</sup> Furthermore, the National EIA Guidelines, 2050 BS (1993) No. 28 provide for the same requirement.<sup>5</sup> The Guideline No. 14 (c) further provides for making the data and information public, particularly to the concerned people and organisations for their comments which are collected by the scoping study. In case of the larger projects, the Guidelines further state that suggestions and comments must be obtained through public notices and by holding meetings at project sites and central levels. People who are likely to be affected by the proposed projects must be notified directly.

A public involvement manual<sup>6</sup> prepared by the Department of Electricity Development (DoED) provides that informing public about projects is essential and should constitute first step in assuring public involvement in the process. The manual further stresses on the use of Nepali language or any other national languages e.g. Maithili, Newari, Sherpa as appropriate means to inform the public. It also stresses on the use of graphics (maps, drawing, photographs and three-dimensional computer graphics) wherever necessary. The Manual had recommended the use of Public Information Packages (PIP)<sup>7</sup> and Public Information Centre (PIC)<sup>8</sup> both at the national and project levels in order to disseminate project related informations. Project proponents should establish both types of PICs. It suggests telephone hotlines and e-mails wherever applicable be used for the same purposes.

Internationally, right to information is guaranteed under various human rights and environmental instruments of the United Nations. Among them is the Common Article 19 of the Universal Declaration of Human Rights (UDHR) 1948 and the International Covenant on Civil and Political Rights (ICCPR) 1966 which provide for the right to information, and state that everyone shall have the right to hold opinions without interference and the right to freedom of expression, including the right to freedom to seek, receive and impart information and ideas of all kinds. These rights are subject to restriction only as provided by

law for the respect of the rights or reputations of others and for the protection of national security or of public order, or of public health or morals. The provisions of the UDHR are considered legally binding under the principle of international customary law, and the ICCPR through ratification. In 1991 Nepal ratified both UDHR and ICCPR.

On the environmental front, the Principle 20 of Stockholm Declaration provides for the free flow of up-to-date scientific information and transfer of experience through their wide dissemination to resolve environmental problems. Likewise is the Principle 10 of the Rio Declaration for the appropriate access to information concerning environment, including information on hazardous materials and activities in their communities. It is also regarded as an opportunity to participate in the decision-making processes. The Rio Principle further asks to facilitate and encourage public awareness and participation by making information widely available, including effective access to judicial and administrative proceedings for redress and remedies as necessary. Preamble 23.2 of the Agenda 21 stresses on the access of information, participation of public and non-government organization in the environmental impact assessment procedures.<sup>9</sup> Likewise, Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environment Matter, although not yet ratified by Nepal, provides for States obligations for the adoption of necessary legislative, regulatory and other measures for access to information and public participation.

In recent decades, the IFIs have also emerged as the law and policy-making bodies globally. There are examples where policy statements of the IFIs and bi-lateral or multi-lateral agreements signed with national governments have even been regarded as supreme over their domestic policies, laws and regulations. As a response to worldwide criticisms of their adverse policies and practices in the field of development, human rights and environment, the IFIs have been compelled to adopt series of policies and guidelines to be applicable in projects they finance. With regard to access to information, the World Bank has adopted an Information Disclosure Policy in 1994 (revised in 2002). The Policy stresses on the timely dissemination of information to local groups affected by projects and programmes supported by the Bank, including concerned NGOs. The types of information include the draft environmental assessment reports, resettlement instruments, indigenous peoples' development plans and project completion reports available on or after 1 January 2002. It has provided that the information must be made accessible in a form, manner and language understandable to the displaced or affected people and local NGOs. The borrowers also have the same obligation to release these information once adopted.<sup>10</sup> In case of failures by the borrowers, the Bank can discontinue the project processing<sup>11</sup>

But it does not mean that all documents and information are disclosed freely and publicly. The policy has stipulated criteria for non-disclosure of a few documents categorised as confidential or sensitive.

The ADB has adopted a new Public Communications Policy in 2005, first adopted in 1994, on disclosure of information in projects and programmes financed by it. It also provides for complaint procedures in situations of non-compliance and violations. The Policy also claimed to be pro-active, aims to enhance stakeholders' trust in engagement with ADB and to promote participatory development and transparency and accountability in ADB Operations.<sup>12</sup> The types of documents to be released include the EIA reports, compensation and resettlement, indigenous peoples, project appraisal and completion reports and the reports of the President.<sup>13</sup> There are some public sector loan documents that can be disclosed only with the permission of the concerned governments. It has also made an arrangement for a Public Disclosure Advisory Committee to ensure compliance with information disclosure.

Paragraph 5 of the Guidelines for Confirmation of Environmental and Social Considerations of Japan Bank for International Cooperation (JBIC) has made provision for the disclosure of information. It encourages the active participation of stakeholders, so that it may consider a diverse range of opinions and information in its environmental reviews and supervision of projects. In order to encourage concerned organizations and stakeholders to provide information to JBIC at an early stage and to ensure its accountability and transparency in the environmental review process, JBIC makes available, important information on environmental reviews in ways appropriate to the nature of the project, while the environmental review is in progress. JBIC may also, when necessary, seek the opinions of concerned organizations and stakeholders. In addition to the aforementioned principles, if requested by third parties, JBIC will provide them with information regarding environmental and social considerations within its capacity to do so. JBIC respects the confidentiality of the commercial and other matters of the borrowers and related parties, and observes concurrently the principles of information disclosure and such confidentiality.<sup>14</sup>

The JBIC guidelines also have made provision regarding the timing of disclosure and content of disclosed information prior to making decisions on funding and depending on the nature of the project, JBIC discloses information in principle at the timing and with the contents.<sup>15</sup> JBIC endeavours to ensure appropriate implementation of the policies and procedures stated in the Guidelines and compliance with the Guidelines. In order to ensure its compliance with the Guidelines, JBIC accepts objections regarding its non-compliance with the Guidelines and takes the necessary actions.<sup>16</sup>

The above policy and legal framework shows that the people affected by dams or those concerned have a right to access to most of the basic project documents and information. However, the main problem is how to make them available to the actual stakeholders. In the case of national provisions, they lack specific procedures for seeking and receiving information and measures for punishment to those who fail to comply with. The issue of multilateral and bi-lateral provisions is complex: affected people hardly know them and IFIs make no attempt to disseminate information publicly through their country offices. There is also a lack of clarity about supremacy of policies and laws in case of disputes. This is a serious problem when the IFIs, foreign consultants and companies are considered immune from domestic legal jurisdiction.

Despite these difficulties, Nepal has made progress in the field of accessing information in development projects and other activities of public concerns. One special case in point is public interest litigation regarding Arun III,<sup>7</sup> when in 1993, Nepal's Supreme Court made a landmark judgement.<sup>18</sup> In this first-ever law suit challenging a development project on information ground, the Court decided in favour of the petitioners declaring the right to access to all information in any development projects to all citizens, the adoption of transitional rules of procedures for information release and an instruction to the government for the enactment of legislation as earliest. (See Box 5 for details)

The cases of Mahakali Integrated Development Treaty signed with India on 12 February 1996 ratified by the Parliament on 7 September 1996, and the ADB-financed Kali Gandaki A Hydroelectric Project (KGA) regarding access to information are similar. Even information and documents available after decisions made and the projects completed are denied to stakeholders and no reason is given.<sup>19</sup> Accessing documents and information in private sector-led projects is also difficult as Bhotekoshi, Khimti and Indrawati indicate.

Though various policies, laws, regulations and campaigns for access to information, exist much remains to be done to reformulate procedures for accessing information. In almost all cases, basic project documents and information are made public only after claims or complaints are made rather than their release as a public duty. In many cases, basic information is available after the key decisions about the project are already made. As a result, no opportunity exists to influence or effects on the type, size and nature of projects. The availability of information and documents in English language is another obstacle, particularly to the local people and communities who cannot speak English. In many cases, the grasp of official Nepali language is poor. The methods of dissemination of information are also ineffective. They are text-based rather than technique-based, as not all can follow, read and understand the written



## Box 5: Arun III Verdict and Rules of Procedures for Information Release

The Arun III Hydroelectric Project was the first test case about whether a development project can be brought before the court for judicial review. The legal debate on Arun III was about the process of decision-making and transparency rather than its technical and economic defaults. The latter aspects were challenged separately by experts both in Nepal and abroad. The case was decided under Article 16 of the Constitution that provides for the right to seek and receive in information. After a series of campaign from Nepal to the Inspection Panel of the World Bank, the project was unilaterally cancelled on August 2, 1995 following the findings of the Inspection Panel. This was the first-ever-filed complaint a project financed by the Bank. By declaring that no fundamental rights can be infringed for an indefinite period of time with the failure of the enactment of appropriate implementing legislation, the Supreme Court framed the following rules of procedures as a transitional measure till the existence of a separate information law. It is relevant to note that all decisions made by the Supreme Court form the status of binding precedents as equal to the laws till they are replaced by parliamentary acts. These rules still function as the law of the land as Nepal still has not developed a separate information law.

The rules of procedures set by the Court are:

- » The plaintiff should ask for a list of documents related to different subjects from the defendants;
- » If the defendant provides the said list within seven days, then the plaintiff should demand for the inspection of the relevant documents;
- » Once a demand is made according to Para. 2, the defendant should notify the plaintiff by specifying exact time, date and place for such an inspection within three days;
- » Notes should be made after the inspection and request for copies of the documents should be made to the designated official;
- » If there is an absence of a specific rule to provide copies of the relevant document then certified copies should be provided after charging for the cost of making such copies;
- » If the defendant decides not to permit the plaintiff to inspect the documents then a notice should be served within three days by explaining the reasons;
- » If the plaintiff are denied access to information or not satisfied with the reasons given for such a denial then a petition can be filed in the Supreme Court within seven days demanding for the right to information; and
- » The petition shall be dealt with according to the Supreme Court Rules.

Source: *Nepal Kanoon Patrika*, 2051 BS, No. 5, p. 255.

information. Depending on the types of information and the level of education, information dissemination process requires various techniques of arts, graphics, drawings and other materials to convey the fundamental message about projects rather than foreign language documents.

### 3.2.2 Public Participation

Participation is essential to secure public acceptance of plans and projects for water and energy development. Public acceptance of the decision is achieved through agreements negotiated in an open, democratic and transparent process conducted in a good manner with informed participation of all stakeholders.<sup>20</sup> Public participation is not only about attending meetings but also about practicing democracy. It involves the exercise of freedom of speech and expression, meeting and assemblies, protests and demonstrations and even negotiating rights and interests. It applies to development activities as to the former political process. Only publicly endorsed projects can be sustainable. Participation of local and affected peoples in dams projects from its inception to planning, and implementation and monitoring brings indigenous knowledge, skills and willingness to work together. It helps minimise negative impacts and implement mitigation plans effectively. It is also about ownership in development activities where people take rights and responsibilities leading to the increased empowerment of citizens. It is about practicing democracy in real sense. Public participation does not happen in abstracts but requires great amount of interest and motivation on the side of the project proponents. It is the quality of participation and outcome that matters the most for a successful project rather than formality of meetings.<sup>21</sup>

A workshop organized by the Dams and Development Project in Kenya in October 2005<sup>22</sup> discussed the details of the methods of participation in the context of dam projects. It underlined the need of informed participation in decision-making process and identified the following key issues:<sup>23</sup>

- » Public Participation should be done throughout the project lifecycle and as soon as the policy is formulated when possible.
- » During project planning, the intensity of public participation should increase from the initial scoping stage to the project implementation phase.
- » After construction level, public participation may decrease unless there are specific issues or risks to be addressed through continued public participation and information access.
- » Sufficient time should be provided to allow people to effectively and meaningfully participate bringing them to the same level.
- » Tools and techniques should be context specific and be adapted to the local culture and traditions.
- » As a Principle, national strategic planning of water resources must be a participatory process that provides

the opportunity for water resource users to be included in the policy decision-making.

- » The main regulatory framework in which informed participation in the decision-making should be embedded is in environmental law while making explicit social and health issues.
- » There is a necessity to translate policies into effective implementation through different mechanisms and processes: an example to accomplish this may be by devolving more power to the regional level.

### Public Participation Processes and Techniques

It is important that public participation has to be viewed as a process leading to a joint effort between interested and/or affected parties, the developers, governments and the technical specialists to make better decisions. There should be no independent, unilateral and unfair actions. It involves the sharing of ideas and pooling resources in order to make better decisions. By doing this, the dam developers or governments do not have to bear the burden of criticisms with the required public acceptance through effective and meaningful participation in a timely manner.

It is critically important to define and agree on the objectives of the public participation process in advance and follow certain standards thereafter. It is not the event but the process that makes a project acceptable to public. Public participation should be an opportunity to make informed decision-making, particularly in large infrastructure projects like dams and hydropower schemes. Public participation requires the following objectives and processes:<sup>24</sup>

- » Seek out and facilitate the involvement of those potentially affected and interested. Proactive identification of such people and personal contact with affected people works best.
- » Involve participants in defining how they participate. Either interview or ask people about how they prefer to be involved or as a minimum allow people to comment on the proposed process methodologies.
- » Provide participants with the information they need to participate in a meaningful way. Information has to be accessible in terms of language and style, available as a mix of written, verbal and visual information, has to cover both content and process information, and should help build people's capacity to participate.
- » Communicate the interests and meet the process.

On the basis of the above, the workshop recommended that:

- » Public participation is required in the identification of needs and priorities at the national planning level and throughout the entire process even beyond project construction.
- » Public participation should increase from the scoping stage to project implementation from information to full consultation. However after construction, the

level of public participation usually decreases unless specific issues need to be addressed.

- » Time is required to bring all stakeholders to the same level in order to enable them to participate meaningfully in the decision making process. Therefore, the need to allow flexibility and resist from imposing deadlines was considered important.

In the 1990 Constitution of Nepal, the right to participation is guaranteed under fundamental rights to freedoms under Article 12. This right provides for freedom of speech and expression, and assembly and movement. These freedoms allow citizens, including project-affected persons, to be able to study, understand, write, speak and campaign about negative and positive aspects of projects. Under these freedoms, protests and demonstrations could also be organised peacefully, and raise questions about the legality, constitutionality and sustainability of projects, and demand for reforms or offer better alternatives. Similarly, Article 26(7) of the Directive Principles and Policies of the State also provides for the involvement of women in developmental activities. Although, the Directive Principles and Policies of the state are not enforceable by the courts, the Supreme Court has established that the government always has a duty to comply with these principles and policies, they cannot be overlooked<sup>25</sup> and they cannot be violated even if the states fails to implement them for effectively for some justifiable reasons.<sup>26</sup>

Rule 4(1) of the EPR had a mandatory provision to gather concerns, comments, suggestions and recommendations concerning potential project impacts from the public during the scoping of projects. Similarly, Rule 7(2) also has a similar provision which is to solicit their opinions and suggestions concerning the contents of the Initial Environmental Examination (IEE) report and a mandatory provision to organize a public hearing about proposals at the area of Village Development Committee or Municipality wherever the projects are located.

Similarly, the Manual states that any public involvement must be opportunities-oriented, participatory and proactive.<sup>27</sup> The public involvement process consists of four integrated activities: a) information gathering; b) information dissemination; c) public consultation; and d) public participation. The manual further states that the current practice of public involvement on hydropower projects is often ad hoc, top down, fragmented and insufficient to the actual needs ranging somewhere between persuasion and consultation.

Often the implementation of the process and regulations on public involvement is lacking. The manual suggests for the formation of a Public Involvement Facilitation (PIF) Team, and an interdisciplinary team to implement a public involvement strategy. It further defines a stakeholder as any individual, group, agency or organisation affected by a



### Box 6: List of prospective stakeholders may be identified in terms of one or several of the following categories:

- » Affected local individuals, communities or households;
- » Government agencies and their representatives at various levels (national, district and local);
- » Elected officials of concerned Village Development Committees (VDCs), municipalities, District Development Committees (DDCs) or constituencies;
- » Concerned business people and entrepreneurs;
- » Concerned NGOs, CBOs and user groups;
- » Political party representatives and local parliamentarians;
- » Locally influential people from the affected areas, such as informal or traditional community heads, school teachers, healers, social and religious leaders and other notable women and men;
- » Health workers;
- » Social workers and marginal group workers; and
- » The project developers or proponents.

project and/or with concern or interest in a development project and its outcomes, or common resources impacted by a development project. A stakeholder is defined as a 'partner in development'.

A list of prospective stakeholders for hydropower projects is given in Box 6. While identifying the stakeholders, both women and men should be represented preferably in equal numbers.

However, these policies and practices remain largely unimplemented. The project proponents have taken the issue of public participation as a public relation exercise. Only when the affected and concerned people are invited, involved and heard meaningfully are when they are organised and better informed. The consequence of limited participation has been reformulation of projects or in many cases their cancellation. Under the existing domestic laws, there is no concept of public participation in dams and development decision-making as a prerequisite or a legal right. Regarding the provision of IFIs, prima facie they look better, but in effect lack monitoring, supervision and implementation unless strong public pressure is built up. In Nepal, the first issue of the need and the right to participation was raised in Arun III case in 1993 (Box 7). The project had organised several meetings but the reports systematically avoided critical voices.

In terms of participation, the case of KGA was more progressive than Arun III case. This outcome resulted because activists had highlighted many shortcomings with Arun III processes and had highlighted right to participation to development. As a result, public consultation meetings in the project sites and Kathmandu



## Box 7: Public Participation in Arun III Case

The Bank relied on 23 public meetings to justify the participation of the local people in designing the project. Whether basic project documents and information were made available to the local people and the public at large before the holding of such consultations were, however, not clear. There were two or three consultative meetings but were also limited to discussion on positive side of the project. Moreover, during or prior to 23 public meetings, project information in Nepali language were not made available. The 23 meetings were held prior to Nepali Supreme Court's verdict on the disclosure of project information and document which was made on 8 March 1994. An Information Centre was established after the show-cause notice was issued against the government of Nepal and Nepal Electricity Authority by the Court. The official radio, television and the print media highlighted benefits of the project but made no mention of critical questions about various aspects of the project. Most importantly, the mere participation of some selective groups and individuals as well as the local government authorities through governmental influence did not represent Arun Valley.

Holding of meetings and discussions in the absence of basic project documents and information cannot foster meaningful debate about the various aspects of the project.

Based on: Arun Concerned Group, Request for Inspection to the Inspection Panel, the World Bank, 24 October 1994, p. 5.

were more open and frequent. However, the critical voices of those of those who lived outside of the project area were restricted or were not represented. In some cases, they were even barred from attending meetings and had to get information by using methods such as eavesdropping. The local people were promised benefits ranging from employment, contracts and local development. But voices of caution were not heeded. Although campaign aimed to reform project conditionalities and bring about compliance, they were labelled 'anti-development'. Accusations were hurled on some of the activists, including charges that they were being paid off by oil companies. In an interaction meeting organised in the hall of Syangja District Development Committee, representatives of the local political party demanded death penalty for critics of the KGA. They also insulted the activist by offering a bundle of green grass, as 'animals' opposing a 'good' and 'big' development project.<sup>28</sup>

When Kulekhani and Marshyangdi hydropower projects were built the concept of public consultations did not exist and the partyless Panchayat polity promoted top down and bureaucratic form of participation. In the debate of the Arun III Hydroelectric project the provisions of 'freedom' and 'right' guaranteed under the Constitution of 1990 and related laws became more tangible. The main thrust of public participation would be to seek public

opinion about the viability, acceptability and applicability of a project before decisions are made. In Nepal, these processes have not been institutionalised and serve no purpose for the benefits of project-affected persons.

### 3.2.3 Environment Impact Assessment and Mitigations

The EIA is a useful tool for ensuring economic, social and environmental soundness of a project. The WCD framework has identified that a Compliance Plan need to ensure that each project, before it begins, spells out how compliance will be achieved. The plan would include relevant criteria and guidelines as well as specify the binding arrangements for project-specific technical, social and environmental commitments to minimise negative effects. In Nepal the provision of EIA in hydropower projects was initiated in early 1980s. It was made compulsory with the enforcement of the EPA and the EPR.

The EPA and the EPR are the principal legal instruments for environment protection and preservation, and are subject to compliance in all infrastructure projects, including large dams. The EPA provides that the project proponents cannot carry out or implement a project without IEE or EIA. The EPA outlines that the concerned agency or ministry may grant permission to implement a project, only on the condition that the IEE or EIA reports are cleared with the provision of control of mitigation of adverse impacts. On scoping, the rules makes clear that the proponent shall conduct the IEE and the EIA as prescribed in schedule 2 of the EPR and that, the proponent should make a scoping for that process. According to rule 4(1), the project proponent should publish a notice to the concerned VDCs, metropolitans or schools, health posts and the affected groups about the impact of the implementation of the project by inviting written suggestions within 15 days. If any suggestion is received within the prescribed time, the proponent is obliged to forward it to the concerned government department. As per the rule 4(3), it is only after the completion of this procedure that the project proponent can file an application for the scoping of the project by attaching the view thus obtained.

The EPA restricts any entity from creating significant adverse and hazardous impacts on the environment, public life and health. If anyone violates such provision the concerned agency shall take the necessary action.<sup>29</sup> The EPA also provides for reasonable compensation of loss and injuries made by the projects on the application made by the concerned party.<sup>30</sup> The EPR states that the purpose of scoping is to identify the affected and related communities, groups and societies who should be involved in the decision-making process. The information collected should be forwarded to the local concerned organisations for their comments which are directly involved in the project monitoring or affected. Large scale projects should first publish a public notice.

After that they should organise a public hearing to receive comments and suggestions. The rule explicitly requires that the most affected people should be informed directly. They specify implementation of mitigation measures and the publication of impact assessment reports for review and comments.<sup>31</sup> All concerned persons should be informed about potential environmental damage, and there should be regular monitoring of the environment impact of the project so as there is information about the project.<sup>32</sup>

The National Environmental Impact assessment Guidelines, 1993 further recommends that a study of the socio-economic context in which the project will be located and a listing of its possible adverse effects on the local communities and population be undertaken. The socio-economic impact assessment needs to include the effects on ecology, vegetation (crops, trees and other biomass), wildlife and aquatic life.<sup>33</sup> Alternatives should be identified so that there is a comparative study of various dimensions of the beneficial and adverse impact of the project.<sup>34</sup> The Guidelines advocates for an evaluation and monitoring to ensure that the impact does not exceed legal standards and compliance monitoring to ensure that the project complies with the law.<sup>35</sup> It recommends for the incorporation of the implementation of mitigation measures in the design of projects so that these measures are self-propelled into the construction and operational phase of the project.<sup>36</sup>

The IFIs also have developed operational policies and guidelines relating to environmental and social obligations. The World Bank's operational policy on environment adopted on July 17, 2001 has developed safeguard policies to help ensure that its operations do no harm people and the environment. These policies within the scope of environmental assessment are cultural property, disputed areas, forestry, indigenous peoples, international waterways, natural habitats, pest management, and safety of dams. The Bank conducts environmental screening of each project to determine the extent and type of environmental assessment required, and whether the project may trigger other safeguard policies. The environmental assessment policy applies to all projects, sector investment lending, sector adjustment lending, financial intermediate lending, and emergency recovery projects. The policy also provides for capacity-building in environmental assessment for borrowers, public consultation, and rules for disclosure of environmental assessment reports.

The policy further asks the recipient countries to address their environmental challenges and ensure that the Bank projects and programmes integrate the principles of environmental sustainability. It has three primary objectives: improving peoples' quality of life, improving the quality of growth, and protecting the quality of the regional and global common goods. The World Bank has developed regional environmental strategies for all six

regions. These strategies set regional and sub-regional priorities based on environmental constraints, on poverty reduction strategies and growth. The Bank intends to use strategic environmental assessment of sectoral and regional programmes by addressing environmental concerns early in the decision-making and planning processes. It further mandates improvements into the Bank's safeguard systems through better compliance, and assist in building environmental assessment capacity.<sup>37</sup>

The Environment Policy of the ADB 2002 is based on its Poverty Reduction Strategy and Long term Strategic Framework (2001–2015). The Strategy recognizes that environmental sustainability is a prerequisite for pro-poor economic growth and efforts to reduce poverty.<sup>38</sup> It provides five key elements to reduce poverty through environmentally sustainable development. The five elements are: (i) promoting environment and natural resource management interventions to reduce poverty directly, (ii) assisting borrowing member countries to mainstream environmental considerations in economic growth, (iii) helping in maintaining global and regional life support systems that underpin future development prospects, (iv) building partnerships to maximize the impact of ADB lending and non-lending activities, and (v) integrating environmental considerations across all ADB operations.<sup>39</sup>

Likewise, for the protection, conservation, and sustainable use of natural resources, the priority areas for ADB assistance include (i) maintaining the flow of ecosystem goods and services to sustain the development process, and rural livelihoods in particular, including through the conservation and sustainable use of biodiversity; (ii) protection and improved management of freshwater systems, and coastal and marine resources; and (iii) prevention of land degradation, including desertification. ADB envisages a wide range of loan and technical support to encompass the strengthening of national policy and institutional frameworks to provide appropriate incentives for improved natural resource management, including through community-based initiatives, building the capacity of relevant agencies and stakeholders at local level, strengthening rural support services and access to markets and appropriate technologies, including collecting data and generating knowledge.<sup>40</sup>

The policy further provides for the implementation and monitoring matrix of the first medium-term action plan directed at the five major objectives of the Environment Policy. These are: (i) assisting borrowing countries to invest in environmental protection and natural resource management for poverty reduction; (ii) strengthening their capacities to mainstream environment in economic growth and development planning; (iii) enhancing international, regional, and sub-regional cooperation and the transfer of finance and technology for maintaining global and regional life support systems; (iv) building

partnerships to tackle environment and natural resource management challenges; and (v) enhancing the integration of environmental considerations into ADB operations.<sup>41</sup> The project teams of ADB are responsible for environmental assessment process, and the reports are reviewed by specialists in regional departments. The quality assurance of projects and programmes are undertaken by the teams, with formal peer review of category A projects done with the Environment Committee. Internal and external environment networks facilitate cross-fertilization, knowledge-sharing, and dissemination of lessons learned.<sup>42</sup>

In 2002, the ADB implemented new Guidelines for making environmental assessment. They are: (i) institutionalizing tools to integrate environmental concerns into country programming, (ii) applying transparent procedures for environmental categorization, and (iii) providing mechanisms for addressing ADB's lending activities in the financial sector and other lending activities where project or sub-project designs are uncertain.<sup>43</sup>

Regarding compliance, accountability, and monitoring of the policy, a Regional and Sustainable Development Department has been created to: (i) develop and monitor policies and guidelines for all thematic and sector areas, (ii) act as ADB's centre for compliance oversight, and (iii) support region-wide cooperation work and linkages with regional institutions.<sup>44</sup> The Regional Departments are responsible for complying with the policy. The ADB's Chief Compliance Officer, supported by the Environment and Social Safeguard Division is responsible for monitoring compliance with ADB's safeguard policies, and advising and assisting the operations units. The Chief advises the ADB's Management Department on safeguard policy issues and reviews the status of compliance with projects in line with the safeguard policy.<sup>45</sup> The Environment Committee monitors policy implementation across the Regional Departments. Under the leadership of the Environment and Social Safeguard Division, the Environment Committee develops a system for monitoring implementation of the Environment Policy and the medium-term action plan, both ADB-wide and across the five geographic regions. The system includes performance monitoring and reporting across regions, countries, and sectors.<sup>46</sup>

The IFIs have made environmental assessments mandatory for the approval of loans and investments in projects and programmes they finance.<sup>47</sup> Often projects are classified into different categories depending upon the levels of impacts the projects shall make on the environment. The projects are categorized as Category A, Category B and Category C in the descending order of impact a project has on the environment.<sup>48</sup>

The conduct of public consultations during EIA and disclosure of the reports are mandatory for the Category A and B projects. Generally speaking, the Category A projects

have the most stringent requirements and need the highest level of effort and resources while category B have less stringent requirements. The consultations are to be carried out as early as possible in the project cycle. Such consultations are conducted with project-affected and other local groups at least twice. The first consultation should be done, prior to environmental screening, and the second, after the draft EIA report is prepared.<sup>49</sup> For Category A and B projects, the draft EIA reports must be made available to project-affected groups and local groups at a publicly accessible place.<sup>50</sup>

At bilateral level, the JBIC Guidelines for Confirmation of Environmental and Social Considerations were adopted in April 2002. Its main objective is to encourage project proponents to implement appropriate environmental and social safeguards in accordance with their guidelines and policy standards by making clear their procedures, criteria for decision-making and requirements which projects subject to funding are to meet. It also covers social issues such as involuntary resettlement and respect for the human rights of indigenous peoples. The Guidelines state that the project proponents are responsible for environmental and social considerations for the project. JBIC encourages project proponents seeking funding to undertake appropriate environmental and social considerations in accordance with the nature of the project.

However, the fundamental question, as in other cases described above is ensuring compliance. The experiences from Arun III, KGA and other projects suggest that there can be no proper EIA and development of comprehensive mitigation plans in the absence of complete and timely information, in appropriate languages and formats. Absence of meaningful public participation at the appropriate time makes the compliance issue with the EIA standards even worse. The EIA is not conducted independently but in the interest of and by the project proponents themselves. Further, they are conducted in the absence of critical information and documents. In many cases, such studies are done in consultation with known project followers than independent stakeholders. The most important aspect of the EIA, the development and implementation of mitigation plans is the extent of public participation applied during the study and accuracy. The EIA prepared by using sophisticated formats and by experts in an alien language results in a major disjuncture with local reality. It has been observed even in Nepal that EIA, particularly in developing countries, is not necessarily done to question or criticise or cancel a project plan but to defend them at any cost.

The EIA of hydropower projects in Nepal began in the late 1990s. The EIA of the proposed Arun III had been undertaken but the World Bank's Inspection Panel found flaws with it (see Box 8). EIAs of KGA, Khimti, Bhotekoshi, Chimlime and Middle Marshyangdi hydropower projects

were conducted. The EIA on the KGA was comprehensive but it lacked effective implementation. Some of the mitigation plans were violated even after the completion of the project in 2002, e.g. fishery management, and maintaining environmental flow downstream and rehabilitation of Bote community, an indigenous fishing community.<sup>5</sup> In Khimti and Bhotekoshi hydropower projects, the EIA were not accessible to the public on the grounds that they are immune from disclosure as private sector projects. It shows glaring public policy contradictions while complying with the EIA and mitigation.

The IFIs, bilateral donors and investors have developed some monitoring and complaint mechanisms within their institutions for ensuring adequate compliance. But they are centralised, bureaucratic and far removed from the field reality. Their complaint offices are located in Washington, Manila and Tokyo and not in country offices. They could at least have some country-level field staff assisting the affected people in bringing their complaints in an effective and timely manner. In all of this there is absence of institutional linkages with project-affected persons and communities. At the same time, they do not establish close communication in addressing environmental complaints and provide remedies in a timely manner. Mostly, they rely on EIA reports with no compliance with existing national and international environmental law and policy.

### 3.2.4 Compensation, Rehabilitation and Resettlement

The fifth WCD recognises entitlements and benefit sharing for those who are likely to be affected by the multiple activities of dam projects, as a strategic priority. A risk assessment has to be conducted based on the identification and inclusion of possibly adversely affected stakeholders in joint negotiations on mitigation, resettlement and development related decision-making. Impact assessment should extend the downstream region and catchments, where property, livelihoods and resources are likely to be affected. The assessment should include those affected by dam-related infrastructure such as



#### Box 8: EIA Claim in Arun III

The EIA report should include "Systematic comparison of the proposed investment designed, site, technology, and operational alternatives in terms of their potential environmental impacts, capital and recurrent costs, suitability under local conditions; and institutional training and monitoring requirements. For each of the alternatives, the environmental costs and benefits should be quantified to the extent possible and economic values should be attached where feasible. The basis for selection of the alternative proposed for the project designed must be stated". An essential part of any environmental assessment process is the investigation of alternatives to the project, to discover whether these options are more viable from

canals, transmission lines and resettlement development. All those recognised as adversely affected people must be able to negotiate mutually agreed formal and legally enforceable mitigation, resettlement and development. The project plan preparation needs to take into account compensation for lost assets through replacement, substitution, cash and allowances, livelihood restoration and enhancement in the form of land-for-land option, sustainable and non-agricultural employment and other measures.

environmental and social standpoints. As stated above, the Bank's OD required an environmental analysis to the proposed project. Unfortunately, in the case of Arun III, the environmental issue at stake and the available alternatives was not been integrated into decisions about whether to proceed with project. During the 1991 EIA, the team did not have the mandate to investigate alternatives to the dam site or the road alignment (hill route) at the time. The King Mahendra Trust for Nature Conservation which undertook the Basin Wide Environmental Impact Study stated "the road alignment and the dam site were already decided, and the study team did not have a mandate to change these decisions." Later in 1992, an EIA for the Valley route was conducted for the purpose of determining whether this route "might provide time and cost savings in providing access to the Arun III hydropower site. Serving the needs of the population in general area through which the road will pass is a secondary consideration." This EIA concluded that the Valley route was preferable to the hill route even though the EIA recognized that there would be irreversible significant impacts to the valley. This EIA was also limited to investigating alternatives to the road and not to the Arun III HEP and road itself, which were both considered a *fait accompli*. In any case, "... the need for the sitting of the power project, and therefore the justification for the road, is taken as given. The EIA of the Valley route fails to take into consideration and compare from environmental standpoint any alternative approach to build this road. For example, applying environmentally-friendly approach in building the roads in the Himalayan foothills by employing simple and conservation-oriented techniques and labour intensive methods have been proved successful. The pace of the proposed construction of the road and the approach adopted, thus, is a serious environmental concern that the EIA ignored. After the EIA process was completed and was into the project cycle, the bank commissioned a study of alternative to the project. This study known as "Plan B" was issued only after a year of intense local and international pressure on the bank to adequately investigate alternatives. The Plan B was conducted from the standpoint of whether the Arun III is the "least cost" option for Nepal, without regard to environmental and social cost of either Arun III or the alternatives.

Source: Arun Concerned Group, Request for Inspection to the Inspection Panel, the World Bank, 24 October 1994, pp. 4-5.

Nepal's experience with compensation and rehabilitation is not encouraging. There is no specific law to deal exclusively with dam-affected issues, particularly rehabilitation and resettlement of those displaced. There are no legal provisions for any compensation or resettlement in the post-project period. It is only through other general rights-related provisions that the issue of resettlement can be addressed. For example, Article 17 of the Constitution provides for the right to property, and compensation for any property taken for public interest but it does not provide for any provision for resettlement or rehabilitation. This Constitutional guarantee of property rights, however, needs a separate implementing law. The Land Acquisition Act, 2034 (1977) makes a provision that the government can acquire private land for public purpose. While acquiring land, the act makes a provision that adequate compensation be provided to the owner.<sup>52</sup> According to it, any loss incurred to crops, plants, walls and other assets while acquiring the land must be compensated.<sup>53</sup> The Compensation Fixation Committee consisting of four members at the district level headed by the Chief District Officer (CDO) implements the provision.<sup>54</sup> There is no representation of affected persons or communities in this Committee. As a result, the affected person cannot secure their rights. The administrative decision-making process is also political biased, and creates incentives for corruption. Section 7(3) of the law makes provision for complaint. Those dissatisfied with the compensation can file complaints at the Office of the CDO within 15 days of the information received by the claimant. Section 18(2) provides that those not satisfied with the list published for the compensation according to the Section 18(1) of the law can file a complaint before the Home Ministry.

Similarly, the Electricity Act, 2049 BS (1992) makes a provision for compensation when land is acquired for public use.<sup>55</sup> Any loss incurred during the survey, development, supply and distribution must be compensated.<sup>56</sup> Although, it has made important provisions for land acquisition, there are some loopholes. The Act does not spell the procedures for making compensation claim. Distinct examples are families living under or near-by the electricity transmission lines, those displaced or affected from any construction or extensions as they are neglected or denied of compensation. The experience of large number of families displaced by Kulekhani-I project completed in 1981 and the Marshyangdi-built in 1989 are lessons of poor compensation planning regarding involuntary displacement.<sup>57</sup> In all these cases, no standard framework and criteria were applied for making resettlement plan but rather limited in cash compensation. As a result, those losing land ended up spending the money because they were never part of the monetized economy. In the KGA, the affected people have protested and are still making protest against arbitrary, inadequate and disproportionate compensation being given not according to the competitive market price. In the case of the Koshi Barrage project built in the 1960s in Nepal, land owners are struggling for the compensation of their land and losses.

It can be argued that the existing legal provisions are complicated, discretionary and less friendly to the displaced persons. The valuation of land and compensation are fixed by government officials, the project proponents and local elites without the representation of the affected persons or communities. At the same time, the indirect loss of land and access to other natural resources in the surrounding areas, are not taken into consideration. Community properties such as schools and health posts if located in public lands are not included for compensation, e.g. a school in the KGA faced problem after the public land where it was located was taken over.

The 1977 Act needs amendments. One amendment must ensure that the compensation fixation committee is representative and that the scope of compensation coverage is made comprehensive by including public properties and ecology. At the same time arrangements must be made for creating compensation and mitigation funds and resettlement plans. A multi-stakeholder monitoring mechanism needs to be put in place to so that the displaced and seriously affected persons' voices are heard. Other inadequate provisions require updating, too. For example, notices in daily newspapers are published so that land acquisition details are public. But most of the dam-affected areas have no access to such newspapers. At the same time those likely to be affected have low literacy rate who cannot read or write let alone send written complaints. Language is another limitation. The notices are published in Nepali language but many ethnic-language communities in Nepal still cannot read or write Nepali. The new law needs to specify that individuals likely to be affected must be informed directly without any regards to time limitations in special circumstances, e.g. geographic distance, isolation, low literacy rate and language.

The IFIs policy on involuntary resettlement provides that all alternatives measures must be taken to minimize the impact of resettlement and cash compensation should not be the only means. These policies mention that previous living standards of the likely affected persons must be maintained if not improved. The building of a dam project should be an opportunity for the people living in the area and not be the cause of loss of any social and economic loss. The policies provide that displaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, consulted on resettlement options, and offered opportunities to participate in planning, implementing, and monitoring of resettlement tasks.

For effective implementation, the resettlement plan is made mandatory in the projects financed by IFIs. The World Bank's Resettlement Policy explicitly mentions the preference of land to land compensation rather than cash, especially to those whose livelihoods is based on land. In case of people with without land, the opportunities for employment or self-employment must be provided in addition to land compensation or lost assets. Cash compensation can be preferable only when the livelihoods are not land-based or the loss of all or part of

the land does not affect the livelihoods of the families significantly. The policy states that the amount of cash compensation should be sufficient to replace the lost land and other assets at full replacement cost according to local markets.

Likewise, the ADB's Resettlement Policy requires Initial Social Assessment for any development projects in order to identify the people who may benefit or adversely affected. It further requires time-bound actions and budgets for resettlement plans. The Policy provides similar provisions towards land to land compensation as in the case of the World Bank. It states that monetary compensation for land alone may not be adequate. Preference should be given for the resettlement of people dislocated from agricultural setting unto similar setting. Opportunities for employment or self-employment must be provided to the displaced people in case the land to land compensation cannot be provided. The Policy further states that absence of formal legal title to land among some affected groups should not be treated as an obstacle to they receiving compensation.

In Nepal, projects funded by World Bank, ADB and JBIC have failed to inform the affected people about such resettlement provisions. They have also failed to act even when they know that resettlement is the best option, and not cash compensation. They largely rely on cash compensation, make decisions unilaterally without the involvement or approval of the affected people. They follow Land Acquisition Act 2034 BS (1977) which does not provide for mandatory land to land compensation except in case of the total land acquired and that the landowner is willing to get land in exchange.<sup>58</sup> But the latter provision has not been in practice due to the lack knowledge of the legal provision and preference to cash settlement.

### 3.2.5 Rights and Interests of Indigenous, Ethnic and Local People

The WCD advocates the identification of core stakeholders and vulnerability or risk analysis in order to protect the rights of indigenous and local people. It says that the livelihoods, human rights, and property and resource rights of these people must be safeguarded. Special attention should be given to indigenous and tribal people, women and other vulnerable groups as they may face greater risks from development interventions. The WCD guidelines place focus on the protection of the rights of the indigenous and tribal people. Free, prior and informed consent through formal and informal representative body is recommended to be essential if any decision on project affects indigenous and tribal people.

This provision of WCD is relevant in the case of Nepal which is a multi-ethnic, multi-cultural, multi-lingual and multi-religious country. There are 59 groups belonging to indigenous/ethnic communities covering 37.2% of the total population, including Newar.<sup>59</sup> Most of the indigenous and tribal people live in high hills, valleys and plains. Often these communities have been victimized by construction of



### Box 9: The Question of Involuntary Resettlement: Land Acquisition, Compensation and Rehabilitation in Arun III Case

One of the main objectives of the involuntary resettlement policy of the World Bank is to provide people displaced by a project with the means to improve, or at least restore, their previous living standards, earning capacity and production levels. This central objective was violated in the case of the proposed Arun III hydropower project.

**Under-valuation of Compensation:** EIA states "for the majority of households compensation with cash would not enable them to recover from the loss of a significant proportion of the family land holding, unless the money were used to buy an equivalent of land in the vicinity. However, the effect of Land Acquisition, Compensation and Rehabilitation Plan (ACRP) has been to inflate land prices far beyond the compensated value, thus making the purchase of replacement land impossible for most Project Affected Families (PAFs). The report also confirmed that land was undervalued by the District Land Revenue Officer, making it impossible for the displaced people to recover their losses. The report further stated that "The filed surveys for this report found that land values fixed by the local Land Revenue Offices seriously underrate the reported market value". This action also violates para. 14 of OD 4.30 which states "Valuation of lost assets should be made at their replacement cost."

**Opportunities to Share in Project Benefits:** The benefit of this project will be electricity, which was not meant for the Arun Valley. One section of EIA (6-11) mentioned that the local people expected to receive power from this project at affordable rates. The modification made in the project which corresponded with this expectation was to increase in the width of the transmission lines so that sometime in the future the Valley can benefit from a future electrification programme. The benefit of the particular project-electricity would not be conferred to the people directly affected by the project.

**Employment to the Seriously Project Affected Families (SPAfs):** Noting that the displacement of project-affected people would be permanent, earlier versions of the EIA recommended that permanent employment be provided for at least one member of those families likely to be severely affected by the project. In later versions, this recommendation was not carried through. Local people affected by the project were to be given first priority for employment in the construction of the access road. This opportunity, however, was not permanent whereas adverse effects of displacement would be permanent.

**Land Based Resettlements:** The Bank's policy on involuntary resettlement states that replacement of resettlement land ("land for land strategies") is far superior to cash compensation. In fact, experience has shown that most people displaced by the Bank projects that received only cash for their land did not regain their standard of living, but instead have become impoverished. In addition, the EIA

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>> has shown that cash compensation is already failing in the case of people displaced by the hill route in the Arun III project. The EIA has further stated that it is expected that the Valley route PAFs will have less ability to be able to deal with cash compensation because they are poorer than the people along the hill route. Despite the overwhelming evidence against cash compensation, it is still the centrepiece of the government's land acquisition guidelines. The updated Land Acquisition, Compensation and Rehabilitation Plan (ACRP) has attempted to cope with this issue by requiring that the PAFs be given the option of receiving land instead of cash. However, the burden of identifying land has been put on the displaced people themselves and they also must arrange for the government to purchase it. Furthermore, those already displaced do not have the option of receiving land. According to the Sankhuwasabha Peoples' Awareness Group that raised concerns about the project within the Arun Valley has recently documented that people who received cash compensation earlier has not been informed or asked whether they would prefer land, not the cash. Government has given on October 5, 1994, a 30-day public notice of land acquisition under the Land Acquisition Act, 1979 in Manakamana village. However, the notice does not say anything about whether the families are eligible to ask for land or land compensation since the law is basically limited to cash compensation. The claimants fear that standards of living of many valley residents will be decreased because of cash compensation and loss of land.

**Surveys:** In violation of Section 11 of OD 4.30, there has not been a socio-economic survey completed on the valley route to determine whose land will be affected or to determine the value of land.

**Resettlement Planning:** According to Bank policy, resettlement should take place before appraisal. However, no resettlement plan has been established for families who will lose their houses due to power transmission lines.

Source: Arun Concerned Group, Request for Inspection to the Inspection Panel, the World Bank, 24 October 1994, pp. 6-7.

dams and other infrastructure projects. In case of dam projects, the fishing communities, particularly the Majhis, are seriously affected and displaced from their livelihoods. Neither are they provided with alternative income nor compensation or new employment opportunities are provided. There is also no plan for benefit sharing for them although they are the direct beneficiaries of rivers. Representatives of the Majhi community claim that the right of the community to river is same as that of land tenancy rights. In recent years, the Majhi communities have claimed mohiyani hak (right to access to river for livelihoods and prosperity) on rivers.

The main problem with the issue of rights and interests of indigenous-ethnic and local peoples vis-à-vis benefit-sharing is the lack of legally binding provisions under both domestic

and international law. Therefore, there is a need to develop a conceptual framework and legal provisions on the basis of existing national and international principles and policies with rights perspectives. At the international level, many human rights and environmental instruments exist and articulate such perspectives.

Chapter 26 of Agenda 21 recognises and strengthens the role of the indigenous people and their communities in managing natural resources and maintaining biodiversity as the indigenous people bear holistic historical traditions since time immemorial. Hence, national and international efforts to implement environmentally sound and sustainable development should recognize, accommodate, promote and strengthen the role of indigenous people and their communities.<sup>60</sup> The provision also underscores the active participation of indigenous people and their communities in the formulation of national policies, laws and programmes relating to resource management and other development within the rubric of sustainable development strategies.<sup>61</sup> Control over resources and participation in management of those resources and importance of consultation of indigenous people during formulation of national policies and legislations is emphasised under Chapter 26.4, 26.6 and 26.8 of the Agenda.

Principle 1 of the Rio Declaration on Environment and Development has recognised that human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>62</sup> This provision is about undertaking the EIA for proposed activities that are likely to have a significant adverse impact on the environment which is stated under Principle 17 and are subject to a decision of a competent national authority. The Principle 22 has accepted the role of indigenous people and local communities in environment management.<sup>63</sup> Similarly, the Johannesburg Declaration on Sustainable Development, 2002, has recognised the vital role of the indigenous people in sustainable development.<sup>64</sup> Principle 23 of the Durban Declaration and Programme of Action has fully recognised the right of indigenous people consistent with the principles of sovereignty and territorial integrity of States. The declaration also recognises the special relationship that indigenous people have with the land as the basis for their spiritual, physical and cultural existence and encourage States to ensure that indigenous people are able to retain ownership of their lands and of those natural resources to which they are entitled under domestic law.<sup>65</sup>

Some of the instruments are hard-laws (legally binding) and some are known as soft-laws (non-binding legally but morally obligatory). The latest one is the 1986 UN Declaration on the Right to Development<sup>66</sup> which stipulates that the States need to create a perfect environment for the participation in development; the enjoyment of economic, social, cultural, and political development, and the exercise of inalienable right to full sovereignty over all natural wealth and resources by the peoples.<sup>67</sup> It mentions that human being is the central subject of development and should be an active participant and beneficiary of the right to development.<sup>68</sup> States have the rights and duties to formulate appropriate national development policies that aim at constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.<sup>69</sup> To materialise this, States should undertake, at the national level, all necessary measures for the implementation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.<sup>70</sup>

The UN Resolution on Permanent Sovereignty over Natural Resources<sup>71</sup> stipulates that people and nations have the permanent sovereignty over the natural wealth and resources.<sup>72</sup> Nationalization, expropriation or requisition of these resources can be done for public use, security or the national interests. If done so, the owners shall be paid appropriate compensation in accordance with the national and international laws. In case disputes are not settled, arbitration or international adjudication is to be sought.<sup>73</sup> Similarly, the Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of the International Labour Organisation (ILO) defines tribal people as peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.<sup>74</sup> It further states that the government should take appropriate special measures with their consent to protect the rights, guarantee respect of their integrity and to safeguard the persons, institutions, property labour, culture and environment of indigenous people.<sup>75</sup> In addition, they should have the right to decide their own priorities for the process of development and participate freely in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.<sup>76</sup> Realizing dependency of these people on the natural resources, especially land, their rights to participate in the use, management and conservation of these

resources must be safeguarded. Furthermore, the government must recognize and take special measures to safeguard the right of these people<sup>77</sup>.

According to the above framework, the indigenous people must be protected from displacement from the land they occupy. In case of exception, relocation shall take place with their free and informed consent. In case consent cannot be obtained, relocation shall take place according to national laws and regulations with effective representation of the peoples concerned and those peoples— have the right to return to their traditional lands as soon as the grounds for relocation cease to exist. In case of relocation, land of similar quantity and quality must be provided. Any loss or injury is also to be compensated fully.<sup>78</sup> Similar provisions are made in the Draft Declaration on the Human Rights of Indigenous People.<sup>79</sup>

At the domestic level, Nepal has no specific law that deals with the rights of the indigenous peoples on the question of proper utilisation of natural resources and any other development activities. The only relevant provisions that can be located and interpreted in this context are the Directive Principles and Policies of the State in the 1990 Constitution although they are not enforceable by any courts. These provisions recognise the need of wider participation, equitable distribution of social and economic gain. It also provides for the prevention of economic exploitation and giving priority to national enterprises for a healthy social life. It further has a provision for the elimination of all types of economic and social inequalities and the establishment of harmony amongst the various castes, tribes, religions, languages, races and communities by respecting their cultural diversity.<sup>80</sup>

The above-mentioned set of international principles and frameworks create some binding and some non-binding but moral obligations upon Nepal for compliance although existing domestic laws do not provide for such rights and interests-based approach to dams and development activities in relation to indigenous and ethnic populations. It would have been a different case if Nepal had become a State Party to the ILO Convention No. 169 concerning the indigenous and tribal people. The Convention is so far the only international instrument having binding implications on the States for the protection of the rights of indigenous people.

On the part of the IFIs, the World Bank's Operational Policies on Indigenous People has recognised an inextricable linkage of these people to the natural resources and especially land. It has also recognised the customary rights of these people, both individual and collective, to lands or territories that they traditionally own.<sup>81</sup> They assert that the physical relocation of these peoples from their land may have significant adverse impacts on their identity, culture and customary livelihoods. Therefore, it recommends avoiding relocation by exploring all

alternative project designs, and to carry out any activities without free, prior and informed consultations.<sup>82</sup>

Similarly, the ADB has defined indigenous people as those who have distinct and separate cultural and social identities; social, economic, cultural and political institutions; distinct language and residing in a particular ancestral territory with collective and intimate attachment with the natural resources in the territories.<sup>83</sup> ADB's policies have recognized the indigenous people as one of the most disadvantaged groups in the development process and in benefit sharing. The lack of economic, social, political and legal representations in

decision-making often limits their capacity to defend their interests in and rights to development. So wherever the projects funded by IFIs identifies an impact on indigenous peoples during the Initial Social Assessment or Environmental Screening,<sup>84</sup> proactive measures should be taken to protect their rights and concerns after taking informed consent from them. According to ADB's Policy on Indigenous Peoples, Indigenous People Development Plan has been mandatory for the development project that affects indigenous peoples adversely and significantly. Specific measures and approaches must be taken to mitigate the negative effects on the indigenous people, wherever appropriate the projects are to be redesigned.<sup>85</sup>

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1 Ibid, pp. 301-305.

2 The Constitution of Nepal, 2047 (1990), Art. 16: Every citizen shall have the right to demand and receive information on any matter of public importance provided that nothing in this Art. shall compel any person to provide information on any matter about which secrecy is to be maintained by law.

3 EPR, (2056) 1997, Rule 8(2) and 11(2).

4 Water Resources Rule, 2050 (1993), Rule 19, and Electricity Rule, 2050 (1993) Rule, 16.

5 National Environmental Impact Assessment Guidelines, (2050) 1993, Guideline 28, Release for Public Review: A draft environmental impact assessment report must be released for public review and comments. The review of the draft environmental impact assessment report and the comments received should be made available for review by the project proponent, along with non-government organisations, agencies, independent institutions and concerned public.

6 Department of Electricity Development, 2058 (2001), Manual for Public Involvement in Environmental Impact Assessment (EIA) Process of Hydropower Projects, Private Sector Hydropower Development Project, Government of Nepal jointly with USAID and IRG, Kathmandu.

7 Public Information Packages (PIP) may include informative brochures or pamphlets describing all aspects of the development project, written in easily understandable language. They are an important source of information for the public, and can be used effectively to sensitize the public to their rights and opportunities for involvement.

8 A Public Information Centre (PIC) is a convenient and easily accessible facility where the public can view and study relevant information about project-related developments, can be sensitized as to their rights and opportunities to become involved, and can ask questions and get answers.

9 Preamble to Sec. III, 23.2. One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate in environmental impact assessment procedures and to know about and participate in decisions, particularly those which potentially affect the communities in which they live and work. Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures.

10 The World Bank 2002, Information Disclosure Policy, Para. 31 and 34.

11 Ibid, Para. 33.

12 ADB 2005, Public Communications Policy, Para. 27.

13 Ibid, Para. 92.

14 Japan Bank for International Cooperation, 2002 Guidelines for Confirmation of Environmental and Social Considerations April, Para. 5(1).

15 Ibid, Para. 5(2), JBIC endeavors to disclose information in a manner that allows enough time before decisions are made on funding: Upon completion of the screening of a project, JBIC discloses, as soon as possible, the project name, country, location, an outline and sector of the project, and its category classification, as well as the reasons for that classification; and for Category A and Category B projects, JBIC publishes the status of major documents on environmental and social considerations by the borrowers and related parties, such as EIA reports and environmental permit certificates, etc. issued by the host government on the JBIC website, and promptly makes available the EIA reports etc. After executing a loan agreement, JBIC provides the results of its environmental reviews of projects in Categories A, B and FI for public perusal on the JBIC website. JBIC pays due consideration to the confidentiality of the commercial and other matters of the borrowers and related parties, taking into account their competitive relationships, and encourages them to exclude such confidential information from any documents on environmental considerations submitted by them that may later be subject to public disclosure. Any information that is prohibited from public disclosure in the agreement between JBIC and the borrower may be disclosed only with either the agreement of the borrowers and related parties or in accordance with legal requirements.

16 Ibid, Para. 7.

17 Art. 88(2) of the Constitution of Nepal 1990 provides that: The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy has been provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or settle the dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of habeas corpus, mandamus, certiorari, Prohibition and quo warranto.

18 Pathak, N.P., 1997 Gopal Siwakoti 'Chintan' et al. vs Ministry of Finance, Nazir Kosh, Aatharia Pustak Bhandar, Kathmandu.

19 Siwakoti, G. 'Chintan', 2004: 'How donors reject governance and human rights: two case studies of hydropower and water supply projects in Nepal', The Reality of Aid 2004: An Independent Review of Poverty Reduction and Development Assistance Focus on Governance and Human Rights, IBON Books and Zed Books, Manila.

- 20 World Commission on Dams, 2000, Op. Cit., p. 217.
- 21 See, Saasa, O. S. et al. 2003: Improving Effectiveness of Finnish Development Cooperation Perspectives from the South, Ministry of Foreign Affairs of Finland, Helsinki, pp. 154-155.
- 22 [http://www.unep.org/dams/files/GPA\\_Proceedings.pdf](http://www.unep.org/dams/files/GPA_Proceedings.pdf)
- 23 For details, see, Tisha Greyling, International Association of Public Participation (IAP2), "Public Participation Processes and Techniques", Gaining Public Acceptance: Issue Based Workshop Proceedings Nairobi, Kenya, October 5, 2005.
- 24 Ibid.
- 25 Pathak, N.P., N.P. Khanal and Prakash Mani Sharma vs Government of Nepal Cabinet Secretariat, Nirnaya Saar Kosh 2060, Pairavi Prakashan, Kathmandu, 2060 B.S. p. 646.
- 26 Pathak, N.P., Gopal Siwakoti 'Chintan' et al. Op. cit.
- 27 Department of Electricity Development 2058 (2001), Op. cit.
- 28 News entitled 'Kali Gandaki 'A' Aayojana Bitholna Khojeko Aarop ma ghash Upahar' (Grass gift in accusation of disrupting Kali Gandaki 'A' project) was published in Gorkhapatra Daily dated 18 Shrawan 2056 (August 2, 1996).
- 29 Environment Protection Act, 2053 (1997), Sec. 7.
- 30 Ibid.
- 31 Environmental Protection Rules, (2054) 1997, Rule 4; and National Environmental Impact Assessment Guidelines, 1993, Guidelines 14 and 28.
- 32 Ibid, Guidelines 32 and 35.
- 33 Ibid, Guideline 23.
- 34 Ibid, Guideline 27 (a).
- 35 Ibid, Guidelines 32 and 34.
- 36 Ibid, Guideline 27 (e).
- 37 World Bank in Environment Policy of the ADB 2002, p. 26 <http://www.adb.org/documents/policies/environment/>
- 38 Environment Policy of the ADB 2002, Para. 23.
- 39 Ibid, Para. 24.
- 40 Ibid, Para. 32.
- 41 Ibid, Para. 71.
- 42 Ibid, Para. 73.
- 43 Ibid, Para. 74.
- 44 Ibid, Para. 76.
- 45 Ibid, Para 77.
- 46 Ibid, Para 78.
- 47 The World Bank, Operational Policies 4.01 Environmental Assessment, Para. 1; ADB, Environmental Assessment Guidelines, Para. 17 and JBIC, Guidelines for Confirmation of Environmental and Social Considerations, 2002, Point 5.
- 48 The World Bank, Operational Policies 4.01 Environmental Assessment Para. 8; ADB Environmental Assessment Guidelines, Para. 26, and JBIC, Guidelines for Confirmation of Environmental and Social Considerations, 2002 Point 4(2).
- 49 The World Bank, Operational Policies 4.01 Environmental Assessment, Para. 14 and ADB Environmental Assessment Guidelines, Para. 31.
- 50 The World Bank, Operational Policies 4.01 Environmental Assessment, Para. 15 & 16 and ADB, Environmental Assessment Guidelines, Para. 32.
- 51 See also, Rai, K., 2004. Dams and Development, The Nepali Times, 26 December 2003-1 January 2004, p. 6.
- 52 Land Acquisition Act, 1977, Sec. 3 and 4.
- 53 Ibid, Sec. 7(1) and 30(2).
- 54 Other members are Chief of Land Revenue or Land Administrative Office, a representative of the project for what the land is going to be acquired, and a representative of the DDC.
- 55 Electricity Act 2049 (1992), Sec. 33(3).
- 56 Ibid, Sec. 32.
- 57 See Bisangkhe, S., 2004, Water Project Related Involuntary Displacement in Nepal, in Water Nepal, Vol. 11, No. 1, Aug 2003-Jan 2004.
- 58 Land Acquisition Act, 2034 (1977), Sec. 14.
- 59 The Tenth Plan (2002-2007), National Planning Commission, Kathmandu, 2002. See, also, Population Monograph of Nepal, Vol. 2, Central Bureau of Statistics, Kathmandu, 2003.
- 60 Agenda 21, Chapter 26 Recognising and Strengthening the Role of Indigenous People and their communities.
- 61 Ibid, Objectives 26.3 b and c.
- 62 Rio Declaration on Environment and Development, Principle 13.

63 Ibid, Principle 22, Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

64 Johannesburg Declaration on Sustainable Development 2002, Principle 25.

65 Durban Declaration 2001 (World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance), Principle 43.

66 Adopted by UN General Assembly, Resolution 41/128, December 4, 1986.

67 Declaration on Right to Development 1986, Art. 1.

68 Ibid, Art. 2.

69 Ibid.

70 Ibid, Art. 8.

71 UN General Assembly resolution 1803 (XVII) of December 14, 1962, "Permanent Sovereignty over Natural Resources" adopted by the General Assembly resolution 1803 (XVII) of December 14, 1962.

72 UN Resolution 1803 (XVII), Art. 1.

73 Ibid, Art. 4,

74 ILO Convention No. 169, Art. 1.1(a).

75 Ibid, Art. 2 and 4.

76 Ibid, Art. 7.

77 Ibid, Art. 14(1) and 15(1).

78 Ibid, Art. 16.

79 Art. 10, the Draft Declaration on the Human Rights of Indigenous Peoples: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. Art. 27, the Draft Declaration on the Human Rights of Indigenous Peoples: Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

80 The Constitution of Nepal, Art.s 25.

81 The World Bank Operational Policies 4.10 on Indigenous Peoples, 2005, Para. 16 (a).

82 Ibid Para. 20.

83 ADB's Policy on Indigenous Peoples, 1998, Para. 8 & the World Bank Operational Policies 4.10 on Indigenous Peoples, 2005, Para. 4.

84 ADB's Policy on Indigenous Peoples, 1998, Para. 34 & the World Bank Operational Policies 4.10 on Indigenous Peoples, 2005, Para. 8.

85 ADB's Policy on Indigenous Peoples, 1998 Para. 37 & the World Bank Operational Policies 4.10 on Indigenous Peoples, 2005, Para. 13.



4

Institutional  
**Mechanisms &  
Remedies**

Laws and policies alone do not produce expected results and outcomes unless they are supplemented with effective implementing institutions and mechanisms. One main criticism of international law is the lack of adequate monitoring and enforcement mechanisms unlike the provisions of police force and court systems under national legal systems. It is not always the case of the absence of enforcement provisions. These human rights mechanisms and treaty-monitoring bodies receive complaints, hear grievances and offer remedies in forms of non-binding resolutions, comments and recommendations. They can also create pressure for sanctions and the use of force under the UN Charter and through the General Assembly and the Security Council. But one fundamental question is the political will of the States to cooperate and to act. The provision of the UN International Court of Justice is a separate case as no individuals or private entities can bring cases before it. It is accessible only to the States. This section discusses various available institutional mechanisms and remedies under domestic and international legal and policy systems. The section also touches upon provisions that the affected persons or victims of dam projects could use to ensure compliance with laws, policies and promises in securing their rights and interests.

## 4.1 Domestic Level

### 4.1.1 Administrative Mechanisms

The administrative mechanisms are established under the executive authority of the State. Such mechanisms are intended to implement all laws enacted by the Parliament, policies and regulations made by the government and international obligations created subsequent to the ratification or accession to international treaties and agreements. There are various ministries, departments and agencies whose powers and functions are directly or indirectly related with dams. Generally and in terms of issues and sectors in connection with compliance, all public authorities have the duty to provide information to citizens which are of public interests.

For example, all information-related issues related to dam building fall within the jurisdiction of concerned public agencies. Sometimes, the private sector may also be involved depending on its involvement in the dam building. Water resources-related issues are handled by the Ministry of Water Resources and its departments. The issue of public hearing, public participation and the EIA, including mitigation plans, fall within the jurisdiction of the Ministry of Environment, Science and Technology. In the same vein, questions related to land acquisition and compensation are defined within the authority of the Home Ministry. This institutional landscape creates its own challenges in relation to implementation, coordination and compliance. The following section discusses the role and functions of these various ministries and departments/agencies in ensuring compliance on the above-mentioned subject matters.

## Ministry of Water Resources and Related Agencies

The Ministry for Water Resources holds the primary jurisdiction over water resources and hydropower. It is divided into policy, operational, implementation and regulation units. The main agencies are the Department of Irrigation, Department of Electricity Development, Department of Water Induced Disaster Management and Nepal Electricity Authority . DoED is responsible for licensing, and survey and development of hydropower projects on a competitive basis. Besides, the Water and Energy Commission Secretariat , headed by the Minister for Water Resources, formulates periodic plans and makes recommendations for suitable hydropower development.

Relating to water resources and dams, the main institutions are the Ministry of Water Resources, the DoED and the NEA which have the primary responsibility of planning, implementation, monitoring and maintenance of water and energy-related projects. As NEA is the main implementing agency of electricity-related projects, it has the duty of coordinating with all other relevant institutions to address project-related all social and environmental issues, claims and grievances, e.g. coordinating with District Administration Offices for land acquisition and settle compensation. The interested, concerned and affected persons or families can approach the related ministries, departments or agencies and project offices for information.

## Ministry of Environment, Science and Technology

In the case of EIA and mitigation plans, the Ministry of Environment, Science and Technology is the main agency to ensure compliance with the provisions of the EPA and the EPR. It also formulates necessary plans and policies for the protection of environment, including the adoption and updating of EIA guidelines. The Ministry serves as the focal point for environmental protection in all infrastructure projects. It examines and approves the EIA reports before the project implementation. Furthermore, it has an obligation to ensure the domestic implementation of international environmental treaties and agreements and act as a national agency to develop plans and strategies as necessary. It has a leading role to coordinate with other ministries with regard to the compliance with such treaty obligations.

The EPA permits the ministry to appoint Environment Inspector for the following functions in accordance with EIA and IEE reports:<sup>1</sup>

- » To inspect the mitigation, avoidance or control pollution as per the laws and regulations;
- » To inspect activities whether they are being conducted according to the laws and regulations or not;
- » To examine as to whether or not the activities are in accordance with the terms prescribed while granting approval to implement a project proposal; and

- » In the course of inspection as mentioned above the Environmental Inspector may, by giving a prior notice to the concerned person, organisation or proponent, inspect, examine or investigate any house, land, building, factory, industry, vehicle, industrial device, tools, machinery, animal, object, records.

In case the concerned person or organisation does not allow inspection or inhibits on the works while doing inspection, the Inspector may impose a fine of up to five thousand rupees on such persons or organisations.

### Ministry of Home Affairs

Home Ministry is responsible to ensure compliance with all land acquisition and compensation related matters. This function is conducted through CDO offices in the country's 75 districts. It has the responsibility from maintaining law and order to deal with all welfare and compensation issues. The CDO offices function not only as administrative but also as semi or quasi-judicial bodies with overwhelming jurisdictions and responsibilities. As a result, they also exercise wide range of administrative and semi-judicial discretions – sometime good in favour of victims, and sometime unfair due to political consideration, undue influence and/or corruption.

With regard to the case of dam projects, the direct relationship of the DAOs, under the Land Acquisition Act, 2034 BS (1977), is the acquisition of land, fixation of compensation amount and its payment. The CDO has the authority to receive complaints or applications, and summon the concerned individuals or institutions for records, statements, proof or documents or any other necessary statements as needed before making decisions relating to compensation. Although the amount determined by the CDO must be reasonable,<sup>2</sup> the criteria of such reasonableness are still vague thus discretionary. The CDO sets a time-limit of 15 days for the claimant to provide and furnish necessary documents and proof of claim/ownership for which compensation is to be granted, and a reasonable time for the compensation of claims relating to collaterals such as crops, livestock and trees. The CDO can also deliver notices personally and inform the time-limit for the collection of compensation or make claims if s/he is not satisfied with the land acquisition and compensation schemes.<sup>3</sup>

As for the procedures, if a landowner does not want his land or property to be acquired, s/he can file an application with reasons to the Home Ministry through the CDO offices within seven days from the date of notice. A tenant (mohi) is also eligible to file such an application. All final decisions on the applications are to be made within 15 days.<sup>4</sup> These decisions stand as equal to the decisions by the District Courts. In case the decisions are not acceptable to the landowner and/or tenant, they can lodge an appeal before the Appellate Courts.

The EPA also provides for compensation provisions from concerned persons, institutions or project proponents in case of damages caused by pollutions and related activities. The CDO office is the authority to receive complaints and provide reasonable compensation.<sup>5</sup> Similarly, the EPR provides that the affected persons or organisations can file applications mentioning all aspects of loss they have incurred.<sup>6</sup> Once an application is filed, the CDO has a duty to evaluate and fix the actual loss if necessary in consultation with other concerned district offices or the inspectors if they are appointed. The matter can also be forwarded to other concerned agencies within 30 days in case the CDO is unable to make decisions without their advice. Decisions must be made within 15 days from the date of advice received. In case the CDO is able to make decisions then it must be done so within 60 days from the date of application.

### Ministry of Local Development and Related Public Authorities

The Ministry of Local Development (MoLD) is empowered with authority to develop necessary procedures and mechanisms for distribution of benefit-sharing. It has already begun the work in consultation with ADDNC, VDCs, Municipalities and DDCs.<sup>7</sup>

It has been observed that the absence of local government bodies have severe negative impacts on local development activities and their monitoring. It would be most important to make some provisions in the future through amendment in existing laws by providing alternative mechanisms to ensure compliance with benefit-sharing and their proper utilisation. Provision must be made to directly involve the beneficiaries, the local people, the representatives of political parties and community groups in a multi-stakeholders process. Similarly, the MLD should also develop procedures and mechanisms to ensure compliance in benefit-sharing.

### Department of Electricity Development

The Department of Electricity Development (DoED) is mandated to develop and promote electricity sector by improving financial effectiveness. Created under the Electricity Act, 1992, it was previously known as the Electricity Development Centre and renamed DoED in 1999. It is responsible for assisting the MoWR in implementation of overall government policies related to power/electricity. Its major functions are to ensure transparency of regulatory framework, accommodate, promote and facilitate private sector's participation in power sector by providing "One Window" service and permit license to power projects.

The DoED also promotes and develops multipurpose projects and power projects of bi-national and/or multinational nature. Its other functions include the development of sub-sectoral guidelines and codes of practice for construction

work, quality control of power generation, transmission and distribution facilities. It provides advisory assistance to the MoWR in reforming existing policies, rules and regulations for efficient and effective development of power projects.<sup>8</sup>

### Nepal Electricity Authority

Most of the problems relating to the above issues mentioned fall within its jurisdiction and activities. Following the debate in Arun III and Kali Gandaki 'A', the NEA has established a Public Relation and Grievance Management Department in February 22, 2005. Mandated to address public grievances in a timely manner the Department does not have any decision-making role. It only acts as a mediator for complaints and grievances.<sup>9</sup> The NEA has a separate Monitoring Department to collect and evaluate monthly, quarterly and annual progress reports of its projects. It monitors other departments and district or local-level nodal offices.<sup>10</sup>

To hear grievances of the affected local people, the NEA conducts public hearings depending on the nature, size and impacts of dam projects or reservoirs. The notice of the meeting is published in Gorkhapatra Daily before 15 days of the said public hearing. The field staffs also inform local people before 2/3 days of the hearing. Formal invitation letters are sent to the concerned local groups. In the invitations, the date, time and place are mentioned but no other details are provided. Some information about the project is distributed during the hearing. Some illustrative descriptions on technical, social and environmental aspects are described by the staffs at the beginning of the meeting followed by open discussions. The public meeting is an open event where all the invited participants are treated equally. The concerns of local peoples, and problems and remedies offered are documented but no there is no guarantee that they will be incorporated in project documents.

For ensuring compliance, NEA forms some temporary team consisting of environmentalists and sociologists for monitoring depending on the nature and scale of the project. If necessary the team undertakes assessment of post-project impacts. It was the case in the KGA where a team from the ADB Headquarters visited the area and made critical comments to the NEA for failing in compliance with various social and environmental mitigation plans and make recommendations for appropriate actions.<sup>11</sup> The NEA has an Environment Department to look after the compliance with EIA and mitigation plans but it has no power to take point actions for violations. The Ministry of Water Resources, and the Ministry of Environment, Science and Technology can legally take actions but no such action has been taken so far. As a procedure, the Environment Department of NEA submits reports to the project chief who then forwards it to the consultant, who in turn forwards it to the contractor for remedial actions. Such action is

largely left to the discretion of the contractor. But the NEA Managing Director can always act to ensure compliance with contractual provisions and even cancel such contracts if they are not complied with. There is also a grievance-handling unit at project levels. The victims can submit complaints for remedies. The result of this provision has provided temporary employment for some during the project construction period.

### Local Government Bodies

The Local Self-Governance Act, 2055 BS (1999) has pursued six principles and policies for the development of local self-governance system to promote decentralization of these bodies. They are:

- (a) Devolution of powers, responsibilities, and means and resources as are required to make the Local Bodies capable and efficient;
- (b) Building and development of institutional mechanism and functional structure in Local Bodies capable of considering for local people and bearing responsibilities;
- (c) Devolution of powers to collect and mobilize such means and resources as are required to discharge the functions, duties, responsibility and accountability conferred to the Local Bodies;
- (d) Having the Local Bodies oriented towards establishing the civil society based on democratic process, transparent practice, public accountability, and people's participation, in carrying out the functions devolved on them;
- (e) For the purpose of developing local leadership, arrangement of effective mechanism to make the Local Body accountable to the people in its own areas; and
- (f) Encouraging the private sector to participate in local self-governance in the task of providing basic services for sustainable development.

Section 28 and section 93 state the functions, duties and powers of the VDCs and the ward committees respectively. The VDCs have a public duty to prepare drinking water projects in the area and implement, operate and maintain.<sup>12</sup> They also have a duty to prepare projects of irrigation, dams, canals, water channel etc. and arrange their implementations, including the distribution of electricity. The other duties include the preparation of criteria for houses, buildings, roads and other physical infrastructures etc. to be constructed within the VDCs, and approve them as prescribed. The subsection 'h' of the section 28 has enshrined functions relating to forest and environment. They also have to prepare programmes in respect of forests, vegetation, biological diversity and soil conservation and environment protection, including the security of its property. Likewise, the Ward Committees of municipality are responsible to preserve water, barren land and plant trees in the barren land and hills, steeps and in conserving the environment within the Ward.

The functions, duties and powers of the DDCs are defined under section 189. The functions of DDC include the development of rural drinking water, housing schemes and prepare plans on forests, vegetation, biological diversity, soil conservation, irrigation and environment etc. Relating to hydropower, they have the duty to formulate, implement, operate, distribute, maintain and repair mini and micro hydropower projects.<sup>3</sup> The VDC has judicial power to hear and settle cases on border/boundary land, public land, canals, dams, ditches, or allocation of water.<sup>4</sup> The VDC has right also to form arbitration committees to hear and settle the cases filed in the VDC.<sup>5</sup> Similarly section 36, 37, 38, 39, 40, 41, 42 has made provision on exercise of jurisdiction, process of decision making, crossing off the case list, procedures on the cases, right to appeal, enforcement of decision and transfer of cases respectively.

### Other Public Bodies dealing with Compliance

Depending on the nature of cases of violations of existing rules and rights, the complaints could also be made at other public bodies. For examples, the issue related to controversy over lands can be brought before the Land Revenue Office. Similarly, if the non-compliance with any existing and international legal and human rights provisions are violated during dam planning, construction and maintenance, they could also be brought in for investigation before the National Human Rights Commission (NHRC), established in 2053 BS. The NHRC has a duty to receive complaints from any persons against the violation of some rights and suggest remedies. The NHRC can recommend for remedies to the concerned government officials and/agencies for compliance such as the payment of compensation for the loss.<sup>6</sup> Although the NHRC has no power to file cases on behalf of the victims like the Commission on the Investigation of the Abuse of Authority, it has the power to put pressure on the concerned government officials or agencies. However, the NHRC is not authorised to investigate the violations of economic, social and cultural rights but only those of civil and political rights. The right to information and compensation falls under the civil rights. In any case, the NHRC, within the scope of individual rights, can investigate non-compliance issues for the purpose of redressing violations caused by dams or any development projects.

If the above problems are associated with the Dalit communities, they can be investigated separately by the National Dalit Commission established in March 8, 2002. Similarly, women's rights-related issues could be brought before the National Women Commission established in March 8, 2002. However, the functions, the jurisdictions and remedial procedures are not clearly defined in both commissions. They were created by Cabinet decisions and not by the Parliament. Nepal's new parliament needs to enact separate legislations once it comes into existence.

### 4.1.2 Judicial Mechanisms

Judicial mechanisms are the most authoritative means of seeking appropriate remedies on all matters of violations, including dams and development projects. The judicial mechanisms are more specific, time-bound that their decisions are binding on government agencies as well as the public who are treated as equal before the law. The judicial mechanisms are considered more impartial and independent from the government and from any financial or political influence. To approach to the courts, the cases must be brought in accordance with the existing laws and regulations or under the public interest litigation.

According to the Judicial Administration Act, 2048 BS (1991), the District Courts have jurisdiction over all cases as the first tier of the judiciary, except provided for by law. The Appellate Courts can appeal on decisions and judgements by all District and Special Courts as well as bodies like the CDO and concerned ministries and departments. It means the cases relating to all decisions made on land acquisition and compensation can be heard by the Appellate Courts. But the Appellate Courts can also hear cases directly as prescribed by law as in the case of the Civil Rights Act, 2012 (1955). This law is a supplementary legislation in guaranteeing various civil rights, including the right to property and compensation for any loss or damage.<sup>7</sup>

The Supreme Court is the highest court of law. All decisions made by the Supreme Court become final and they have to be enforced as equal to the law. It has two kinds of jurisdictions — ordinary and extraordinary. Under the ordinary jurisdiction, appeals are heard on cases decided by all the lower courts. Under extraordinary jurisdiction, the Supreme Court can receive direct writ petitions in case of violations of fundamental rights. It can even declare the existing laws and regulations unconstitutional and void if they are found against the Constitution through judicial reviews. For the purpose of this study, the right to equality as well as freedoms of speech, expression, assembly, association, profession, publication, information, property, privacy etc., are directly related to dams and development issues. The violations of these rights can be challenged at the Supreme Court according to article 23 of the Constitution. In case of the lack of clear provisions and remedies in other laws or in case of constitutional disputes, cases can also be filed under the most popular public interest litigation and seek constitutional remedies under Article 88(2). In the past 15 years, the Supreme Court has decided many landmark cases under the public interest litigation from the Godavari Marble<sup>8</sup> to Arun III<sup>9</sup> cases. The Supreme Court has all the power to issue any orders as for remedies as it finds appropriate.

The above provisions relating to administrative and judicial remedies show that they can be used effectively in

seeking remedies for the violations of rights and interests of different kinds by dams and any other development projects. But some of the problems for their effectiveness are: a) lack of knowledge about the procedures and remedies among the general public, and in victims in particular; b) lack of inter-agency coordination; c) the high cost of complaints/litigation and delays; d) overlapping in duties and jurisdictions; and e) poor enforcement of decisions and judgements.

## 4.2 International Level

### 4.2.1 International Law and Ensuring Compliance

In addition to domestic arrangements, Nepal is also bound with international instruments and mechanisms towards ensuring compliance in dam projects. In fact, as a result of economic and trade globalisation, domestic legal systems are becoming weaker compared with the powerful international legal regimes. The most important amongst them is the international law developed under the auspices of the multi-lateral international institutions, particularly, the United Nations and its specialised agencies such as the International Labour Organisation and the United Nations Educational, Scientific and Cultural Organisation.

These international legal instruments ranging from human rights, environment and development are categorised as those having binding, and non-binding effects. The conventions and covenants, also known as hard laws in forms of treaties and agreements, are regarded as the legally binding instruments upon their ratification by the States. The declarations, resolutions and programmes of actions are considered only as morally binding framework as the soft laws. Whereas, although it is only a declaration, the Universal Declaration of Human Rights is regarded as a legally binding document through its wider acceptance for six decades, in accordance with the principles of customary international law.

Particularly upon the ratification of these treaties and agreements, the States Parties become internationally obligated to undertake necessary legislative, executive, judicial and other necessary measures as earliest within their maximum capacity. These measures also include education, training, dissemination, allocation of resources, ensuring benefit sharing, etc. as part of compliance with the international obligations. In this connection, the UN bodies are known for being more pro-human rights in all development projects by including all civil, political, economic, social, cultural, environment, development, and peace unlike the pro-corporate international agencies such as the World Bank and World Trade Organisation (WTO).

The second source of international law is the multilateral agreements, understandings as well as policies and guidelines developed by various other regional and international inter-governmental organisations. They

range from the IFIs to the WTO and the European Union (EU) and other regional bodies in the Asia-Pacific, the Africa and the Americas. These frameworks are enforced upon the States and governments, although not binding in all cases, through contacts and lending conditionalities. Except the WTO which is focused only on free trade, these policies and procedures of the IFIs and other bodies cover the issues and rights relating to environment, information disclosure, gender, fisheries, water resources, indigenous peoples, forestry, involuntary resettlement, energy and other development areas. These entire rubrics come into relevance in the case of dams where policies and procedures are set as mandatory guidelines for projects financed by them. Compared to human rights approach to dams and development, these secondary source of international law instruments of economic, financial and trade largely promote free-market and free-trade policies, and they are found more unfriendly towards the vulnerable sections of the society and environment.

Most importantly and at least in principle, Nepal has fully integrated into the international legal regime in place of domestic ones. The enactment of the Nepal Treaty Act, 2047 BS (1990) is a clear example of such a political will by declaring the supremacy of international law over domestic law as described under article 9. It means that the affected persons, groups and citizens can demand for ensuring compliance in dam projects more in accordance with the international legal instruments and policy frameworks. When approaching to domestic courts and mechanisms, they can demand for remedies not only under domestic but also international law which Nepal has recognised and accepted. And, in case of insufficient or unsatisfactory remedies from domestic mechanisms, they can always approach to the UN human rights and environmental bodies, the IFIs and other bilateral agencies such as JBIC can also be approached with information and complaints seeking compliance and justice for victims of dams.

One significant achievement of the 1990 political change is the ratification of all major international human rights instruments by the Interim Government of Krishna Prasad Bhattarai. The objectives and spirits of these documents are clearly reflected in the WCD report as well<sup>20</sup>. They include the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), the ICCPR, 1966, the International Convention on the Elimination of All Forms of Racial Discrimination, 1965 (CERD), the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW), and the Convention on the Rights of the Child, 1989 (CRC), and the ILO Convention No. 169 on Indigenous and Tribal Peoples.

In brief, the common Articles 1 and 3 of the ICESCR and the ICCPR provide for the right to self-determination. The ICCPR guarantees all fundamental rights to information disclosure, freedom of speech and expression, assembly and

publication that are essential for an effective and meaningful public participation. If implemented effectively, these freedoms also make the EIA and mitigation plan process as well as the right to property in relation to land acquisition and compensation more complete and comprehensive. Similarly, the ICESCR, under article 11, further recognises the right of each persons and families that includes the right to adequate and nutritious food, clothing and housing and primary health care to improve living conditions. Likewise, the CERD, the CEDAW and the CRC also provide for the equal and equitable sharing of public resources as relevant and appropriate.

The large varieties of international law and policies have become more and more influential and mandatory either through their ratification by the States or by compulsions created by the forces of globalisation in re-shaping existing national legal and governance systems. Depending on the source and nature of these laws and policies, the Member States or the loan/grant recipient countries face global criticisms, suspension of economic relations and even sanctions in case of violations of non-compliance with international obligations or lending conditionalities. Harmonisation of international law framework with domestic laws, policies and actions has become a compulsion for a country like Nepal. As result, it is time to discuss these frameworks so that the compliance provisions in relation to the construction of good, accountable and sustainable dams could be planned from the beginning and continued throughout the project-cycle.

Today, many of our domestic laws and policies are directly influenced by international law. They range from the laws created under the United Nations to other specialised agencies and international financial and trade institutions. They create domestic obligations for their effective implementation upon the signing of loan or cooperation agreements and the ratification of treaties and agreements. The following chapter provides some provisions and institutions relevant to this study:

#### **4.2.2 International Financial Institutions The World Bank**

In 1993 the World Bank created mechanism of Inspection panel which is mandated 'to monitor, evaluate and sue against it' within its own institutional framework. The procedures of the Panel are given in Box 10.

Based on the Panel's findings and the Bank Management's recommendations, the Board then takes the final decision on what should be done. In the complaints field, the decisions of the Panel are found mixed. Arun III was the first test-case ever-filed in which it made the findings mainly on social and environmental compliance. Based on the findings of the Panel the Bank cancelled the project on August 2, 1995.<sup>21</sup>



### **Box 10: Operational Procedures of Inspection Panel of the World Bank**

When the Panel receives a "Request for Inspection" about a Bank-financed project from affected people in a project area, the following steps are taken:

- » The Panel sends the request to Bank Management who prepare a response to the allegations and submit it to the Panel.
- » The Panel makes a preliminary review of the request, conducts an independent assessment of the merits of the Bank Management response to it, and recommends to the Bank Board whether or not the request should be investigated.
- » If the Board approves a Panel recommendation to investigate, the Panel then proceeds with the investigation.
- » When the Panel finishes an investigation, it sends its findings to the Board as well as to Bank Management.
- » The Bank Management then has six weeks to submit its recommendations to the Board on what, if any, actions the Bank should take in response to the Panel's findings.

Source: <http://wbln0018.worldbank.org/ipn/ipnweb.ns>

#### **Asian Development Bank**

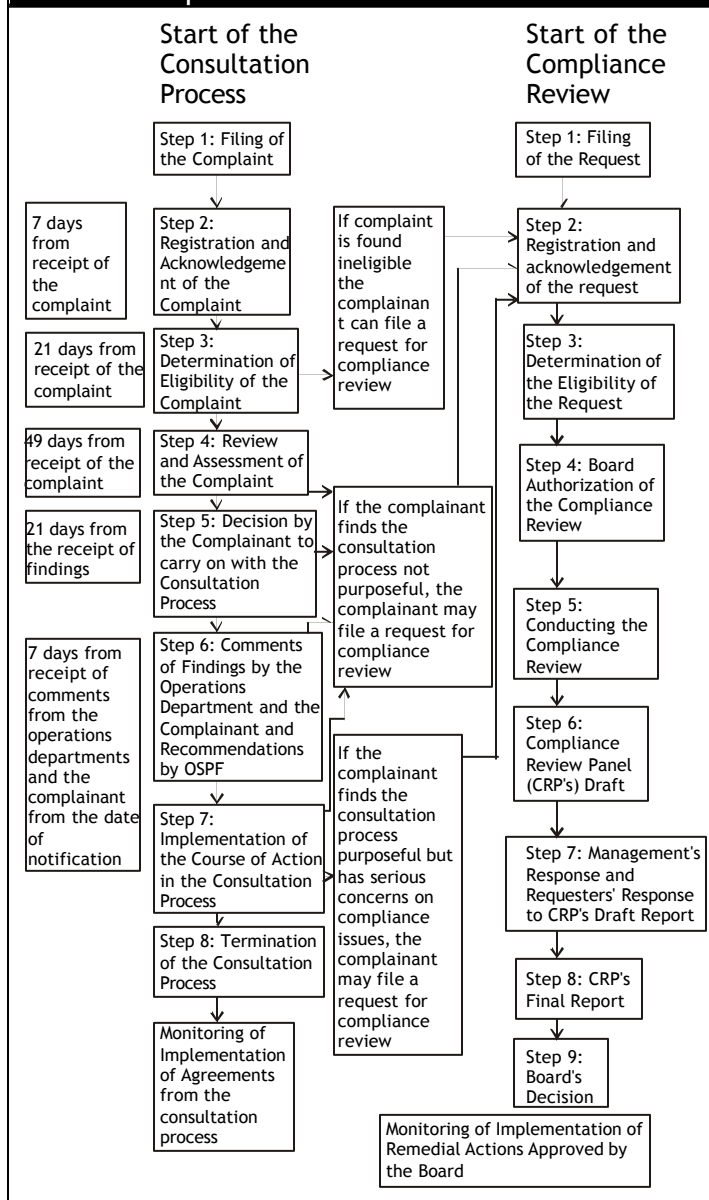
In 2003, the ADB has formulated a new Accountability Mechanisms to replace the previous Inspection Function. The mechanism is divided into two levels: Consultation Phase and Compliance Phase. The details of the mechanisms are shown in the flow chart below.<sup>22</sup>

From Nepal, the issues of non-compliance with ADB's policies relating to information, public participation, EIA, forestry, indigenous peoples, and compensation and resettlement were first filed by the local people of Melamchi Valley in relation to the Melamchi Water Supply Project (MWSP). It was the second case to reach the Office of Special Project Facilitator and the Compliance Review Panel. This complaint made some progress as regards to access to project document and information, and speedy payment of pending compensation.

#### **Japan Bank for International Cooperation**

The JBIC has developed a policy to make project proponents responsible the on environmental and social considerations. For this, it has adopted Guidelines for Confirmation of Environmental and Social Consideration in April 2002 which are to be followed in all projects financed or co-financed by it.<sup>23</sup> On the side of the JBIC, it first conducts screening and environmental reviews of projects before making decisions for funding. The first step is the screening of projects according to their classification which is done on the basis of potential of the project; the substance, degree and uncertainty of its potential

## Box 11: The ADB Accountability Mechanism and Inspection Procedures



environmental impacts as well as the environmental and social context of the proposed project site and surrounding areas. The second step is the environmental review according to the procedures specified for each category of the project.

The third step is the confirmation by the JBIC with the project proponents about its environmental and social impacts, compliance plan and monitoring. For the task of the monitoring, the borrowers and related parties have to provide necessary information to JBIC on the basis of which it conducts its own investigation when necessary. If the third parties point out in concrete terms that environmental and social considerations are not being fully undertaken, JBIC forwards such claims to the borrowers and, if necessary, encourages them to request the project proponents to take appropriate actions. Based on

project proponents' response to the claim, JBIC confirms whether to carry out the investigation of the specific claim, the examination of countermeasures and their incorporation into the project plans through transparent and accountable processes.

JBIC may request the cooperation of the borrowers and related parties in conducting its own investigations to confirm the state of undertaking of environmental and social considerations. If JBIC finds that there is a need for improvement in the situation with respect to environmental and social considerations, it may ask the project proponent, through the borrower, to take appropriate action in accordance with the loan agreement. If the response of the project proponent is inappropriate, JBIC may consider taking its own actions in accordance with the agreement, including the suspension of the disbursement. The JBIC also accepts objections regarding non-compliance but there is no provision of any institutional mechanism to take any action against non-compliance.

### 4.2.3 United Nations Human Rights Bodies

There are various international mechanisms available under the UN system of human rights an environment depending on the nature of violations of affected persons' or communities' rights and interests. These mechanisms are classified as general/administrative and the treaty-monitoring bodies. As a UN Member, the citizens of Nepal have access to all the general human rights mechanisms, and as a State Party to various international human rights instruments, they also have access to the treaty-monitoring bodies having all their offices at the UN Office in Geneva.<sup>24</sup> Depending on the functions and the nature of complaints that could be made are described briefly as below:<sup>25</sup>

#### UN High Commissioner for Human Rights

The United Nations has established an Office of the High Commissioner for Human Rights to look after all human rights issues and problems worldwide. The mandate of the High Commissioner is to:

- Work for the promotion and protection of all human rights for all, support relevant human rights bodies and institutions, provide advisory services and technical assistance at the request of the State concerned and coordinate education and public information programmes in the field of human rights;
- Enhance international cooperation for the protection and promotion of human rights;
- Respond to situations challenging human rights around the world. This includes playing an active role in removing current obstacles for the full realisation of human rights, prevent the continuation of human rights violations, and engage in dialogue with governments for the improvement of and respect to human rights.

The High Commissioner works for the prevention of violations of human rights and help in removing obstacles and challenges. It also establishes offices in countries with severe human rights situations and work with the governments and non-governmental organisations. There is also one country office in Nepal since 2005 to monitor the human rights situations in the country. It has a mandate to receive information from any sources regarding human rights violations, monitor the human rights situations, prepare reports for the UN human rights bodies, assist governments in their human rights programmes and engage with civil society in promotional activities.<sup>26</sup>

### UN Commission and sub-Commission on Human Rights

The UN Commission on Human Rights (CHR), to be replaced by the Human Rights Council from June 2006, is the main human rights in making human rights laws and policies. It is also the highest body in discussing and monitoring human rights situations around the world. It has a mandate to examine, monitor and report the human rights situation in specific countries or territories. The CHR has also established various working groups and special rapporteurs in many areas of human right and their violations. These groups and rapporterus also cover the problems of internally displaced persons, indigenous peoples and minorities. Anyone can send information directly to these mechanisms asking for their help to remedy related human rights violations. As the members of the CHR are elected government representatives, it is sometime hard to find immediate remedies and responses from it due to vested governmental interests and their undue influence.

There is also a subsidiary human rights body of the CHR which is known as the UN Sub-Commission for the Promotion and Protection of Human Rights. Unlike the CHR, the Sub-Commission is composed of independent experts although elected by governments from different regions. Its main functions are to undertake studies on human rights issues, to make recommendations to the CHR concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms, the protection of racial, national, religious and linguistic minorities and to carry out any other functions relating to any kind of human rights, including the problem of compensation, resettlement and rehabilitation.<sup>27</sup>

### Treaty-Monitoring Bodies

There are several committees established under the various human rights instruments. They are also known as the treaty-monitoring bodies.<sup>28</sup> The Human Rights Committee (HRC), based at the UN Headquarters in New York, is established under the ICCPR. It has a mandate to receive

complaints from any victims of violations of all civil and political rights. Before bringing such complaints, the victims first try their best to find remedies under the domestic laws and the courts. The complaints have to be filed within six months from the date of any decision made by the highest judicial authority of the country which is the Supreme Court. The complaints can also be filed directly and immediately if the there are no domestic remedies available or if the courts are not found impartial and effective. This is the case of military rule or absolute dictatorship in the country.

In the case of dams projects, all violations of access to information and documents; freedom of speech, expression, publication, assemblies, associations, publication, movements, etc; discriminatory treatment of all kinds from employment to compensation and the right to property could be brought before the HRC. Once the complaints are received and accepted, the HRC asks the government for written responses and makes decisions on the merit of the complaint. It finally makes comments and recommendations suggesting for appropriate remedies. In this sense, the HRC is considered as a kind human rights court.

In addition, there are also other committees known as the Committee on the Elimination of Racial Discrimination (CERD); the Committee on Economic, Social and Cultural Rights (CESCR); the Committee on the Elimination of Discrimination against Women (CEDAW); the Committee against Torture (CAT) and the Committee on the Rights of the Child (CRC). Compared to the HRC, not all these committees have formal complaint procedures but any information and complaints relating to the violations of the rights of the affected persons, families and communities as caused by an dams or other infrastructure projects can be brought before these committees. The only requirement is that the complaints must be related to the violations of one of the rights provided under the respective human rights treaties. Once such complaints are received, these committees respond to or document such information in their reports. They can also write and create pressures on the concerned governments or corporations involved in committing violations and failing in ensuring compliance. These committees can also ask the governments to provide details of such violations and available remedies for justice when discussing the country's periodic progress reports.<sup>29</sup> Such periodic reports are to be submitted every two years under the ICCPR, the CERD and the CAT, and every four years in relation to the CEDAW, and every five years as regards to the ICESCR and the CRC. As Nepal has ratified all these treaties and has obligations to submit all these reports as mentioned above, the scope of influencing the national and international decision-making in favour of the dam-affected victims is huge now and in future.

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- 1 EPA, 2053 (1997), Sec. 8.  
2 Land Acquisition Act 2034 (1977), Sec. 7(3).  
3 Ibid.,Sec. 9(3).  
4 Ibid.,Sec. 11.  
5 EPA 2053 (1997), Sec. 17.  
6 EPR 2054 (1997), Rule 45.  
7 See, Dixit, A. et. al., Recognising Entitlements and Sharing Benefits: Emerging Trends in Nepal's Hydropower Terrain, IUCN-The World Conservation Union Nepal and Nepal Water Conservation Foundation (NWCF), Kathmandu, 2005.  
8 For details, visit, [www.doed.gov.np](http://www.doed.gov.np)  
9 See, [http://www.nea.org.np/anrepo5/central\\_activities.htm](http://www.nea.org.np/anrepo5/central_activities.htm).  
10 Ibid.  
11 This was done after the formal complaints made by WAFED and other local affected groups in June 27, 2003.  
12 Local Self Governance Act, 1999, Sec. 28 (b).  
13 Ibid.,Sec. 189 (c).  
14 Ibid.,Sec. 33.  
15 Ibid.,Sec. 34 1.1  
16 See, Art.9-12 of the National Human Rights Commission Act 2053 BS about the functions and duties, jurisdiction, investigation process and remedial actions to be taken by the Commission.  
17 Civil Rights Act,2012 (1955), Art. 9.  
18 See, Surya P. Dhungel vs. Godavari Marble Industry. Pvt. Ltd. et al, Nepal Kanoon Patrika (NKP), Golden Jubilee Special Issue, 2052, Supreme Court, p. 168.  
19 See, Gopal Siwakoti 'Chintan' et al vs. Nepal Government et al, NKP, 2051, Supreme Court, p. 255.  
20 World Commission on Dams, 2000, op. cit., 5, pp. 200-203.  
21 See, for details, [www.worldbank.org](http://www.worldbank.org)  
22 Accountability Mechanism: Listening to Communities Affected by ADB-Assisted Projects and Enhancing Development Effectiveness, Asian Development Bank, Manila, 2003.  
23 Japan Bank for International Cooperation, Guidelines for Confirmation of Environmental and Social Consideration, April 2002, <http://www.jbic.go.jp/english/environ/guide/eguide/index.php>  
24 Shrestha, N., 2059 BS (2002):UN, International Human Rights Law and Nepal in Human Rights and Legal Remedy in Nepal , Gopal Siwakoti 'Chintan' (ed.), Tribhuwan University Human Rights Centre, Kathmandu  
25 See,<http://www.ohchr.org/english/bodies>.  
26 Satyagraha, 2062: Human Right Organization of Nepal (HURON), Kathmandu, Annual issue, No. 10, pp. 42-53.  
27 Ibid.  
28 Shrestha, N., 2059 BS (2002), op cit, 127.  
29 Ibid.

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# Conclusion & Recommendations

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## 5.1 Conclusion

The WCD was established in response to debates around the issue of performance of large dams and their outputs. It was probably the first global multi-stakeholder initiative in addressing global problems.<sup>1</sup> The mandate of the WCD was to review the development effectiveness of large dams and assess the potential of their alternatives for water and energy development. Its report included a framework for the planning, design, appraisal, construction, operation, monitoring and decommissioning of dams. The WCD report has made recommendations in the form of strategic priorities for decision-making and 26 guidelines to pursue those strategic priorities. Among its 26 guidelines, five (from no 21 to 25) concern ensuring compliance. Nepal needs to pay serious attention to incorporate these guidelines into Nepali laws and policies towards ensuring compliance in all water and energy-related projects in the future.

The 1990 Constitution of Nepal has provided for the right to equality; freedoms of speech, expression, assembly, association, movements, publication, property and the right to information are directly or indirectly related to the compliance with rights and interested to be projected when building dams. The EPA, the EPR and the LAA broadly covers EIA and mitigation issues as well as the issue of land acquisition, compensation and limited resettlement plan. With regard to the environmental compliance, the EIA Review Committee consisting of independent consultants, concerned institutions, and others is mandated to review scoping, terms of reference, and the EIA findings but not empowered to express opinion on the environmental performance of a project during construction and operation. Issues of performance bond or insurance and the trust fund are not adopted in any legal provision of Nepal, while some provisions of EIA guidelines relate in some manner to the integrity pact.

Apart from the domestic legal and policy regimes, Nepal has comprehensive international obligations created under series of human rights and environmental instruments. The provisions of these instruments are recognised as the supreme law over domestic law and many provisions directly deal with the rights and interest issues of dam-affected persons and groups. Similarly, there are issue-based operational policies and guidelines of the WB, the ADB and the JBIC which are largely binding for borrowers and the construction companies. They also have provided for complaint mechanisms although they are not known to many affected people and the procedures are less victim-friendly.

Many of the WCD provisions are incorporated in Nepali law and policy but in broader terms. There is a need to make explicit provisions and appropriate institutional mechanisms capable of and committed to ensure compliance. Some specific such as independent and well-funded

monitoring mechanisms; clear, rationalised and enforceable regulatory frameworks; contingency funds to increase the likelihood of successful compliance and the implementation of good practice are needed. Nepal lacks compliance plans followed by specific project-based complaint, review and remedial mechanisms. This situation suggests for strict legal provisions on compliance plan with the creation of independent panels, and identification and provision of indicators for implementing compliance plans as required. In parallel, the government in general also needs to develop its capacity and commitment to ensure compliance in dams and development activities.

Nepal's main problems are rooted in poor compliance through comprehensive implementation and monitoring mechanisms. No laws and policies can be enforced unless they are provided with effective administrative and judicial complaint mechanisms and adequate remedies. In the case of Nepal, these can only be achieved through continuing dialogue on dams and development. The dialogue needs to take place at local, district and national levels. WCD framework, domestic and international human rights, environmental and investment-related instruments and mechanisms developed under the UN, the IFIs and bi-lateral donors such as JBIC should form the basis for dialogue.

## 5.2 Recommendations

We make the following recommendations for future dialogue and their adoption in national law and policy related to dams and development:

### 5.2.1 Right to information

- » Although the constitutional provision on the right to information is regarded complete, it needs a comprehensive implementation law and regulations in line with Nepal's international obligation under Article 19 of the ICCPR.<sup>2</sup>
- » The right and access to information must cover all public and private agencies that use public funds, either domestic or multilateral. DoED and NEA need to come up with their own step by step detailed and specific procedures and remedies in ensuring compliance in dam and reservoir projects of all size and scale.
- » In all projects, basic project documents and information must be made available to the affected persons, communities and concerned groups in a timely manner and in a language and methods that they understand.

### 5.2.2 Right to public participation

- » There is a need to clearly define the concepts and methods of public participation. A comprehensive operational guidelines or a separate legislation as in the case of the right to information must be developed.
- » The process of participation must allow full consultation, and involvement, including public hearing throughout the project-cycle.

- » The comments and recommendations of public consultations must be incorporated into the project plans and mitigation measures, and any reasons of their denial must be publicly justified to the reasonable satisfaction of the stakeholders.

### 5.2.3 Environmental assessment and mitigation plans

- » Mitigation measures must be implemented with commitment. The framework discussed above relating to access to information and public participation must be ensured beforehand, and during the project implementation and post-project impact assessment and remedies.
- » The mandate of the EIA Review Committee which are mainly only non-binding suggestions must be made binding and its comments and recommendations made public.
- » Public, private sector projects and joint undertakings must be subjected to the same environmental scrutiny. The smaller projects can cause adverse negative social and environmental impacts if neglected. This must be avoided.
- » The EIA and mitigation must recognise entitlement of the local people on the consumptive or future use of water as a human right. Sustaining water is crucial for maintaining livelihoods and ecological niche.
- » The non-compliance with EIA and mitigation plans must be compensated properly with punishment for violators through administrative and judicial remedies.

### 5.2.4 Compensation and resettlement

- » The existing LAA should be revised and amended by incorporating all major provisions from the WCD framework, human rights obligations and the guidelines of the IFIs. There must be a provision of land to land compensation if the cash compensation entails the risk of loss of previous living standards.

- » The compensation should be fixed only with the proper representation of the affected persons and communities and according to the market price. It should include other social costs of displacement and resettlement. In addition, the non-payment or discriminatory payment of compensation must be remedied at any time and at any stage.
- » The affected persons and families must have the right to claim for previously unforeseen project social, economic and environmental impacts if they arise.

### 5.2.5 Rights of affected indigenous and other local people and benefit sharing

- » There must be a provision for free, prior and informed consent in the case of projects located in the area of indigenous peoples. No projects should take away their rights as well as the rights and interests of others living in the area from public and community access to water resources and the guarantee of their primary right to livelihood.
- » Certain amount of project benefits and income from royalty must reach the affected areas directly for their overall development on the principle of equity. The Ministry of Water Resources in partnership with local government bodies should develop procedures and mechanisms to ensure compliance in benefit sharing.
- » There should be a provision for the formation of a multi-stakeholder committee to deal with all natural resources, projects and the compliance plan, including benefit sharing. This is important given the absence of local government. Such forum must be conceived as a long-term arrangement too.
- » Necessary performance bonds, trust funds and integrity pacts must be established to address the problems of adverse development impact and ensure adequate benefit-sharing through clear legal and institutional provisions. The details should be subject of enquiry and dialogue at local level.

<sup>1</sup> Dubash, N. K. et al. 2001, A Watershed in Global Governance: An Independent Assessment of the World Commission on Dams, World Resources Institute, Lokayan, and Lawyers' Environmental Action Team.

<sup>2</sup> ICCPR, Art. 19: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in Para. 2 of this Art. carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (order public), or of public health or morals.

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## IUCN - THE WORLD CONSERVATION UNION

Founded in 1948, IUCN-The World Conservation Union brings together states, government agencies and a diverse range of non-governmental organizations in a unique world partnership: over 1,087 members in all, spread across some 180 countries. The World Conservation Union builds on strengths of its members, networks and partners to enhance their capacity and to support global alliances to safeguard natural resources at local, regional and global levels.

As a Union, IUCN seeks to influence, encourage and assist societies throughout the world to conserve the integrity and diversity of nature and to ensure that any use of natural resources is equitable and ecologically sustainable.

IUCN-The World Conservation Union officially launched the Nepal Country Office on 23 February 1995 with the Ministry of Finance as the government partner. IUCN Nepal has been developing partnerships with various government line agencies as well as non-governmental organizations to carry forward its activities to conserve Nepal's natural resources and ecological processes.

## WAFED

Water and Energy Users' Federation-Nepal (WAFED) is an independent network of activists, campaigners, experts, researchers, lawyers, professionals and various project-affected communities. It analyses economic, social and environment assumptions of water projects from the perspective of democracy, equity and sustainability of benefits from natural resources.

Established in March 2001, WAFED maintains relationships with various regional and international human rights, environment and development-related campaigns and networks. WAFED believes that natural resources use from community management perspective offers cheaper alternatives of management to electricity, irrigation and drinking water supply services.

To achieve these goals, WAFED helps local communities organize, and empowers them to engage in claiming rights through civic protests, negotiations, complaints and litigation. It advocates with local and national governments to foster policies to influence Nepal's donors and lenders.

WAFED represents the dam-affected victims and communities in the Steering Committee of the Dams and Development Project of the United Nations Environment Programme. A member of the International Committee on Dams, Rivers and Peoples (ICDRP), WAFED hosts the regional secretariat of the South Asian Solidarity for Rivers and Peoples (SARP).

## GTZ - THE GERMAN TECHNICAL COOPERATION

The Deutsche Gesellschaft fuer Technische Zusammenarbeit (GTZ) GMBH is an international cooperation enterprise for sustainable development with worldwide operations. Its corporate objective is to improve people's living conditions on a sustainable basis. Owned by the Federal Republic of Germany, GTZ translates the federal government's international cooperation into practice in more than 130 countries

For the past forty years, the German government has developed a strong collaboration with the Kingdom of Nepal. During this period the bilateral technical cooperation, implemented by the GTZ, has covered a broad range of sectors. In constant dialogue with our Nepalese partners and the German Federal Ministry for Economic Cooperation and Development (BMZ), the program is continuously adjusted according to the changing environment.

