



# DISCUSSION PAPER

TRANSPARENCY AND ACCOUNTABILITY SERIES

Discussion paper 2

**Why the need for an independent  
accountability mechanism at the  
New Development Bank?**

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JUNE 2022





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## CONTENTS

Acknowledgements	4
List of Acronyms	4
Executive Summary	5
Summary of key recommendations	7
Introduction	9
Purpose and methodology	11
A brief background on IAMs	13
The fundamentals of IAMs	15
The 'right to be heard' as a feature of accountability and transparency	15
The need for an IAM at the NDB	17
Current progress on the development of an IAM at the NDB	17
Hearing community voices in the debate on an IAM at the NDB	18
Recommendations: Finding a way forward for a potential IAM at the NDB	23
Appendixes	28
Appendix 1: Brief overview of IAMs of some leading MDBs	28
Appendix 2: Information requested concerning IAMs	30
References	32

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## LIST OF ACRONYMS

<b>ADB</b>	Asian Development Bank
<b>AfDB</b>	African Development Bank
<b>AIIB</b>	Asian Infrastructure Investment Bank
<b>AM</b>	Accountability Mechanism
<b>AoA</b>	Articles of Agreement of the New Development Bank
<b>ARC</b>	Africa Regional Centre
<b>BRICS</b>	Brazil, Russia, India, China and South Africa
<b>CAO</b>	Compliance Advisor Ombudsman
<b>CM</b>	Complaints Mechanism
<b>CRMU</b>	Compliance Review and Mediation Unit
<b>CSF-NDB</b>	Civil Society Forum on the New Development Bank
<b>CSO</b>	Civil Society Organisation
<b>DFI</b>	Development Financial Institutions
<b>EIB</b>	European Investment Bank
<b>EBRD</b>	European Bank for Reconstruction and Development
<b>IAM</b>	Independent Accountability Mechanism
<b>IDB</b>	Inter-American Development Bank
<b>IDP</b>	Information Disclosure Policy
<b>IFC</b>	International Finance Corporation
<b>IFI</b>	International Financial Institution
<b>IPAM</b>	Independent Project Accountability Mechanism
<b>IRM</b>	Independent Review Mechanism
<b>LHDA</b>	Lesotho Highlands Development Authority
<b>LSHWP I</b>	Lesotho Highlands Water Project Phase I
<b>LSHWP II</b>	Lesotho Highlands Water Project Phase II
<b>MICI</b>	Independent Consultation and Investigation Mechanism
<b>NDB</b>	New Development Bank
<b>MDB</b>	Multilateral Development Bank
<b>MIGA</b>	Multilateral Investment Guarantee Agency
<b>PAP</b>	Project Affected Persons
<b>SOLD</b>	Survivors of Lesotho Dams
<b>WB</b>	World Bank
<b>ZAR</b>	South African Rand



Young mother and son at their home in Marapong, Lephalale in Limpopo Province.

## EXECUTIVE SUMMARY

The New Development Bank (NDB) is the newest multilateral development bank, established in 2014 by the BRICS countries: Brazil, Russia, India, China and South Africa. With the creation of this new institution it was anticipated that the Bank would have a better approach to transparency and accountability, amongst others, through the establishment of an independent accountability mechanism. However, this has not been the case.

An Independent Accountability Mechanism (IAM) would allow for voices from affected communities where NDB projects are located to be heard when NDB project borrowers such as state-owned enterprises (Eskom, Transnet, Trans-Caledon Authority and

South African National Roads Agency SOC Limited), or other development financial institutions (Development Bank of Southern Africa and Industrial Development Corporation) fail to hear their voices – be it when communities are harmed by large infrastructure projects due to failure to hold proper consultations throughout the life cycle of a project; or when communities are disenfranchised from their land due to displacement as in the case of the Lesotho Highlands Water Project (LHWP). During the LHWP Phase II, which is co-financed by the NDB, affected communities fear being unfairly compensated such as during the LHWP Phase I, during which people received compensation as low as ZAR 1 500 per year. Similarly, communities fear the

loss of their livelihoods such as Durban fisherman who no longer have access to fish due to negative environmental impacts of the Expansion and Modernisation of the Durban Container Terminal.

The NDB has an opportunity to leap-frog ahead of older DFIs through the integration of lessons-learnt towards improving the design and approach when developing an effective IAM. It is therefore essential that when developing the IAM, the NDB should provide a meaningful platform for project affected communities and civil society to contribute in the thinking of the IAM design. Such a process would assist the NDB towards meeting its mandate of providing inclusive, sustainable development by ensuring that its projects serve the needs of communities, which includes the empowerment of women. In this way, the NDB can serve its purpose in being an alternative bank of the South, for the South and truly begin to assist South Africa and the region in tackling the multi-layered, complex development challenges of inequality, poverty unemployment and gender injustice.

From the perspective of Civil Society Organisations (CSOs), especially those

in the Southern African region, it was hoped that with the creation of a new MDB lessons would be learnt from previous MDBs on how to strengthen accountability, transparency and participation.

This should be done through developing strong and effective social and environmental safeguard instruments and policies, ensuring stakeholder engagement in the development of policies, learning lessons on the implementation of these types of instruments and policies, and developing other mechanisms to enhance accountability such as an IAM.

In fact, the need for an IAM at the NDB could never be more critical than now as the NDB enters its second half decade of operations in the BRICS countries, and begins expansion to new countries, namely the United Arab Emirates, Bangladesh, Uruguay and Egypt.

The need for an IAM, where there are MDB-financed projects, is very important to ensure transparency and accountability, and to give communities a real voice on projects implemented in their area.

## SUMMARY OF KEY RECOMMENDATIONS

In finding a way forward for a potential IAM at the NDB, the paper recommends that:

- From the onset, the development of a mechanism requires a process of public consultations that will incorporate different stakeholders, including Project Affected Persons (PAPs), CSOs and other community groups. These public consultations should aim at genuinely seeking to solicit inputs that impact the design and implementation of a mechanism.
- Informing PAPs of the existence of a mechanism should include providing all relevant policies and documents, providing sample project documents like examples of a complaint letter and other regular documentation, as well as doing so in a language that is accessible to PAPs.
- Accessibility of a process requires a simple complaints process with minimal barriers to entry and that its jurisdiction be broad enough to cover complaints concerning all the activities of the MDB. With respect to simple admissibility requirements, it should be enough to demonstrate harm. The mechanism should allow these complaints to be submitted in various formats to cater for everyone, for instance a complaint in writing or even in an audio format.
- Admissibility rules to allow new complaints should not require that complainants exhaust other complaints/grievance redress mechanisms or any other local remedies, including national judicial proceedings. This should also be the case where there is a project-level grievance redress mechanism of MDB's clients.
- Where there is co-financing and policies of a different MDB or DFI are used in a project, the IAM of each MDB should still be operational for that project.
- A major concern of PAPs is the risk of retaliation if complaints are lodged. In part this is resolved if a mechanism is independent and if the confidentiality is adhered to. Nonetheless a mechanism should actually have a strategy on how to deal with this risk.





## INTRODUCTION

The New Development Bank (NDB) was established in 2014 by the leaders of Brazil, Russia, India, China and South Africa (the BRICS countries) during the BRICS Summit in Fortaleza, Brazil. Its creation was seen as a step in the reform of the global financial architecture. On 17 August 2017, the NDB also opened its first regional centre, the Africa Regional Centre (ARC) in Johannesburg. The ARC aimed to not only be the face of the Bank in the region, but to also play an active role in project development:

The ARC will work closely with the Government, public and private sector agencies, and other relevant stakeholders in South Africa to identify projects that have strong development impact to be supported by the NDB. It will play an important

role in preparing these projects so that they can be financed. Subsequently, the ARC will also support the effective and efficient implementation of these projects.<sup>2</sup>

So far, the NDB has already approved ten projects in South Africa and one project in Lesotho in sectors including clean energy, transport, water resource management and sanitation, as well as a Covid-19 emergency loan programme.<sup>3</sup> However, a major concern by communities affected by NDB projects and civil society at large in the region is the lack of an independent accountability mechanism (IAM) despite project implementation. An accountability mechanism is important because it creates an additional layer of checks and balances to hold an institution accountable to its own

policies, and it provides communities with an equitable complaint process. The value of an IAM is determined by its ability to successfully deliver redress to impacted communities via a compliance investigation or dispute settlement. In an effort to enhance transparency and accountability, as well as addressing the potential impacts of projects, many IFIs have adopted environmental and social policies and safeguard instruments that include project level grievance redress mechanisms. IFIs have also gone a step further and made it possible for communities to lodge complaints through IAMs to hold the institution responsible to its own policies for the damage the investment has caused.<sup>4</sup>

The establishment of an effective IAM would enable the NDB to serve its mission of 'achieving development goals with transparency and empathy and creating an equal opportunity for the development of all countries'. However, it is unclear what the NDB means by 'empathy' as the Bank is less transparent than most MDBs and it has not shown particular empathy towards the communities that are affected by its projects. Empathy may entail sympathising with the suffering of

communities harmed by an investment and offering redress.

Unlike most MDB's, the NDB has not created an IAM or alternate means through which these communities can safely seek redress and/or hold the NDB accountable. Over half a decade after its creation, the NDB's approach to accountability falls short of even reaching minimum standards, specifically due to the lack of an IAM, which most of the other MDBs already have. It is unclear why since its inception and with the many projects the NDB finances, the Bank does not have an IAM. However, this gap presents the NDB with another opportunity to learn lessons from the approaches and mistakes of other MDBs on how to create an effective IAM. It also presents an opportunity for CSOs, and project affected communities to contribute to the thinking on some elements of the design of an IAM and influence its development at the NDB.

Community activist leading a tour of Marapong, Lephalale in Limpopo Province with Members of Parliament, April 2022.





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## PURPOSE AND METHODOLOGY

This discussion paper has been developed in response to the notable gap from the lack of an IAM at the NDB, which is a cause of concern for the Civil Society Forum on the New Development Bank (CSF-NDB).<sup>5</sup> While many lessons can be learnt from the experiences of other DFIs, a sound framework requires also incorporating the perspective of the community/potential users. As such, the central enquiry of this discussion paper is **what are the key best practices that the NDB should consider in developing an effective IAM, with a particular focus on the community perspective of such a mechanism?** In so doing, the discussion paper will explore how an effective IAM would be structured to ensure compliance and tackle disputes. While

various studies which are referred to in this discussion paper have assessed best practices of IAM structure and processes more broadly, this discussion paper focuses on the perspectives of project affected communities/users of a mechanism including the perspectives of some in South Africa and the region.

The research to develop this discussion paper was primarily conducted through a desktop review of existing literature and policies, additionally the research team solicited input from members of community-based organisations for two NDB-funded projects, and the CSF-NDB. The research team in developing this discussion paper conducted two interviews that were aimed at extracting thoughts on the main challenges

that are being faced by communities, the knowledge and awareness of communities on who the funders of projects are and the policies of funders, as well as IAMs. The interviews solicited views from a member of Survivors of Lesotho Dams (SOLD), a community-based organisation working on projects that affect communities affected by dams and other large infrastructure developments such as the (South Africa) Lesotho Highlands Water Project Phase II (LSHWP II).<sup>6</sup> The interviews also solicited the views of Elana Greyling on the (South Africa) Environmental Protection Project for Medupi Thermal Power Plant (Medupi project) and a resident of Lephalale, Limpopo Province.<sup>7</sup> Elana Greyling is not only a freelance journalist, and an environmental activist, but also a long-term resident of Lephalale with extensive experience and activism on Medupi and

other projects, including as a consultant with Earth Life Africa Johannesburg and with eight other women's and environmental justice groups.

Notably these projects are co-financed by various institutions including the NDB. There are currently 11 NDB funded projects that have been approved in South Africa and the region.<sup>8</sup> As such, the perspective of the community members in this region finds relevance. This discussion paper firstly provides a brief overview of IAMs and the principles that should govern them; the discussion paper then tackles the issue of the NDB and whether it plans to develop an IAM and concludes with recommendations.

Power lines towering over shacks at Marapong, Lephalale in Limpopo Province.





Oxfam South Africa workshop on International Financial Institutions and its Gendered impacts. Lephalale, Limpopo Province, 2022.

## A BRIEF BACKGROUND ON IAMS

In 1993, the World Bank's Inspection Panel was the first IAM created, with its first complaint lodged the following year.<sup>9</sup> The Inspection Panel is an impartial fact-finding body that assesses whether the Bank acted in compliance with its own applicable operational policies, independent from the WB management and staff, reporting directly to the Board of Executive Directors.<sup>10</sup> It is made up of three members who are selected for a non-renewable five-year term by the Board. After a review of the Inspection Panel policy in 2021, the Inspection Panel is now housed within the newly constituted WB Accountability Mechanism. This new accountability structure includes two new functions: dispute resolution and advisory

services. Close to three decades after the creation of the WB's Inspection Panel, the creation of IAMs by MDBs and other IFIs has proliferated.

The structures, functions and processes of the various IAMs differ from one MDB to another. Despite some small differences in functions and structure, they generally have the common goal of investigating complaints filed by communities, and investigating the impacts of projects, policies and processes. These IAMs in essence create 'a direct accountability path between financing institutions and the ultimate beneficiaries of their activities', which in their absence would mean a lower standard of accountability

for an MDB.<sup>11</sup> As such, IAMs are proving to be an integral factor to ensure accountability. However, the NDB, which is the newer DFI and therefore had the comparative advantage of being able to learn from decades of lessons, surprisingly does not have an IAM, and did not prioritise developing one in the early days of the development of the institution. As such, the NDB should prioritise the establishment of an IAM to ensure that communities, which are inherently in a weaker position, have a true right of recourse on the projects being developed.

Dr Khanyisile Litchfield-Tshabalala presenting to Members of Parliament at an information exchange meeting hosted by the Civil Society Forum-NDB in Cape Town, 2021.





## THE FUNDAMENTALS OF IAMs

Community activist, Francina Nkosi of the Waterberg Women Advocacy Organization.

### The 'right to be heard' as a feature of accountability and transparency

Two core principles followed by DFI's are accountability and transparency. A 'right to be heard' should be included when the projects financed by the DFI, and its policies, are either causing adverse effects or have the potential to cause harm. An IAM is a platform for project affected persons (PAPs) and other stakeholders to raise their concerns about alleged harm or potential harm. IAMs are created to 'hold the DFIs and their clients accountable to the DFIs' own policies and to provide access to remedy for individuals and communities that are adversely affected by DFI-financed activities'.<sup>12</sup> IAMs are in fact

an important form of protection for communities as they are the main mechanism initiated by complainants from affected communities and offer them the important channel to have their concerns investigated at the highest levels in an MDB. Further, these processes provide the staff, management and Board of MDBs with a unique perspective from the complainants themselves on the actual impact of their operations.

While the mandate of each IAM developed by different MDBs may differ, an ongoing study conducted and co-authored by Accountability Counsel and various other organisations, assessing best practices of IAMs notes that they should broadly encompass two mandates:

- 1) Safeguard PAPS from harm and the environment from damage, as well as offer adequate solutions; and
- 2) Ensure compliance with relevant policies and avoidance of social and environmental risks and impacts of DFI-supported projects.<sup>13</sup>

Notably, these mandates are of equal importance.<sup>14</sup> In an effort to meet these two mandates, IAMs should encompass three fundamental functions: a compliance review function; and a dispute resolution role to both respond to and remedy complaints; as well as an advisory function to modify procedures, practices and policies of the MDB.<sup>15</sup> As such, an IAM should not only remedy harm, but also help a DFI to continuously reform its policies.

In a separate study on the proliferation of IAMs, Elena Mitzman also emphasises that the mandates of an IAM are fact finding, problem-solving (or consultation), compliance review and monitoring implementation of remedial action.<sup>16</sup> Fact finding arises when 'IAMs are given access to the organisation's documents, they may conduct interviews with the operational departments and other actors (requesters, local authorities, other interested parties), and, in most cases, they may also hire external experts and make on-site visits'.<sup>17</sup> Notably, fact-finding is an important component of compliance review. While the fact-finding function is

carried out across all MDBs and IFIs that have IAMs, what differentiates them is the structure of the fact finder and also the outcomes, which can be findings or recommendations. The problem-solving function of an IAM aims to set up dialogue between stakeholders and addressing the issues or harm in the complaint.<sup>18</sup>

The contents of the request from the community can differ between fact finding and problem solving. In the case of fact finding, the request must allege non-compliance with applicable MDB policy as the cause of the harm. However, in the case of problem solving, the request must merely allege a problem with the project sponsor or project contractor or more rarely, the MDB itself. Thirdly is the function of compliance review 'which has the purpose of verifying whether Management has complied with the organization's policies or not and may therefore resemble, to the extent that it leads to findings of conformity or non-conformity with general norms'.<sup>19</sup> An additional function is the function to monitor implementation of remedial action. The range of activities that may fall under this function may include 'keeping track of Management's progress for reporting it to the heads of the organizations and making it public, even though the extent of the IAMs powers may vary from case to case, and range from merely receiving information from Management, to actively investigating its operations also through direct site visits'.<sup>20</sup>

### The basic principles to develop an adequate and effective IAM<sup>21</sup>

Independence and transparency of the mechanism

Accessibility of the mechanism

Transparency during and after the conclusion of the complaint

Usability of the mechanism

Predictability of the process





Marianne Buenaventura Goldman (Oxfam South Africa) and Yared Tsegay (African Monitor), Co-Chairs of the Civil Society Forum- NDB.

## THE NEED FOR AN IAM AT THE NDB

### Current progress on the development of an IAM at the NDB

The NDB was established with the goal of mobilising resources for infrastructure and sustainable development projects in the BRICS and other emerging economies and developing countries. High standards of transparency, accountability, and public participation or engagement are essential for the effective development of projects. The principles of transparency and accountability are enshrined in the values of the NDB. Article 15 of the NDB's Articles of Association (AoA) mandates the NDB to 'ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents'.<sup>22</sup> An IAM is required to

promote high levels of transparency and accountability. However, since 2017, the NDB has not established an IAM. A key question is whether there are any plans or efforts currently underway to develop an IAM.

As part of the development of this discussion paper, the International Development Law Unit at the University of Pretoria submitted an information request pursuant to article 3.2 of the Information Disclosure Policy. The request was sent on 4 September 2021, through both a direct email to the NDB and by submission through the information request platform. It raised questions on the possible development of an IAM (see information request enquiry in Box 7 below).<sup>23</sup>

The NDB has stipulated that information disclosure is an important component of promoting transparency and a presumption of that project-related information should be made available, with exceptions.<sup>24</sup> As such it was anticipated that the response would provide detailed information and timelines. This information request (see Box 7 below), specifically raised questions on:

- 1) the prospects of the development of an IAM;
- 2) any potential timeframe to its development and opportunities for public consultations;
- 3) the possible structure of the mechanism and the procedures to operationalise the mechanism;
- 4) the issues dealt with by the mechanism; and finally,
- 5) the relationship between the NDB's IAM and the grievance redress mechanism that exists at a project level.

In a response provided by the NDB on 20 October 2021, after a follow up because of no confirmation of receipt, the NDB noted that it is in the process of developing an IAM (see response from NDB in Box 8 below). The response by the NDB highlighted that the current approach of the NDB is that at a project level complaint about the NDB staff is handled under the whistle-blower procedures of the NDB's Compliance and Investigations (C&I) Department, as well as project grievance redress mechanism that are required as per the NDB's Environment and Social Framework. The NDB notes that the C&I Department (as per the new organisational structure approved in December 2020) 'shall be in charge of the grievance redressed that also

deals with complaints from individuals, communities and organizations that are considered being negatively affected by the Bank's activities and operations' (see Box 8 below). While it is clear from the NDB response that the development of a mechanism is underway, the detailed request for further information was not exhaustively responded to. Further, it needs to be asked whether there will be public consultations with stakeholders in the development of the policy and what efforts will be made to provide the project affected communities with the knowledge and capacity to make use of the mechanism. This process should nevertheless be done in a consultative and participatory manner.

### Hearing community voices in the debate on an IAM at the NDB

From a South African and regional community perspective, as well as from the perspective of the CSF-NDB, an IAM would allow for voices from affected communities where NDB borrowers such as state-owned enterprises or other DFIs fail to hear their voices when harm or potential harm is faced. An IAM can be an important tool when communities are not adequately consulted during the lifecycle of a project, where displacement occurs and where other concerns may arise on the impacts of projects.

As indicated in the methodology used in conducting the research for this discussion paper, members of community representative organisations in two NDB-funded and co-funded projects played an important role in sharing their concerns with the projects in their communities.

*a) Lesotho Highlands Water Project Phase II with a loan amount of ZAR3.2 billion (Trans Caledon Tunnel Authority)*

The Lesotho Highlands Water Project Phase II (LHWP) is the second phase of an existing joint project between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho aimed at increasing water supply in the Vaal River Basin by transferring water from Lesotho to South Africa.<sup>25</sup> The project seeks to promote South Africa's resilience to climate change, support economic growth and foster sustainable livelihoods. The Project is expected to cost ZAR 32 billion in total. NDB will provide ZAR 3.2 billion, or ten per cent, of the overall project budget.

The LHWP is a large dam project, and consequently a very sensitive project especially with respect to displacement, compensation and the impact of the social and environmental project on local communities. The LHDA Treaty

which governs the project notes that 'the authority shall ensure that as far as reasonably possible, the standard of living and the income of persons displaced by the construction of an approved scheme shall not be reduced from the standard of living and the income existing prior to the displacement of such persons'. However, the reality on the ground is that communities are concerned about/that:

- Promises from LHWP I will not be fulfilled by the Lesotho Highlands Development Authority (LHDA);
- Insufficient information has been provided on the project;
- Corruption has taken place, and will continue to do so; and
- Crime, HIV/AIDS, orphans (due to increased deaths rates from HIV/AIDS) and gender-based violence within local communities will escalate during project development as a result of an influx of labour.

**Box 1****Thoughts conveyed by the people**

Excerpt from 'Pre-dam community fears, concerns and aspirations-phase II of the Lesotho Highlands Water Project'<sup>26</sup>

'They [community members] were excited about the dam project but they were nervous about LHDA. There were many people from the previous Phase I dams that were still unhappy and unfairly treated about compensation on their affected physical assets which they were deprived of due to the project. Even for the assets affected during construction operations, owners were still struggling after many years

to have their compensations paid. This was the most frustrating aspect on dam construction projects and the Mokhotlong people were not prepared to experience;

They felt that all compensation values should be negotiated with the people and not be imposed on them by LHDA;

Assets like crop lands ought to have life-time compensation because they were land inheritances passed on from generation to generation within families; and compensations on affected assets must be paid prior to project construction.'

**Box 2****The magnitude of the challenges in LHWP I and concerns with LHWP II**

Excerpt from an interview with a member of SOLD, a community-based organisation in Lesotho

'We have a problem with a feasibility study report of the project which has said that they would take community views and incorporate them into the project policy, but they have not done that. Hundreds of community members for instance said that they wanted compensation for life, not for 50 years as is the case for phase I. In Phase II, communities were hoping that it will at least change into compensation for life, or better. However, compensation is still at a 50-year period, so this is the greatest concern. Some of the promises have not become a reality, like some communities have not been paid yet for Phase I.

In the beginning of Phase II, we engaged communities in a workshop setting trying to find out what their fears were about the project. The fears of the community included delays in compensation, the project authority not honouring its promises.

Another great concern was that there would be influx of the workforce in the work area and, as a result, an impact on the HIV/AIDS rate. What was feared became a reality in Phase I.

Other concerns in Phase I, and even now is the concern over access to water and sanitation.

Now we are in Phase II, we are trying to get opinions of different people, we want to get the views of the women and children.'

***b) Environmental Protection Project for Medupi Thermal Power Plant with a loan amount of USD 480 million (Eskom)***

The objective of the Project is to achieve sulphur dioxide (SO<sub>2</sub>) emission reduction of the Medupi coal-fired power plant from 3 500 mg/m<sup>3</sup> to below 500mg/m<sup>3</sup> from 2026 onwards. The Project entails the design and construction of six flue-gas desulphurisation units along with ancillary facilities, at a total project cost of USD 2 750 million (17 per cent financed by the NDB).

The history of the project has been plagued by controversies. The previous phases of the project at Medupi have given rise to numerous environmental and social concerns by community

members located in Lephalale, Limpopo Province, South Africa. The main social impacts of the project have arisen from labour influxes of previous stages of the project, including but not limited to unemployment, homelessness, increase in HIV/AIDs, prostitution, gender-based violence and increased school dropouts of minors. In the interview with Elana Greyling, she highlighted the especially vulnerable position of women and girls. The current phase of the project also raises concerns, as expressed in an interview with Elana Greyling.

*Medupi Coal-Fired Power Station, located in Lephalale, Limpopo Province is the fourth largest coal-fired power plant and the largest dry-cooled power station in the world.*



**Box 3****The concerns with Medupi project****A community perspective**

Excerpt from interview with Elana Greyling, Lephalale community member and activist

‘Giving Eskom loan after loan, after loan to install pollution abatement technology, and them not doing it is problematic. We can speak from experience, that is what the previous World Bank lending has taught us. They gave Eskom a loan specifically for the pollution abatement Eskom had at that stage, which was for flue-gas desulfurisation (FGD) technology. It was not installed.

Lenders like the World Bank and NDB, believed that the country laws should be applicable to projects. In other words, the lenders do not police adherence to laws. That is the country prerogative. They believed that country laws should apply and be enforced by country mechanisms, for instance pollution related laws. This has not really happened with respect to emission levels for instance. Eskom is violating laws regarding emissions. They have applied for exemptions from laws on multiple occasions and for once National Air Quality officers denied this exemption again. Which is actually fabulous.

My main questions on this pollution abatement loan are (a) What type of guarantee do we have, or how do we make sure that if Eskom received the money from multilateral lenders they will do what they said they will, what measures are put in place that they will? and (b) and what will happen if

they don’t? Actually, what would be different with this loan?

Eskom has yet to decide on the type of technology they will use. You can use the terms FGD or scrubber. But we don’t know what they will do. In the first round of public participation of FGD, EarthLife Africa (Johannesburg) got an expert in this technology to demonstrate that there are FGD technologies that require less water. And Eskom refused to consider this despite the issue of potential shortage of water. The representative of Eskom at these meetings stated that there would be sufficient water to run 3 units of FGD. Now water has been an excuse against the use of the FGD technology. Instead, Eskom is waiting for the development of the Mokolo and Crocodile River (West) Water Augmentation Project. A project that is far behind. The delays with this project are a cumulative impact of failure to decide on the appropriate technology. They are now waiting for proposals to be potentially received in April 2022. This will be inevitably followed by potentially long procurement etc.

Eskom can’t make decisions. How do you give a loan for something that has not been decided? This is not a loan for scrubbers or FGD, they haven’t decided. It’s a loan for some sort of pollution abatement technology that no one knows yet. This does not make practical sense at all.’



Elana Greyling of Concerned Citizens of Lephalale.

## RECOMMENDATIONS

### Finding a way forward for a potential IAM at the NDB

The need for an IAM where there are NDB-financed projects is very important to ensure transparency and accountability, and to give communities a real voice on projects implemented in their area. Some recommendations that can be considered to enhance the effectiveness of a mechanism are set out below:

#### **Recommendation 1**

Public consultation process during the development and ongoing public review of the IAM

Developing an IAM requires not only learning from what may be seen as the best practice, but also engaging directly with the users in project communities and community representative organisations. From the onset, the development of a mechanism requires a process of public consultations that will incorporate different stakeholders, including PAPs, CSOs and other community groups. These public consultations should aim at genuinely seeking to solicit inputs that impact the design and implementation of a mechanism. Furthermore, on its establishment, regular reviews of the mechanism should be conducted, which should include a process of public consultations. The ongoing review of a mechanism should include independent assessments that test the effectiveness and efficiency of a process that includes the view of users of the mechanism.

**Box 4****Excerpt from interview**

Views of Elana Greyling, community member and activist based in Lephalale, on what would make an IAM more effective from the perspective of the community

‘Firstly, one should think and know what would be the laws that apply or the steps that could be taken after a mechanism is approached.

For instance, the World Bank inspection panel came and said yes pollution is high in the area of Medupi, but this was not according to South African law. The Bank trusted the country to enforce their own laws, which we know has not been happening so any IAM structure should have some form of teeth. There must be some way or some methods to say, these are the rules, and these are the consequences for not following the rules, and that must be clearly seen.

I think, public participation is still a powerful tool and it’s a chance to explain things to people on a

level that we understand. Here I’m talking about the language. Language is a tool in the deception of people during public participation processes today. Also using legalese that’s too technical is an issue.

Making things more understandable at a grassroots level during public participation can be really helpful at making sure that people understand that there are policies, what the policies are, and what the implications will be for breaking the rules. I really think that would help because, after all, knowledge is power, and we must believe that no one is above the law, and we have to believe that somebody cares.’

**Box 5****Excerpt from interview**

Interview with a member of SOLD

‘The NDB could come to the communities, could come to us, to have a face-to-face engagement, so that they know what we want, so that they know what communities want and so that we are at the same level.

They [the communities] have to know that they have a right to engage with financing institutions, they have a right to engage with the NDB, and they must have a right to invite the NDB to come to the communities.’



## Recommendation 2

### Disclosure of a mechanism and capacity development

As has been stated above, the starting point of accessibility of a mechanism is the fact that PAPs are aware of the existence of a mechanism; they know how to use it; and know what to expect after filing a complaint from a procedural perspective. There is a need to disclose the existence of the mechanism and build capacity on its use by both the MDB and its clients. It is important that clients and sub-clients of the MDB be required to disclose the existence of a mechanism as they tend to be the main source of information for PAPs.<sup>27</sup> Various development financial institutions have revised their environmental and social protection policies to mandate their clients to disclose the availability of accountability mechanisms.<sup>28</sup>

Informing PAPs of the existence of a mechanism should include providing all relevant policies and documents, providing sample project documents like examples of a complaint letter and other regular documentation, as well as doing so in a language that is accessible to PAPs.

## Box 6

### Excerpt from interview

#### Interview with a member of SOLD

'With the New Development Bank, in short, we don't know them and we have not been part of the New Development Bank agenda. We only know that they are have certain social and environmental requirements for the disbursement of their funds or that they are targeting the involuntary settlement and that they are having a great concern that these issues have to be complied with by the elites.

But we on the ground, and the communities are like us, do not know the financing institutions. The communities do not know about a New Development Bank. The affected communities are not aware of social, environmental guidelines of the NDB, not at all! Nobody told them about any financing institution, nobody told them about entitlements or any the guidelines.'

### Recommendation 3

#### Developing a user-friendly and accessible complaint process

Accessibility to a process requires a simple complaints process with minimal barriers to entry and its jurisdiction should be broad enough to cover complaints concerning all the activities of the MDB. With respect to simple admissibility requirements, it should be enough to express that harm was caused by the project. The mechanism should allow these complaints to be submitted in various formats to cater for everyone, for instance a complaint in writing or even in an audio format. Further, admissibility should not require that complainants exhaust other complaints/grievance/redress mechanisms or any other local remedies, including national judicial proceedings. This should also be the case where there is a project-level grievance redress mechanism of MDB's clients. A review process by an IAM to determine compliance with policies should also proceed despite any other ongoing and parallel internal investigations and proceedings.

An additional consideration to be made when developing an IAM is whether there should be a required minimum number of individuals to file a complaint. If so, this requirement should not be so onerous that it creates a barrier to submission. Upon submission of a complaint or review, claimants should be clear on the next steps and exact timelines in the process. It is recommended that an IAM not have a minimum number for lodging a complaint. Even a single complainant

should be enough for an IAM to receive a complaint.

On the requirement of accepting complaints concerning all MDB-related activities, a complexity may arise where there is a co-financed project that may make use of the policies of a specific MDB. The question arises whether other DFIs can be held accountable under their own policies and if complaints can be submitted under their IAM. While this question is complex and requires further assessment, a MDB's IAM should still be accessible even in a co-financed project. In this respect, the Accountability Counsel and others notes that '[t]he risk of harm to communities and the environment is not limited to certain lending instruments but can result from all types of activities financed or co-financed by the DFI'.<sup>29</sup> As such, even where there is co-financing and policies of another MDB or DFI are used in a project, the IAM of each MDB should still be operational for that project. The complexity of co-financing is evident in the LHWP II, which purports to make use of the policies of the African Development Bank. This raises the question of the role of the policies and processes of each financier, including the NDB, as well as the question on how each institution is held accountable. Cooperation among IAMs in handling complaints may be beneficial in some cases, and several IAMs have provisions allowing for such cooperation.<sup>30</sup>

#### **Recommendation 4**

##### Protection of complainants after lodging a complaint

A major concern of PAPs is the risk of retaliation potentially from project implementation authorities and other stakeholders implicated if complaints are lodged. In part this is assessed if a mechanism is independent and if the confidentiality is adhered to. Nonetheless a mechanism should actually have a strategy on how to deal with this risk.

Operations at Exxaro's Grootegeluk mine, which supplies coal directly to Eskom power plants in Lephalale, Limpopo Province.





The impacts of coal mining on communities in Lephalale, Limpopo Province.

## APPENDIXES

### APPENDIX 1

#### Brief overview of IAMs of some leading MDBs

- The African Development Bank (AfDB), developed its **Independent Review Mechanism (IRM)** on 30 June 2004, which became operational in 2006.<sup>31</sup> The IRM accepted complaints that demonstrated that rights or interests had been or were likely to be directly affected by the failure of the relevant AfDB Group entity to comply with policies.<sup>32</sup> This version of the IRM consisted of a Compliance Review and Mediation Unit (CRMU) and a roster of experts comprising three individuals. The AfDB however adopted a new policy in 2021 that makes substantial revisions to the IAM. It is now called the Independent Recourse Mechanism (IRM) and does away with the roster of experts. The IRM currently has a total of 96 claims, with 88 closed claims, and eight claims currently active.<sup>33</sup>
- The Asian Development Bank (ADB) currently uses the **Accountability Mechanism (AM)** that became effective on 24 May 2012.<sup>34</sup> The AM has the two core functions of problem solving conducted by the Office of the Special Project Facilitator, and a compliance review conducted by its Office of the Compliance Review Panel. An important component of the AM is the Special Project Facilitator and Compliance Review Panel (SPF CRP), established in 2003 and reviewed in 2012. The SPF CRP

conducts compliance review of ADB policies and has had 208 total complaints, with 25 active and 183 claims closed.<sup>35</sup>

- The **Compliance, Effectiveness and Integrity Unit (CEIU)** was established in 2016 by the Asian Infrastructure Investment Bank (AIIB), with the aims of ensuring compliance, effectiveness, and integrity. The CEIU is as an independent unit whose responsibilities include: evaluating the Bank's ongoing and completed investment portfolio for quality and results (for completed projects); responding to external requests or complaints about compliance with AIIB's Environmental and Social Policy (ESP) under the Project-affected People's Mechanism (PPM) Policy; [and] investigating cases of project fraud and corruption in accordance with the Policy on Prohibited Practices.<sup>36</sup>
- The European Bank for Reconstruction and Development (EBRD) makes use of the **Independent Project Accountability Mechanism (IPAM)**. The IPAM assesses environmental, social, and transparency-related issues raised by project affected persons (PAPs) and CSOs.<sup>37</sup> The functions of the IPAM are problem solving and compliance review. As at the time of writing, the EBRD IPAM currently has six active cases, none of which have been closed.<sup>38</sup>
- The European Investment Bank (EIB) established the **Complaints Mechanism (CM)**.<sup>39</sup> The CM conducts investigations, mediations and has an advisory function with regard to activities of the EIB Group (which includes the European Investment Fund). According to the EIB, what differentiates this mechanism from others is the fact that it is a two-tier mechanism comprising an internal tier (Complaints Mechanism Division), as well as an external and independent tier (the European Ombudsman).<sup>40</sup> The CM has a total number of 265 complaints, with 55 currently ACTIVE and 210 closed.<sup>41</sup>
- The Inter-American Development Bank (IDB) established the **Independent Consultation and Investigation Mechanism (MICI)** which makes use of a roster of experts.<sup>42</sup> The MICI was established in 2010, and like other IAMs has the dual roles of dispute resolution in the consultation phase and investigation in the compliance review phase of a complaint. The MICI has a total number of 167 complaints, with five currently closed and 152 closed.<sup>43</sup>
- The International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) in 1999 established the **Compliance Advisor Ombudsman (CAO)**.<sup>44</sup>

## APPENDIX 2

### Information requested concerning IAMs

#### Box 7

#### Information requested concerning IAMs

- i) The NDB does not seem to currently have an IAM to receive complaints concerning NDB-financed projects. Is there any prospect of the Bank developing such a mechanism?
- ii) If the answer to question 1 above is yes, what is the estimated timeframe to operationalisation of the IAM?
- iii) Will the NDB IAM be structured similarly to IAMs in other multilateral banks? If not, what model will be used?
- iv) If the NDB will develop an IAM, what activities will lead up to operationalisation, for instance, will a draft of the mechanism be shared with stakeholders and will public consultations form part of the process? Will the process include the development of a policy on the IAM?
- v) What nature of issues will an NDB IAM deal with?
- vi) What will the relationship between the NDBs IAM and the Grievance Redress Mechanism be? What will the main difference between these two mechanisms be?

**Box 8****Response from NDB**

Thank you for your request submitted via the New Development Bank's website. We highly appreciate your interest in the NDB and its work.

Compliance and Investigations (CSI) Department is an independent department and is in charge of the Whistle-blower Procedures of the NDB (hosted on the Bank's Website at <https://www.ndb.int/about-us/whistleblowing/>). Project level complaints involving allegations against the Bank staff are currently handled as per these Procedures. Further, in accordance with relevant operational policies, the Environment and Social Framework of the Bank sets requirements for Bank's clients on grievance redressal relating to project complaints on the matters covered under the framework. A copy of the framework is available on the Bank's Website.

Pursuant to the new organizational structure approved in December 2020, the Department of Compliance and Investigations shall be in charge of the grievance redressal that also deals with complaints from individuals, communities and organizations that are considered being negatively affected by the Bank's activities and operations.

Accordingly, updated guidelines for project complaint mechanism are currently being formulated by the Compliance & Investigations Department. The same shall be reviewed further in due course to evolve into an Independent Accountability Mechanism as may be required for the circumstances of the Bank.

Thank you.

Best regards,  
Corporate Communications Division  
New Development Bank



Community members writing about their challenges in a reflective session held in Lephalale, Limpopo Province.

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## NOTES

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