

Open Letter to the Ministry of Finance and Reserve Bank of the Republic of South Africa

15 December 2014

Ministry of Finance of the Republic of South Africa

To: Minister Nhlanhla Nene

Reserve Bank of the Republic of South Africa

To: Governor Lesetja Kganyago

Dear Minister Nene and Governor Kganyago

PARLIAMENTARY PARTICIPATIVE PROCESS FOR THE BRICS BANK

1. The undersigned organisations call on the National Treasury to put in place:
 - 1.1. a participatory mechanism to allow civil society organisations the opportunity to express their views on the development projects of the BRICS New Development Bank ('NDB');
 - 1.2. human rights standards and safeguards to be adopted by the NDB;
 - 1.3. an independent human rights' complaints mechanism with extraterritorial jurisdiction and the power to make binding and reviewable decisions on human rights violations; and
 - 1.4. a method of remediation for victims of human rights violations.
2. In July 2014, South Africa, along with the other countries in the BRICS bloc, committed to the formation of the NDB. The National Treasury issued a press statement in which it stated that the NDB "will mobilise resources for infrastructure investment and sustainable development projects". The formation of this bank has been hailed as a step towards development not only in BRICS countries, but in other countries on the continent.
3. It follows, given the significant role that may be played by the NDB on the continent that it should not only ascribe to human rights principles but also ascribe to principles of transparency, accountability and participation. The NDB, as a creature of the Republic of South Africa should align with the human rights commitments made by the latter.

4. As a signatory to the African Union's Constitutive Act and the African Charter on Human and Peoples' Rights, South Africa committed to sustainable economic, social and cultural development (articles 3(j) and 22 respectively). This commitment was confirmed by the ratification of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('Women's Charter') and the African Youth Charter (articles 19, and 10(1) respectively).
5. South Africa, through the African Union ('AU') has also committed itself to grant individuals and communities the opportunity to participate in decision-making processes, especially those related to development. For instance, the African Youth Charter provides that young people should be given the opportunity to take part in poverty reduction strategies (article 14(2)(e)). The Women's Charter provides that women should participate equally to men at all levels of decision-making as well as the conceptualisation, implementation and evaluation of development policies and programmes (articles 9(1)(c) and 19(b)).
6. The African Commission on Human and Peoples Rights, in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* case, interpreted the right to development. It said that the right to development has both constitutive and instrumental elements and that the violation of either constitutes a violation of the right to development. In order to meet the requirements of the right, a decision on development "must be equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important, over-arching themes" (para 277).
7. Consultation is also a requirement in terms of South African law. The founding provision of the Constitution of the Republic of South Africa, 1996, states that our democracy is founded on the values of accountability, responsiveness and openness (section 1(d)).
8. In light of the case and the legal instruments set out above, the National Treasury is obliged to facilitate an opportunity for the public to engage in what sustainable development means as a right. This must be done through the national legislature and prior to South Africa's acceptance, ratification or approval of the NDB articles of agreement. This is particularly necessary when one considers that public funds will be used to resource the NDB.
9. The importance of consultation is amplified by the potential human rights violations that could occur through the development projects of the NDB. Illustrative examples appear below.
 - 9.1. The Inga Dam project in the Democratic Republic of Congo, financed by the World Bank, African Development Bank and the South African government may result in the relocation of villages, jeopardise the livelihoods of those dependent on the Inga River, and deprive others of access to water. It has been alleged that relocation without compensation has already occurred.

- 9.2. In 2009 the International Finance Corporation ('IFC') provided a loan to a corporation named Dinant for a palm oil project in Honduras. Human Rights violations ensued pursuant to that loan. And, in December 2013, the Compliance Advisor Ombudsman ('CAO') found that the project had resulted in the forced evictions and violent victimisation of farmers. According to the CAO this could have been avoided, in part, if IFC had comprehensive and rigorous human rights policies in place.
10. In order to ensure that human rights are not violated in project funded by the NDB, the National Treasury should, at the very least, ensure that the NDB has:
 - 10.1. A policy that:
 - 10.1.1. guarantees, and seeks to protect, universal human rights in a way that is conscious of the contextualised manner in which victimisation occurs based on, among other things, age, race, class, gender, ethnicity, sexual orientation and gender identity;
 - 10.1.2. guarantees the free, prior and informed consent of indigenous people affected (directly or indirectly) by development projects;
 - 10.1.3. guarantees equality, transparency, participation, consultation, accountability, and inclusiveness in all NDB projects;
 - 10.1.4. clearly articulates the human right to an environment that is not harmful to health or well-being as well as measures to prevent environmental degradation; and
 - 10.1.5. sets out the steps for human rights due diligences with a view to prevent, mitigate and address them where they occur.
 - 10.2. An independent human rights' complaints mechanism with extraterritorial jurisdiction that has the authority to make binding decisions on issues pertaining to human rights. This mechanism should have direct means of access for persons alleging human rights violations; and, its binding decisions should be reviewable by independent courts of law.
 - 10.3. A method of remediation for victims of human rights violations consequent to NDB development projects that include but are not limited to: compensation, reparation, restoration, non-repetition, and admission of wrongdoing.
 11. It follows that civil society should not only be given the opportunity to be heard on the development projects of the NDB but should also be consulted on the safeguards and human rights compliance mechanisms of the NDB.
 12. In summation, we call on the National Treasury to commit to:
 - 12.1. a consultative mechanism for civil society on the NDB, preferably through the national legislature prior to South Africa's acceptance, ratification or approval of the NDB articles of agreement;
 - 12.2. the human rights standards set out in paragraph 10 above; and
 - 12.3. consultations with civil society on the safeguards and human rights standards of the NDB.

Endorsed by the following organisations:

Centre for Applied Legal Studies, University of the Witwatersrand

Centre for Civil Society, University of Kwa-Zulu Natal

Khulumani Support Group