

Open Letter to Parliamentary Committees

03 March 2015

Portfolio Committee on Economic Development

To: Ms Elsie Mmathulare Coleman

Via email: ecoleman@parliament.gov.za

C/O: Noluthando Skaka

Via email: nskaka@parliament.gov.za

Portfolio Committee on International Relations and Cooperation

To: Mr Moses Siphosezwe Amos Masango

Via email: msamasango@parliament.gov.za

C/O: Lubabalo Sigwela

Via email: lsigwela@parliament.gov.za

Portfolio Committee on Justice and Correctional Services

To: Dr Mathole Serfo Motshekga

Via email: mmotshekga@parliament.gov.za

C/O: Cindy Balie

Via email: cbalie@parliament.gov.za



Select Committee on Finance

To: Mr Charel Jacobus De Beer

Via email: cdebeer@parliament.gov.za

C/O: Zolani Rento

Via email: zrento@parliament.gov.za

Select Committee on Security and Justice

To: Mr Dumisani Livingstone Ximbi

Via email: dximbi@parliament.gov.za

C/O: Gurshwyn Dixon

Via email: gdixon@parliament.gov.za

Select Committee on Trade and International Relations

To: Mr Edwin Ronald Makue

Via email: emakue@parliament.gov.za

C/O: Hlupheka Mtileni

Via email: hmtileni@parliament.gov.za

CC: Ministry of Finance of the Republic of South Africa, Minister Nhlanhla Nene

Via email: Mary.Marumo@treasury.gov.za; Marlon.Geswint@treasury.gov.za; minreg@treasury.gov.za

CC: Ministry of International Relations and Cooperation, Minister Maite Nkoana-Mashabane

Via email: Minister@dirco.gov.za; Parl@dirco.gov.za; malokae@dirco.gov.za; mazibukop@dirco.gov.za; sefolot@dirco.gov.za; tawanam@dirco.gov.za

CC: Reserve Bank of the Republic of South Africa, Governor Lesetja Kganyago

Via email: juanita.jansen@resbank.co.za

Dear Chairpersons of Parliamentary Committees,

PARLIAMENTARY PARTICIPATIVE PROCESS FOR THE BRICS BANK

1. The Centre for Applied Legal Studies calls on the National Treasury and Parliamentary Committees to insist on:
 - 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 by, or related to, the NDB; and
 - 1.4. a method of remediation for victims of human rights violations committed in the development of NDB projects.
2. In July 2014, South Africa, along with the other countries in the BRICS bloc, committed to the formation of the NDB.
3. 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.
4. 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.
5. 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). South Africa's commitment was further 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).
6. 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)). The right to self-determination also appears in section 235 of the Constitution.

7. 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).
8. 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)).
9. 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.
10. 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.
 - 10.1. 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.
 - 10.2. 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.

11. In order to ensure that human rights are not violated in projects funded by the NDB, the National Treasury should, at the very least, ensure that the NDB has:

11.1. A policy that:

11.1.1. 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;

11.1.2. guarantees the free, prior and informed consent of indigenous people affected (directly or indirectly) by development projects;

11.1.3. guarantees equality, transparency, participation, consultation, accountability, and inclusiveness in all NDB projects;

11.1.4. 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

11.1.5. sets out the steps for human rights due diligences with a view to prevent, mitigate and address them where they occur.

11.2. 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.

11.3. 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.

12. 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.

13. This consultation should take place through the national legislature. Section 231(2) and (3) of the Constitution read together provide that international agreements that require ratification or accession bind South African only after they have been approved by Parliament. However, international agreements of a technical, administrative or executive nature bind South Africa upon signature by the executive but must be presented to Parliament within a reasonable period of time.

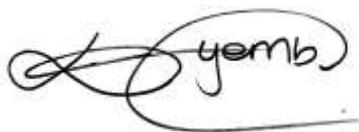
14. It is unclear to us whether the National Treasury has already undertaken a process of adoption. It is also unclear from the Articles of Agreement of the NDB which process of adoption is to be followed by the National Treasury. Article 4 of the Articles of Agreement provides that the "Agreement... shall enter into force when the instruments of acceptance, ratification or approval have been deposited by all BRICS countries." It seems therefore that either one of the three processes (i.e. acceptance, ratification or approval) may be performed by the National Treasury. However, the role played by Parliament cannot be disregarded. Regardless of which process of adoption the National Treasury follows, Parliament must be given an opportunity to engage with the NDB and the Articles of Agreement in terms of South Africa's Constitution.

15. The NDB is of particular importance to you. The committees you chair allow parliament to ensure that issues can be debated in more detail; increase the level of participation of members of parliament; and provide a platform for the public to present views. Thus the committees you chair will enable parliamentary and public engagement and contribution on the NDB, an institution that could soon become an important international financial development institution. The committees can make a crucial contribution by ensuring that South Africa only supports the funding of projects that respect, promote, protect and fulfill human rights.

16. In summation, we call on the National Treasury to commit to:

- 16.1. Informing the public of the process of adoption of the NDB and indicating whether or not it has already undertaken the adoption of the NDB instrument(s);
- 16.2. 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;
- 16.3. the human rights standards set out in paragraph 11 above; and
- 16.4. consultations with civil society on the safeguards and human rights standards of the NDB.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Nyembe', with a large, stylized flourish on the left side.

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