

Advancing Accountability: Establishing a Remedy Fund at the AfDB

One of the central objectives of the current review of the African Development Bank’s (AfDB) accountability system is “to undertake a thorough assessment of the extent to which IRM has been an effective *recourse* mechanism for people affected by a project” (emphasis added).¹ One fundamental gap that must be addressed is the lack of readily available resources for remedying the harm that can result from an AfDB-financed project. The failure to effectively remedy harm in a timely manner is not only an injustice for communities impacted by projects but also undermines accountability for the entire institution. The AfDB should ensure that effective remedy is available now by establishing mechanisms that reserve resources to remedy environmental and social harms if they occur. With a remedy fund, the AfDB can systematically shift risks away from communities and envisage more environmentally and socially sustainable projects. Remedying environmental and social harm *is* development, and the AfDB should address the challenge with zeal.

Why a Remedy Fund is Required

Local communities seeking redress through IRM processes have too often found real remedy delayed or unforthcoming. The report highlighted several barriers to effective remediation of grievances, including a lack of constructive engagement by Bank management.² Even when an IRM compliance review investigation confirms local communities’ claims of harm and the AfDB responds by developing a remedial action plan, positive change on the ground for communities can be impeded by a lack of follow-through on providing the resources necessary for implementation.

For instance, in 2018 the IRM released a compliance review report on the AfDB-financed Sendou Plant Project, a planned 125 MW coal-based power plant in Senegal.³ The report found a number of instances of non-compliance with Bank policies that caused or threatened to cause harm to the local community, including loss of land, economic displacement due to loss of traditional livelihoods, and water and air pollution. Following the release of the report, AfDB management produced a Management Action Plan (MAP), which was approved by the Board in January 2019. The MAP sets out a number of actions to be taken by the Bank and project implementers to remedy the issues identified by the IRM.

However, over a year later, implementation of the MAP has been significantly impeded in large part due to financial constraints. An IRM monitoring report published in June 2020 found that

¹ Third Review of the African Development Bank’s Independent Review Mechanism, para. 5i, p. 11 (2020) [hereinafter, “Review Report”].

² *Id.* para. 83, p. 30.

³ Action Plan Concerning the Compliance Review Report on the Sendou Coal-Fired Power Plant Project (2019), https://www.afdb.org/fileadmin/uploads/afdb/Documents/Compliance-Review/Sendou_Coal_Fired_Power_Plant_Compliance_Review_Report_Eng.pdf.

progress on executing the MAP has been very limited, with the project remaining non-compliant with multiple policies.⁴ The client’s financial insolvency was identified as a major obstacle to implementation and the resources offered by the government was insufficient to address all land claims.⁵ Moreover, the Bank’s ability to bring the project into compliance has been curtailed by the fact that the project loan has been fully disbursed. Meanwhile, local families have been left with uncertainty about their land use rights and the threat of environmental harm.

The effectiveness of IRM problem-solving initiatives, which can potentially produce agreements to abate and remedy harm, can also be hampered by the absence of a remedy fund. The lack of readily available resources can derail a problem-solving initiative and prevent the parties from achieving a meaningful agreement. And even when agreements are reached through problem solving, a lack of resources can delay the implementation of those agreements, leaving community members waiting for additional months or years to receive agreed remedies.

The ongoing review of the AfDB accountability system presents a crucial opportunity for the AfDB to dedicate a fund to resourcing remedy. The fund could be a natural complement to the IRM’s processes, provided that certain other reforms to the AfDB accountability system – such as procedures to ensure meaningful AfDB responses to IRM findings⁶ and, when welcomed by complainants, good-faith engagement by both clients and management in IRM problem solving initiatives – are enacted. The IRM’s role as an impartial factfinder in compliance reviews and as a convener of parties in problem-solving initiatives offers an objective basis for administering a remedy fund.

The review report recognizes that there is an evolving discussion on addressing these and other systemic obstacles to effective remedy.⁷ This discussion has crystallized further in the recent review of the IFC/MIGA/CAO accountability framework, which took the critical step of recommending the establishment of “mechanisms to provide financial support for remedial action.”⁸ It would be a missed opportunity if the AfDB did not embrace the same conclusion.

Designing a Principle-Based Remedy Fund

While a fund can be structured in a variety of ways, it must be geared first and foremost towards delivering effective remedy for communities. No matter how it is structured, the operation of the fund must adhere to the following principles:

⁴ Construction of a 125 MW Coal-Fired Sendou Power Plant in the Village of Bargny Minam, Senegal: Independent Review Mechanism First Monitoring Report on the Implementation of the Updated Management Action Plan (2020), <https://www.afdb.org/en/documents/senegal-construction-125-mw-coal-sendou-power-plant-village-bargny-minam-1st-monitoring-report>.

⁵ In 2017, SENELEC, the national power company offered 1 billion CFA for compensation of land claims.

⁶ The Review Report notes a number of shortcomings stakeholders have raised about current practice regarding Management Responses and Action Plans, including lack of consultation with complainants. Review Report, para. 69, p. 26.

⁷ *Id.* paras. 25-27, pp. 16-17.

⁸ External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness: Report and Recommendations, para. 333, pp. 77-78; see paras. 334-339, pp. 78-79 (2020), <http://pubdocs.worldbank.org/en/578881597160949764/External-Review-of-IFC-MIGA-ES-Accountability-disclosure.pdf>.

- **Remedy-focused:** The fund would bolster the AfDB accountability system in a myriad of ways, from enhancing project outcomes to promoting continuous institutional learning and improvement. However, the fund's primary purpose must be to deliver remedy for those communities that have heretofore found harm unaddressed or remedy unimplemented.
- **Community-driven:** The fund must empower affected communities to shape remedy. Local communities are best positioned to know what will constitute truly effective remedy. While the AfDB and others have important technical expertise to offer, community needs, as voiced by them, should be put front and center. Without this, the fund will fail to mitigate the risk of further unintended harm or ineffective remedy.

Communities must have ample and routine opportunities to participate in the deliberative process of designing and delivering remedy, throughout the IRM's process⁹ and remedy implementation. All other parties involved must meaningfully incorporate community input. Other communities not originally affected by an AfDB-financed activity but potentially affected by remedial measures must also be extended meaningful opportunities for input.

- **Accountability:** Actors that cause or contribute to harm must contribute to remedy.¹⁰ This principle applies to financial institutions that contribute to harm.¹¹ Harm is often not attributable to only the AfDB or only the client. Rather, it is common that both the AfDB and the client share the responsibility for harm caused. The operation of the fund should ensure that the actors with responsibility for harm contribute to resourcing remedial measures.

There are a number of ways that the AfDB and clients can – without impeding the delivery of timely remedy to communities – determine an objective allocation of financial responsibility. Such an allocation is not only a matter of fairness but also critical to ensuring accountability for all actors and incentivizing them to be proactive about mitigating and addressing environmental and social risks.

- **Predictability:** The fund should operate according to well-defined procedures that make the fund's operation predictable for affected communities seeking remedy and equally

⁹ The establishment of the fund should also be accompanied by additional measures to prevent retaliation against IRM complainants. Both the AfDB and the IRM should establish comprehensive processes for assessing, preventing, and addressing risks of and actual instances of retaliation against all project-affected communities, including potential complainants and all others associated with the complaint process (such as complainants' family members, NGOs, translators, drivers, etc.).

¹⁰ See Office of the High Commissioner for Human Rights, United Nations, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, Principle 13, p. 14; Principle 15(c), p. 16; Commentary to Principle 19, p. 21; Principle 22, p. 24, available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹¹ See, e.g., OECD, DUE DILIGENCE FOR RESPONSIBLE CORPORATE LENDING AND SECURITIES UNDERWRITING, pp. 41-42, available at <https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf>; Dutch Banking Sector Agreement, DISCUSSION PAPER: WORKING GROUP ENABLING REMEDIATION, pp. 33-35, available at <https://www.imvoconvenanten.nl/-/media/imvo/files/banking/paper-enabling-remediation.pdf>.

effective from case to case. The fund should also operate according to reliable timelines that should be geared towards delivering timely remedy.

- **Impartiality:** Operation of the fund should entail a process for objectively determining the resources necessary to implement effective remedy, free from commercial considerations or undue influence from the AfDB or the client.
- **Transparency:** In order to ensure it is effective in executing its mandate to deliver remedy, the fund must operate transparently. Information about the remedial actions identified and the resources allocated for their implementation; the rationales for those determinations; assessments by the IRM and communities about the remedial actions' adequacy; monitoring reports of remedy implementation; and more should be disclosed publicly.

Remedy Fund Options

The AfDB should develop a remedy fund framework through a robust, transparent, and public consultation process with a broad range of stakeholders, including affected communities and civil society. Documents detailing the options under consideration should be publicly disclosed, and stakeholders should be afforded meaningful opportunities to provide comments. Structuring a remedy fund entails many complex questions, and proactively incorporating a wide range of perspectives is crucial to answering them properly. These consultations should solicit feedback on a variety of options for structuring a fund, among them: a single, AfDB-wide fund; individual funds for each project; or a fund that employs a combination of institution-level, project-level, and other mechanisms.

- **Common-fund:** The AfDB could create a single common-fund for all AfDB projects. A portion of existing AfDB capital could be reallocated to set up the fund or the fund could be created by a one-time capital increase from AfDB shareholders. The fund could be set up to automatically replenish over time, such as by remitting a small percentage of AfDB revenue, to ensure resources are available to communities harmed by future projects.

Whenever the IRM finds that an AfDB project results in harm, the fund would disburse a portion of its resources. The amount of resources to be disbursed in any given case would be determined through an impartial and transparent process in which communities meaningfully participate in the process of identifying the necessary remedial measures.

To ensure accountability for all actors, other mechanisms would need to be put in place to facilitate allocation of costs between the AfDB and the client when both share responsibility for harm. Financing agreements could, for instance, include obligatory indemnification of costs related to remedy or a variable interest rate that increases when a project results in harm. In certain circumstances, the fund could also be used to finance agreements made through problem solving processes.

- **Project-specific funds:** The AfDB could create individual funds for each project as a standard practice. The amount of resources to be set aside in each project's fund could be determined as part of the environmental and social impact assessment phase. Where the project is financed by loans, the fund resources could be "loaned" to the client as an

additional percentage of support. Other financial instruments, such as equity, likely could also be structured in a way to set aside fund resources and give the client a financial stake in avoiding harm.

If there is an IRM finding of harm, the client would be obligated to use some or all of the fund, as determined by an impartial process, to resource remedy. Other mechanisms could be put in place to allocate – after timely disbursement and potentially as part of repayment – financial responsibility between the AfDB and the client. If the project does not result in harm, the fund resources could be returned to the AfDB interest-free, so the client suffers no financial consequences, or wholly or partially reallocated, possibly creating a positive incentive for clients to prevent harm. Use of fund resources could also be negotiated through a problem solving initiative.

- **Multi-modal:** The fund could employ a combination of mechanisms at the institution and project levels to provide more flexibility in addressing unanticipated circumstances or to streamline allocation of financial responsibility between the AfDB and the client. Third-party insurance instruments could also be used as a component of a remedy fund, but only where their use would not hamper community participation or the predictable and timely delivery of remedy. The use of insurance instruments also cannot enable any actor to elude its fair share of financial responsibility for remedy with a small upfront payment, which would severely undermine accountability.

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The AfDB should not leave local communities without recourse for harm arising from its financing activities. The AfDB accountability system is incomplete and inadequate without a mechanism in place to systematically facilitate effective delivery of remedy. Though current IRM processes may result in remedial action plans or agreements, experience has shown that the lack of readily available resources can be a major impediment to their implementation. The AfDB can close this glaring gap by establishing a remedy fund to ensure resources are available for the predictable and timely implementation of remedy. The ongoing review presents the opportunity to act and also creates the expectation that the AfDB will meet the moment. By committing to developing a principle-based remedy fund framework through a transparent and inclusive process, the AfDB can ensure that the review of the IRM truly advances accountability and is not viewed as a missed opportunity.