Global South Empowerment or Business as Usual: The Challenges Presented by the New Development Bank’s and the Asian Infrastructure Investment Bank’s Accountability Mechanisms

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This Note discusses two new multilateral development banks (MDBs), the New Development Bank (NDB) and the Asian Infrastructure Investment Bank (AIIB), which are rising to challenge the hegemony of the World Bank and other Western-led development finance institutions. Supporters have argued that these new banks will be sources of empowerment and reclamation, allowing the Global South to have a more powerful voice in the development projects that affect it most. I argue that this is only possible if the NDB and AIIB install strong accountability mechanisms and safeguard frameworks to relieve vulnerable Global South communities of further burdens and to ensure these communities have adequate systems of redress for their grievances and human rights concerns. I analyze the current landscape of MDB accountability mechanisms and the ongoing race to the bottom in multilateral financial institutions, looking particularly at the World Bank and its Inspection Panel. I also provide recommendations for both banks’ accountability offices based on implementing best practices and increasing community involvement in project consultation and in grievance mechanisms.

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INTRODUCTION

Multilateral development banks (MDBs), ¹ such as the World Bank, ² are generally known as high-power financial institutions that finance some of the most expensive and risky projects in the poorest parts of the world in order to promote development and alleviate poverty. The histories, practices, and policies of many MDBs have been controversial, and reactions to their work range from accolades to demonization. There are those who believe that underdeveloped parts of the world would have been left behind were it not for MDB investments post-World War II and post-decolonization, while there are those on the other side who believe that MDBs are the true embodiment of Western dominance and

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¹ MDBs are intergovernmental organizations comprised of states. They are a subset of International Finance Institutions. MDBs are born from “state-created constituent instruments often referred to as Articles of Agreement,” which are legal treaties under the Vienna Convention. MDBs are “exclusively comprised of and governed by states,” and their mission is to “work toward the economic and social development of developing member countries.” Leonardo A. Crippa, Multilateral Development Banks and Human Rights Responsibility, 25 AM. U. INT’L L. REV. 531, 533–35 (2010).

² Founded in 1944, the World Bank was the first global bank responsible for long-term development finance. The Bank has 188 member states and consists of five groups—two that focus on lending and aid and three more focused on private-sector activity. In 2014, the World Bank Group disbursed $44 billion. A Board of Governors, with representatives from all member states, runs the Bank. The Bank’s Executive Board consists of the six largest shareholders: the US, China, France, Germany, Japan, and the United Kingdom. Martin Ravallion, The World Bank: Why It Is Still Needed and Why It Still Disappoints, 30 J. ECON. PERSP. 77, 77–79 (2016).
in institutional evil.3 The BRICS4-led New Development Bank (NDB) and the China-led Asian Infrastructure Investment Bank (AIIB) give international financial institutions a chance at redemption. The NDB and the AIIB have the potential to remedy the wrongs and biases5 critics have accused the World Bank and other Western-led development banks of committing for decades. There is renewed hope in the field that these two emerging banks will give the Global South6 a much-needed voice in the realm of development-related project finance, but at the same time there is growing concern that their relatively lax standards might affect MDB accountability.

The concerns of the aggrieved communities that MDB-financed projects have affected are not new, but an institutionalized response to accountability

3. Development scholars see development aid stemming from the World Bank and MDBs as a tool for and extension of “foreign-policy concerns and historical ties,” rather than for distributing aid in a way that truly reflects “genuine need or efficacy.” Id. at 81. Journalists have also written investigatory pieces that assert World Bank Group lenders favor projects that are “large, destructive and fraught with risk” and argue that this lender bias demonstrates a mistrust of Bank motives and an assumption of insidiousness in Bank actions. Ben Hallman & Roxana Olivera, Gold Rush: How the World Bank Is Financing Environmental Destruction, HUFFINGTON POST (Apr. 15, 2015), http://projects.huffingtonpost.com/worldbank-evicted-abandoned/how-worldbank-finances-environmental-destruction-peru [https://perma.cc/8X5M-SWSV]; see also Sasha Chavkin et al., Evicted & Abandoned: How the World Bank Broke Its Promise to Protect the Poor, HUFFINGTON POST (Apr. 15, 2015, 8:01 PM), http://projects.huffingtonpost.com/worldbank-evicted-abandoned [https://perma.cc/NLK3-5H2X].

4. “BRICS” is the acronym that refers to Brazil, Russia, India, China, and South Africa. Ian Bremmer, The Mixed Fortunes of the BRICS Countries, in 5 Facts, TIME (Sept. 1, 2017), http://time.com/4923837/brics-summit-xiamen-mixed-fortunes [https://perma.cc/9THM-VZHJ]. These five emerging national economies of developing and newly industrialized countries have formed a partnership and have conducted formal summits since the early 2000s. Id. The acronym was originally “BRIC” because South Africa was not an original member. Id. South Africa joined in 2010, making the acronym BRICS. Follow the Yellow BRIC Road, ECONOMIST (Oct. 9, 2003), http://www.economist.com/node/2126037 [perma.cc/PFS9-XB6S]; Bremmer, supra.

5. Scholars have, since the inception of the World Bank and other MDBs with majority Western shareholders, scrutinized and criticized these institutions for causing more harm than good with many of their projects. For instance, in the last decade, World Bank projects have displaced an estimated 3.4 million people. When the World Bank Does More Harm Than Good, NAT'L PUB. RADIO, (Apr. 17, 2015), https://www.npr.org/sections/goatsandsoda/2015/04/17/399816448/when-the-world-bank-does-more-harm-than-good [https://perma.cc/8TX5-78XS]. Human Rights Watch has also found that “[i]n several cases, the World Bank has neither acknowledged nor mitigated human rights risks in its programs,” and that the Bank “lacks adequate checks to guard against funding human rights abuse.” World Bank: Ducking Human Rights Issues, HUM. RTS. WATCH, (July 22, 2013), https://www.hrw.org/news/2013/07/22/world-bank-ducks-human-rights-issues [https://perma.cc/AM6L-4JJB].

6. The Global South refers to “[t]he nations of Africa, Central and Latin America, and most of Asia,” constituting nearly 157 nations. Center for the Global South, AM. U., http://www1.american.edu/academic.depts/acainst/cgs/about.html [https://perma.cc/3GW-FQRL]. The unifying features of Global South nations include “[p]olitical, social, and economic upheaval,” as well as “immense hopes for economic growth, investment, and cultural contribution” that these nations’ emerging markets can provide. Id. While not technically a geographically correct term as there are developed and underdeveloped states on either side of the equator, the term “Global South” has become prevalent in modern discourse. This is mainly because it does not rank regions like the outdated terminology of “first world” versus “third world.” The nations of the Global South are also widely known as “developing countries.” Both terms are used interchangeably in this Note.
issues has only been in place since the 1990s. International development projects and accountability for affecting communities with those projects should go hand in hand, but seldom do. It seems ironic that project financing and implementing with development goals and poverty reduction in mind can actually adversely impact some of the most vulnerable communities in already unstable regions and nations. However, all too often, the World Bank and other MDBs place the potential success of a project (which may indeed benefit the community in question or surrounding communities) over the potential or proven harm that may be afflicted upon that community. For instance, most MDB development projects are meant to provide some clear benefit to an underdeveloped community, whether in the form of vocational and educational opportunities, health and sanitation improvement, or vital infrastructure to facilitate water and energy access. But, the issue arises when locals employed to work on a project die because of poor compliance with safety standards, when a sanitation project contaminates nearby farmlands, or when a piece of infrastructure displaces an entire community. Civil society and NGO advocacy, both locally and internationally driven, led the MDBs to—at least on paper—demand higher environmental and labor standards for the projects they finance. The MDBs have also integrated stricter safeguards into their policies, and most have created an accountability or grievance mechanism of some sort for affected


8. See id.

9. For instance, in 2012, the World Bank launched a review of its safeguard policies in order to strengthen them. Natalie Bugalski, The Demise of Accountability at the World Bank?, 31 AM. INT’L L. REV. 1, 10 (2016). The Bank consulted with civil society and NGOs in its public consultations of drafts, which set requirements on the Bank itself and laid out ten areas of “Environmental and Social Standards” that borrowers are required to meet. Id. at 10–11.

10. In the context of MDB accountability mechanisms, a grievance is defined as “[a]n issue, concern, problem, or claim (perceived or actual) that an individual or community group wants a company or contractor to address and resolve.” OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, A GUIDE TO DESIGNING AND IMPLEMENTING GRIEVANCE MECHANISMS FOR DEVELOPMENT PROJECTS, at iv (2008) [hereinafter CAO ADVISORY NOTE]. www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf [perma.cc/5M8F-RJDZ]. A bank or operational grievance mechanism is a non-judicial option which “may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes,” and is “administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group”—in this context, the MDB financing the business’s project. OFFICE OF THE U.N. HIGH COM’R FOR HUMAN RIGHTS (OHCHR), GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 31 (2011) [hereinafter OHCHR], http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [http://perma.cc/NA8Z-R4GA].
communities to directly confront the bank financing the problematic project.\textsuperscript{11} These accountability mechanisms, while voluntary, provide the best way to get communities direct access to MDB leadership without having to go through domestic judicial options, as well as to help combat the industry-wide race to the bottom in meeting social, environmental, and human rights standards.

The introduction of the NDB and AIIB into the MDB landscape creates a rights-based dilemma, which Western-led banks and specifically the World Bank did not have to face. The challenge lies in affording these Southern banks the same opportunities\textsuperscript{12} for achieving the success that the Western-led banks had at their foundation, while also refusing to tolerate the Southern banks’ success at the cost of human rights violations and lacking accountability mechanisms for aggrieved communities. By shifting the international development project-finance hegemony from the West to the Global South, the NDB and AIIB become models of empowerment for the Global South’s political and financial institutions and communities.\textsuperscript{13} However, these new banks must simultaneously follow best practices in the creation and maintenance of their accountability mechanisms, so as not to further burden and destabilize affected Southern communities.

This Note is divided into two parts: Part I is an overview of preexisting MDBs’ accountability mechanisms, and Part II is a discussion of the NDB’s and the AIIB’s importance in the field of MDBs and the potential of their accountability mechanisms. Part I first lays out the legal and quasi-legal landscapes in which the issues of MDB accountability reside and the implications for affected communities. Next, Part I explains the reasons for the field’s race to the bottom regarding the protection of human rights and the attainment of social and environmental standards, and weighs them against the business-related benefits to MDBs of installing proper accountability mechanisms. Next comes an overview of the current features and trends of


\textsuperscript{12} Most existing MDBs were founded in the decades preceding the increased international attention paid to human rights, accountability, and social and environmental harms. That increased international attention has resulted in the establishment of accountability offices and operational safeguards. Borrowers did not have to go through the same hurdles to gain approval for their loans as they do now. See Bugalski, supra note 9, at 5 (explaining how the expansion of the World Bank’s portfolio was accompanied by human rights violations and environmental disasters during the decade preceding the Bank’s adoption of its first safeguard policy in 1980). Because the accountability expectations at MDBs have changed, the new MDBs cannot simply start where many of their counterparts did in the 1960s but must adhere to contemporary standards from their foundation. As new banks, the NDB and AIIB are bound to be on unequal footing with the rest of the field, but the decades of red-tape-free lending their counterparts were able to engage in and gain success from only further exacerbates the disparity—whether or not they are all now held to the same standard.

effective accountability mechanisms, including a brief discussion of what the implementation of those features looks like in practice at two MDBs. Finally, Part I discusses the World Bank and its Inspection Panel, the first accountability office of its kind, and the International Finance Corporation’s accountability mechanism, the gold standard of accountability mechanisms.

Part II takes Part I’s broad lessons and applies them to the NDB and the AIIB. This Part outlines the relevance and significance of these two banks in the context of their ideals of Global South cooperation and counter-hegemonic member state makeup to rival the World Bank. This Part then tempers these ideals through an analysis of the existing plans the NDB and AIIB have for their operational policies, safeguards, and accountability or grievance mechanisms. Lastly, this Part concludes with recommendations for both banks based on following best practice and the International Finance Corporation standard, integrating community-driven and project-level grievance mechanisms into their wider accountability mechanisms, and continuing to consult with NGOs and civil society.

I. MULTILATERAL DEVELOPMENT BANKS AND ACCOUNTABILITY MECHANISMS

This Part provides an overview of the current state of MDB accountability and the historical, political, legal, and practical considerations that have shaped this field. Part I.A begins with an explanation of MDBs and a discussion of accountability within the broader context of the impact of Western politics and policies on membership, shares, and project finance. This Part provides examples of harmful projects and implications of lacking social and environmental standards to illustrate the kinds of damage communities have faced and why these communities require access to mechanisms of remedy and redress. This analysis transitions into a discussion of the jurisdictional gaps that make non-judicial accountability mechanisms, as well as other quasi-legal and extra-legal approaches, necessary. Part I.B uses the challenge of the jurisdictional and legal gaps in multilateral development finance to illustrate why the voluntary standards and guidelines currently in place, paired with the business need to attract borrowers, create a race to the bottom in accountability—despite the establishment of an accountability office at every MDB. Part I.C then discusses why this lack of commitment to accountability, manifested by ineffective grievance mechanisms and the failure to better engage communities, hurts the banks themselves and is bad for business. Lastly, Part I.D provides two examples to illustrate features of existing accountability mechanisms. The first is the World Bank’s Inspection Panel, which was the first MDB accountability office and influenced the rest of the banks to create their own mechanisms. The Inspection Panel has some positive features but ultimately has not been robust or effective enough. The second is the International Finance Corporation’s
Compliance Advisor Ombudsman, which, in contrast, has more progressive, rights-based features and functionality that should be adopted as best practice.

A. The Landscape for Multilateral Development Bank Accountability

MDBs are international financial institutions that are comprised of states and are “charged with fostering economic and social development, either in the public or private sector.” MDBs work toward this mission by financing development projects, usually related to infrastructure, in the developing world. Sometimes the projects and financial assistance are part of policy-based lending, which requires a borrowing country to adopt MDB-favored financial policies in exchange for funds. There are universal MDBs, such as the World Bank, and regional MDBs, such as the ADB, which only operate in specific regions, but membership is open to states from any region. A member state’s decision-making power is directly related to its contribution to the MDB’s capital stock, which can, of course, politicize the agenda of an MDB such that it skews toward policies favored by the majority contributors who happen to be Western nations. For instance, the US is the largest shareholder in the World Bank Group, which consists of five different banking and finance organizations. Since the World Bank’s inception, the US has held the privilege of nominating an American citizen to the post of World Bank President. These factors clearly give the US a distinct and prominent voice, allowing it to be the virtual hegemon of the World Bank Group and govern the direction of Bank affairs and practices—many times to the disadvantage of poor and developing nations.

The World Bank and most of its regional progeny adopted a “set of ‘neoliberal’ economic policies,” the “Washington Consensus,” which focused on

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14. Crippa, supra note 1, at 533.
15. Id.
17. Id. at 127.
18. Id. at 129.
19. The World Bank Group consists of five organizations, including the International Bank for Reconstruction and Development and the International Development Association, which together comprise the World Bank. The IFC and MIGA are the private sector arms of the group. The International Centre for Settlement of Investment Disputes is the venue for international investment disputes. The Inspection Panel only conducts oversight for the World Bank and the CAO only applies to IFC and MIGA. About the World Bank, WORLD BANK, http://www.worldbank.org/en/about [perma.cc/EDV3-C2H6].
the liberalization of trade and privatization of state-owned enterprises. These policies are not only seen as elitist and favoring high-income countries, but also as impeding economic growth and stifling new investment in borrowing countries. Harsher critics find the results of this kind of policy-based lending to be antithetical to the poverty alleviation and development goals of MDBs, and to disguise harmful inequalities in the MDB-borrower relationship. As far as the World Bank goes, roughly 20 percent of its resources went to the poorest countries, while 70 percent of its loans went to only eleven countries, which happened to be “middle-income countries that already enjoyed easy access to foreign capital investment.” This makes the inequalities and dangers of the MDB-borrower relationship quite apparent and also calls into the question the Bank’s intentions of poverty alleviation.

Aside from the high-level problems of the disparity in MDB management, policies that disadvantage developing nations, and restrictive lending packages that affect developing nations overall, there have been several specific instances of harm and wrongdoing at the community level. There are examples of damaging projects gone awry or that actively overlooked social and environmental harm, leading to deaths and injuries, displacement, and environmental degradation. There have also been also instances of projects where MDBs have been complicit in state human rights abuses. Looking specifically at the World Bank, recent harmful projects have included: a large-scale mining project in Mongolia causing destruction of pasturelands and the forcible displacement of herders from traditional sites; an agricultural project in Uzbekistan overlooking state-owned enterprises; and an

22. Ravallion, supra note 2, at 87. Trade liberalization occurs when a country opens its markets up to foreign trade and investment; this allows for the effective management of resources, which in turn increases profits. Increased competition and output usually accompany trade liberalization. Trade Liberalisation, ORG. FOR ECON. CO-OPERATION & DEV. (OECD), http://www.oecd.org/tad/tradeliberalisation.htm [https://perma.cc/WV3J-4JS4].

23. Ravallion, supra note 2, at 87.

24. Washington Consensus policies were a single set of policies, meant to be universally implemented without regard for country-specific situations, such as a country’s development goals, commitment to social protection, or what the country itself wanted. These policies imposed economic tools that did not suit every climate. In some instances, these policies further burdened the poorest populations with increased inflation and decreased job prospects, while also tying countries down with immense debt in the form of structural readjustment packages. See id. at 87–89.

25. See id.; HEAD, supra note 16, at 175.


28. See AMPLIFYING VOICES, supra note 7, at 9–17.


30. AMPLIFYING VOICES, supra note 7, at 11.

31. See “We Can’t Refuse to Pick Cotton”: Forced and Child Labor Linked to World Bank Group Investments in Uzbekistan, HUM. RTS. WATCH (Jun. 27, 2017),
infrastructure and coal power plant project in Kenya destroying the mangrove forests, causing a likely decline in marine populations, and degrading local community health; and a power line project in Nepal leading to displacement and lacking community consultation or provision of information about the project and the displacement. In the last case, the World Bank did nothing when state security forces beat indigenous women who were peacefully protesting the project. There were no formal judicial remedies offered to any of the aggrieved communities mentioned, which is what makes the existence of effective MDB accountability mechanisms necessary.

Thus, the Global South is reasonably weary, based on history and experience, of MDB policies and lending structures that disadvantage developing nations. The lack of applicable laws and avenues for redress and remedy bolsters this weariness and skepticism, particularly for human rights abuses. The primary impediment is that MDBs do not possess “legal personality under international law,” and thus international legal tribunals cannot hold MDBs liable for the human rights violations that their financing activities cause in developing countries. International legal tribunals can only hold states accountable for violations of international human rights obligations. Intergovernmental organizations like MDBs, although comprised of states and operating as extensions of states, have an international legal personality more closely analogous to non-state actors, to which similar tribunal jurisdictions and mechanisms do not apply. Because MDBs are immune in both local and international jurisdictions, they are not subject to international law regarding international human rights violations, and local courts and international tribunals cannot hold them accountable.

The legally binding framework that applies to MDBs to some extent includes their founding charters and their own governing laws and policies, which explicitly provide for immunity in relation to their operational activities. While the majority of MDB charters do not mention the protection or promotion of human rights, the World Bank’s charter explicitly states that the bank’s activities are “subject to the laws of the countries in which the Bank operates.” The International Finance Corporation’s charter states that it aims to “assist countries in their efforts to achieve sustainable development.” These provisions are consistent with the bank’s broader mission to promote economic growth and poverty reduction in developing countries.

32. AMPLIFYING VOICES, supra note 7, at 13.
33. Id. at 17; Ben Hallman, World Bank Fails to Stop Attacks, Arrests of Villagers Protesting Big Projects, HUFFINGTON POST (Sept. 10, 2015), https://www.huffingtonpost.com/entry/world-bank-protesting-projects_us_55fca0a85e4b002d5c076908d [https://perma.cc/2VLT-TWG7] (“In Nepal, security forces repressed peaceful protests against the construction of a high-voltage power line backed by the World Bank, ‘employing torture, detention, and violent attacks on unarmed women,’ according to a 2013 complaint filed with the bank’s Inspection Panel.”).
34. See Desai, supra note 13.
35. Crippa, supra note 1, at 536.
36. See id. at 543–44 (explaining that MDBs act as “surrogates” for states in some of their activities).
38. Hades & Schlemmer-Shulte, supra note 21, at 510–12.
of human rights, they each stress development. The World Bank’s charter mentions increased standards of living and labor conditions, with a focus on development for productive resources and facilities in less developed nations; the ADB’s charter strictly mentions economic development, mainly in the form of infrastructure; and the African Development Bank’s charter mentions social and economic development together. These examples of charter language show where MDBs could and should be held accountable, but the commitments to development in the bank charters are too broad and too vague to enforce. As international organizations, MDBs could ask the International Court of Justice (ICJ) for advisory opinions, but no MDB has ever requested such an opinion.

Other legally binding areas MDBs could be subject to but avoid include international treaties and conventions they choose to enter, and, to a lesser degree, customary international law and jus cogens. The Inter-American Court has noted that, under customary international law, there is a well-established obligation for states to redress human rights violations. Advocates push for exactly this kind of redress in the context of MDBs and their accountability mechanisms when a bank either harms a community directly or is complicit in a state violation of human rights. However there has not yet been an instance of successfully applying, or attempting to apply, this custom to MDBs.

The use of soft law techniques has been the most effective legal or quasi-legal approach in this context, and, while voluntary, can pressure the MDBs into
following best practices. Soft law approaches can create industry-specific standards and norms. These in turn “fill a normative gap located between the state-centered focus of international law and the often inadequate or unenforced standards of the developing country hosts” where MDB activities take place.\(^\text{48}\) One such soft law tool for international development finance is the UN Guiding Principles on Business and Human Rights (“Guiding Principles”).\(^\text{49}\) The Guiding Principles set forth standards about business enterprises and states respecting and protecting human rights. Since MDBs have both state-like and business-like features, many accountability advocates (and even many of the banks themselves) consider the Guiding Principles applicable to MDBs.\(^\text{50}\)

It is within this context of increased attention on institutional accountability that the Guiding Principles stress the importance of providing an avenue for effective redress for affected communities. Guiding Principle 30 states, “Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.”\(^\text{51}\) Thus, grievance mechanisms should be available that allow communities to bring forward complaints addressing instances where the state or institution fails to meet its own human rights-related standards. Guiding Principle 31 goes on to establish the “effectiveness criteria for non-judicial grievance mechanisms,” which are: legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, and continuous learning.\(^\text{52}\) Because social and environmental safeguards are institutionally developed and are at the front end of a project,\(^\text{53}\) MDBs do not usually consult affected communities at this phase, and these communities do not have a chance to bring their concerns to light without an accountability mechanism at the back end. It is vital that these mechanisms are in place and are effective in providing communities with direct and fair access to the MDB, since legal options for achieving a remedy are lacking or non-existent.\(^\text{54}\) A lack of effective mechanisms


\(^{49}\) OHCHR, supra note 10.


\(^{51}\) OHCHR, supra note 10, at 32.

\(^{52}\) Id. at 33–34.

\(^{53}\) See SARFATY, supra note 26, at 5, 83.

\(^{54}\) See Crippa, supra note 1, at 541 (discussing MDBs as subjects of law and lacking legal personality under international human rights law).
incentivizes MDBs to continue business practices as usual and place borrower preferences over community wellbeing.

B. The Race to the Bottom

Despite both the necessity of accountability mechanisms to fill the judicial vacuum for redress and the benefits of installing strong and effective accountability mechanisms for both the communities at risk and the MDBs (which will be discussed further below), a pervasive race to the bottom exists among the MDBs regarding accountability. While virtually all of the MDBs have some sort of mechanism in place, many of them receive little time and dedication from the banks.\(^{55}\) Ironically, some MDBs tend to treat these mechanisms as a grievance for themselves because of the additional resources and staff these mechanisms require.

The race to the bottom ultimately results from the fact that compliance with accountability mechanisms and with the Guiding Principles and other guidelines are voluntary.\(^{56}\) The guidelines for MDB accountability and transparency are all soft law, and jurisdictional issues prevent communities from accessing true legal remedies, as described above; however, the establishment of accountability mechanisms, now a norm at the banks, has become a tool to ensure compliance with social and environmental safeguards. Even though there is an established custom, the commitment to ensuring that the mechanisms are fully accessible, functioning properly, and providing potential avenues of relief for affected communities has not been evenly distributed among the banks.\(^{57}\) Many times, banks’ systems of accountability are only kicked into gear after a project has failed and severely impacted a community,\(^{58}\) making these gestures toward accountability very reactionary and ad hoc rather than proactive and transparent.

Most MDB accountability mechanisms are not as strong, effective, or independent as they could be according to best practice. This is due not only to the lack of binding legal obligations, but also to the lack of incentives.\(^{59}\) Although the MDBs’ charters are committed to the development of underserved and underprivileged regions and communities, the MDBs are ultimately still financial institutions. As financial lenders, their primary interest is to attract borrowers. Whether the borrower is a state, multinational enterprise, or

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\(^{55}\) See generally VIOLET BENNEKER ET AL., GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE 15 (Caitlin Daniel et al. eds., 2016), https://www.grievancemechanisms.org/resources/brochures/IAM_DEF_WEB.pdf [perma.cc/WXW5-FH3H] [hereinafter BENNEKER ET AL.] (assessing data from 758 complaints since 1994, evaluating the extent to which accountability offices are equipped to address these complaints, and finding that the outcome of complaints rarely provides adequate remedy for harm—less than 20 percent of concluded complaints resulted in an actual negotiated settlement or compliance report).

\(^{56}\) Bridgeman & Hunter, supra note 48, at 188–89.

\(^{57}\) See generally BENNEKER ET AL., supra note 55 (providing an assessment of the gaps presented by each major MDB’s accountability mechanism).

\(^{58}\) See CAO ADVISORY NOTE, supra note 10.

\(^{59}\) See Crippa, supra note 1, at 551; Ravallion, supra note 2, at 91.
individual, the borrower always wants a loan package with the least amount of restrictions. With respect to MDBs, borrowers are usually trying to attain financing for specific projects. Most banks require that borrowers not only assess the viability of the project, but also provide a social and environmental impact analysis of how their project will affect its surroundings. These assessments usually are not very thorough, and are only required after project appraisal when the project already has a good chance of being financed. Typically, the borrowers themselves rather than an independent third party conduct the appraisal.

Moreover, the project plans must meet any social, labor, or environmental safeguards and standards the bank already has in place as a matter of policy (even though there are certain instances when the safeguards do not apply to particular packages decided on a case-by-case basis). A bank that has impactful accountability mechanisms, combined with a reputation of addressing and investigating complaints and grievances, deters borrowers. Borrowers seek to avoid the potential delays and injunctions that result from accountability processes. Borrowers flee from regulations, especially those that they find costly to comply with—namely, environmental protection and respecting property rights for indigenous communities. So, borrowers are much more attracted to MDBs with lax oversight of assessment policies and ineffective accountability mechanisms.

The banks do not want their accountability mechanisms to deter business such that borrowers go to another development bank with more relaxed standards. Thus, MDBs may believe it is in their best interest to keep their accountability mechanisms’ procedures slightly vague and opaque. The race to the bottom has resulted from a lack of formalization and uniformity in how seriously each MDB takes its accountability mechanisms and what outcomes the mechanisms actually produce. Competition among the banks, combined with the fact that borrowers can go elsewhere, bolsters the race to the bottom. The MDBs’ accountability mechanisms are meant to evaluate if the MDBs followed their own policies and procedures, as per the obligations outlined in the agreement.

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60. See Ravallion, supra note 2, at 91 (explaining that profits from lending provide an important source of revenue for the Bank, and that this incentivizes managers/directors to pursue a high volume of lending without fully considering subsequent project quality or impact).

61. See BENNEKER ET AL., supra note 55, at 72–73.

62. See Bugalski, supra note 9, at 4–6, 15; see also id. at 4 (discussing how “[c]lear requirements on the Bank and borrowers to ensure compliance in current policies are more flexible and negotiable under the proposal; project appraisal requirements are significantly reduced to expedite approvals; and greater emphasis is placed on borrowers’ (and less on the Bank’s) responsibility for assessing risk, implementing safeguards, and monitoring progress”).

63. Id.

64. See id. at 6, 30. “[T]he proposed framework, in effect, promotes the idea of negotiated agreements between the Bank and the Borrower on a case-by-case basis on the entitlements and protections to be afforded to project-affected people.” Id. at 30.

with the borrower. However, “the scope of what constitutes such failure is an essentially relative question” about which actor should ultimately be held accountable.\(^6\) Therefore, blame-shifting when a project goes awry further fuels the race to the bottom: banks can turn to the borrower, the host country, or the project supplier or contractor and say that any one of them are more liable for what happens on the ground than the bank that financed the project.

However, further victimizing already vulnerable communities that require development and poverty reduction measures goes against the missions and charters of MDBs. There need to be mechanisms in place that hold the MDBs accountable to those goals and make sure they are not burdening or hurting disadvantaged communities. The race to the bottom leaves the enforcement of any MDB accountability regime mostly up to NGOs and civil society organizations. These advocates, especially ones based in Western countries that are bigger shareholders in the World Bank and other MDBs, usually have more luck when they push their own governments to take a stand for accountability.\(^6\)

Since member states invest their own taxpayers’ money into these banks, the advocacy pitch to avoid a race to the bottom is the link between taxpayer money and a project gone bad in a faraway impoverished community.\(^6\) This implicates a state and its people in the resulting harms caused abroad.

### C. Why Lacking Accountability Hurts Multilateral Development Banks

Overall, it has proven difficult to get all of the MDBs on board with adopting the same practices or with implementing them to a similar extent even when they do adopt them nominally. The value of accountability and grievance mechanisms to affected communities cannot be stressed enough for the potential for justice, equity, and redress they can provide. Additionally, these mechanisms can provide much value for the MDBs themselves—value that goes uncaptured when practicing business as usual. However, to reap these benefits, MDBs’

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67. For instance, organizations such as the Accountability Counsel have strengthened World Bank safeguards, improved the resources and staffing at MDB accountability offices, and increased the transparency of different bank mechanisms. They have done so using an advocacy strategy that includes working with Congress, the US Department of State, and other US government officials to push for policy change through their roles at the MDBs. Amplifying Voices, supra note 7, at 19–23; see Past Initiatives, Accountability Counsel, https://www.accountabilitycounsel.org/past-initiative [https://perma.cc/K6VH-LXDE] (providing an example of Accountability Counsel’s engagement with the US government to reform multilateral institutions and banks).

commitment to accountability mechanisms must be thorough, substantive, and well intentioned rather than an ad hoc way to circumvent critics or subdue angry communities.\(^69\) The value to MDBs of including effective mechanisms is vast, ranging from cost efficiency to increased reputation in the field and in the community.\(^70\) Ultimately, accountability mechanisms are good for business because they foster a climate that is good for conducting business in a way that is ethical and profitable.\(^71\)

Compliance with international social and environmental standards and safeguards is essential to risk management for the banks,\(^72\) and the inclusion of accountability mechanisms further improves efficiency, operational stability, and project and resource management. Time, money, and productivity are lost without the adequate mechanisms in place, not to mention that credibility is lost when banks put ad hoc mechanisms into motion following an incident that they could have detected or mitigated with proper accountability mechanisms.\(^73\) The implementation of these mechanisms, as well as the regular analysis and tracking

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70. See generally CAO Advisory Note, supra note 10.

71. The argument proving profitability in the context of MDB grievance mechanism practices is fairly new and is not well developed. This argument was derived from looking at principles of Corporate Social Responsibility (CSR), the UNGP on Business and Human Rights, and the CAO Advisory Note. CSR favors better oversight and corporate practices on the ground, not just for the communities, but also for the businesses. By being more socially conscious, businesses gain a better reputation in the marketplace, develop a more productive and efficient workforce, and make management more effective overall, creating conditions for increased profitability. Richard Levick, Corporate Social Responsibility for Profit, FORBES (Jan. 11, 2012), https://www.forbes.com/sites/richardlevick/2012/01/11/corporate-social-responsibility-for-profit [https://perma.cc/2MZL-CTP8]; Devin Thorpe, Why CSR? The Benefits of Corporate Social Responsibility Will Move You to Act, FORBES (May 18, 2013), https://www.forbes.com/sites/devinithorpe/2013/05/18/why-csr-the-benefits-of-corporate-social-responsibility-will-move-you-to-act [https://perma.cc/HL66-9NNR]. The UNGP states that non-State-based grievance mechanisms can reduce costs for businesses. OHCHR, supra note 10, at 31. The CAO echoes this point and highlights how preventative measures and good management can cut costs down the road, especially with the large-scale, risky projects that the banks finance. CAO Advisory Note, supra note 10, at 10, 22. Overall, these arguments support that effective grievance mechanisms, combined with a socially conscious approach that looks at social and environmental risks and properly assesses them, could allow for the banks’ increased profitability, because money would not be lost to damage control and correcting ad hoc inefficiencies and mistakes. The ability to work with communities and identify potential issues upfront would also save money.

72. Support for risk management in the MDB-specific context is not available. This argument is based on the OECD Guidelines for Multinational Enterprises, which have also been applied to the banks, but not to the same extent as the Guiding Principles, because the OECD Guidelines are directed toward enterprises operating in OECD member states. See generally ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 20 (2008), http://www.oecd.org/corporate/mne/1922428.pdf [https://perma.cc/QP6X-GBC6] (providing non-binding standards for responsible business conduct based on applicable laws and international standards, including those of the UN Guiding Principles on Business and Human Rights).

73. CAO Advisory Note, supra note 10, at 2.
of grievances, can help MDBs install policies to avoid similar risks in the future. These strategies can also help create an internal expert community on grievance mechanisms that interested parties can easily access to address issues of compliance and implementation in the future.

MDBs should value accountability mechanisms since they present a non-judicial option that is a very cost-efficient way of redressing issues that arise. Moreover, banks that deal with problems sooner and more locally tend to resolve these problems more cheaply and efficiently, which is why grievance mechanisms should be in place from the beginning of an operation. Failing to establish proper grievance mechanisms and failing to conduct necessary due diligence leads to heftier costs and more damage down the road because banks did not inform community stakeholders earlier or stakeholders were not able to share their concerns before the harm escalated. For instance, if community leaders or representatives are involved in the design of the grievance mechanism available to them at the outset of the project, they can help “identify key factors” such as the kinds of disputes likely to arise and the availability of local resources to help resolve any conflict. The lack of inclusion of indigenous and local knowledge leads to costly delays, investigations and audits, reworks, injunctions, and restarts. All of these are issues that could be avoided or mitigated earlier with the right mechanisms in place.

Accountability mechanisms also indirectly contribute to the overall economic health and security of a nation, allowing the MDBs to finance projects with lower transaction costs and externalities associated with higher-risk developing nations with “poor governance structures and an inadequate judiciary.” MDB practices that lack accountability and transparency lead to a more unjust society, whereas thorough grievance-redressing mechanisms can allow for equity, justice, and inclusivity. These principles lend themselves to an environment where rule of law is protected, which in turn fosters the development goals of the banks. This outcome would especially be the case if affected communities could rely on MDBs protecting their human rights and

74. OHCHR, supra note 10, at 23–24.
75. See CAO ADVISORY NOTE, supra note 10, at 8–10, 22 (explaining community involvement and expectations for remedial processes, and the need to include community stakeholders from the beginning stages of a project).
76. See id.
77. Id. at 2.
78. See id. at 2, 11 (explaining the necessity of community involvement and problems that could be avoided or mitigated by grievance mechanisms that include community engagement).
79. Id. at 7.
80. See Hamid Bouchikhi, When CSR Must Begin with Observing the Rule of Law, COUNCIL CMTY. (Feb. 12, 2015), https://councilcommunity.com/2015/02/12/when-csr-must-begin-with-observing-the-rule-of-law [https://perma.cc/ES8M-STWF] (describing how corporate social responsibility practices in developing and underdeveloped nations can enhance the rule of law). This argument applies to the banks’ practices even more so, because sound mechanisms that promote and strengthen rule of law also address many of the banks’ explicit or implicit social and development goals.
even filling gaps when national policies fail to meet human rights standards and obligations.\textsuperscript{81}

Lastly, support for strong accountability mechanisms can foster a better relationship between MDBs and the communities they operate within in a way that benefits both sides. The establishment and support of effective and responsible mechanisms show a community that the bank and the project-level management are serious about their commitment to not harming the community through their actions or omissions. This builds bridges, strengthens communication, and improves trust. In addition, this ultimately leads to community acceptance of a bank’s “social license” to operate.\textsuperscript{82} “Social license” is an implicit contract that exists between MDBs and a society and relates to the societal expectations of compliance that go beyond national laws.\textsuperscript{83} This social license is at the heart of the relationship between an MDB-financed project and the community it operates within or affects. When something harmful or abusive results from the project, the social license is breached. Support for accountability mechanisms demonstrates to a community that an MDB takes its social obligation seriously and that it will not arbitrarily or capriciously violate its social license.

For instance, in response to a World Bank-financed project in Papua New Guinea with the goal of poverty alleviation for smallholder farmers, smallholder families feared that the project would increase their taxes, leave them without income alternatives, and damage the environment.\textsuperscript{84} Local and international NGOs worked together to file a complaint on behalf of the farmers with the Bank’s Inspection Panel, which concluded that the project did not meet the standards of the Bank’s operational policies.\textsuperscript{85} Because the community could issue the complaint before the full implementation of the project, the Bank could address the communities’ concerns with a new Action Plan to bring the project into compliance.\textsuperscript{86} This Bank remedy was supplemented with increased NGO monitoring, transparency, and accessibility for the indigenous population to see project-related documents translated into its local language.\textsuperscript{87} Access to remedies such as this empowers communities and amplifies their voices. It also provides

\begin{itemize}
\item \textsuperscript{81} See OHCHR, supra note 10, at 25–28.
\item \textsuperscript{82} CAO ADVISORY NOTE, supra note 10, at 12.
\item \textsuperscript{83} Id. at 72.
\item \textsuperscript{84} Papua New Guinea: Oro Province Palm Oil, ACCOUNTABILITY COUNSEL, https://www.accountabilitycounsel.org/client-case/papua-new-guinea-oro-province-palm-oil [https://perma.cc/C6NA-XDX2].
\item \textsuperscript{86} Inspection Panel Report on Papua New Guinea News Release, supra note 85.
\item \textsuperscript{87} See id.
\end{itemize}
an institutional acknowledgment of their legitimate fears and offers a chance to rectify a project’s potential or actual harm. Effective and robust grievance mechanisms can allay feelings of mistrust, allowing communities to benefit from the projects’ development goals and allowing banks to work with less backlash. However, this example is one of few where a complaint made it all the way to a resolution phase and where the community and MDB had an opportunity to strengthen their relationship. Robust mechanisms that grant more access and have more flexibility in terms of eligibility would most likely result in the acceptance of more complaints and the resolution of such complaints.

D. Features of Existing Accountability Mechanisms

The importance of accountability mechanisms and the ongoing race to the bottom are significant issues in determining whether the NDB and AIIB will counter the ongoing trends or actively work to improve accountability in the field. But, to assess which direction they will take, an understanding of developing effective accountability mechanisms is vital.

The overarching aims of MDB accountability mechanisms are to provide transparency of MDB operations, give access to information on projects, increase participation in the design and implementation phases, conduct independent investigations in project-affected communities, and increase the legitimacy of the institution and its activities. In general, accountability mechanisms, both project-level and those with wider oversight over an MDB’s operations, are designed to receive complaints from people who are harmed or may be harmed by an MDB-financed project. Accountability mechanisms usually serve one to three different functions: (1) problem-solving or dispute resolution for affected communities, (2) compliance with the institutions’ operational policies and safeguards, and (3) an advisory role to inform future MDB projects and provide lessons learned for the field. Depending on the mechanism, the complaint can come from an individual, a group of individuals, or a community representative. Some banks have restrictions on the minimum

88. See EARTH RIGHTS INT’L, supra note 69, at 2; CAO ADVISORY NOTE, supra note 10, at 10.
89. See Papua New Guinea, supra note 84.
90. See BENNEKER ET AL., supra note 55, at 25–32 (explaining how complaints progress through a mechanism and where along the process there is usually attrition or obstacles preventing the actualization of a complaint acceptance, investigation, or remedy).
91. Suzuki & Nanwani, supra note 37, at 203.
94. BENNEKER ET AL., supra note 55, at 34.
number of people required to bring a complaint, even though accountability advocates look down on this kind of obstacle.\footnote{See, e.g., \textit{ACCOUNTABILITY RESOURCE GUIDE}, \textit{supra} note 93, at 7, 14, 20 (providing examples of three different bank mechanisms and their differing criteria for how many people are required on a complaint to bring a claim to the respective bank’s accountability mechanism; for instance, the World Bank and African Development Bank require a group of two or more while a sole individual can bring a claim to the International Finance Corporation). \textit{See generally BENNEKER ET AL., \textit{supra} note 55, at 21 (provides criteria for grievance mechanism effectiveness and includes an overview and analysis of each MDB mechanism’s structure and requirements).}}

Once a complaint has been filed, the mechanisms determine if the complaint is eligible for acceptance and review under the mechanism’s rules.\footnote{BENNEKER ET AL., \textit{supra} note 55, at 38–42.} The eligibility requirements range from whether or not the complainant must live in a project area to whether or not there is a time frame within which a claim must be filed.\footnote{See generally \textit{id.} at 56–57 (provides examples of different eligibility requirements and implications of eligibility-related obstacles).} There are also requirements around anonymous complaints, delivery of the complaint, and what kind of harm the claim must allege—but each criteria differs depending on the bank, and some differences, albeit slight, actually have the potential to impact complainants quite adversely.\footnote{See generally \textit{ACCOUNTABILITY RESOURCE GUIDE}, \textit{supra} note 93 (detailing differences in criteria among MDBs).} Some MDB mechanisms require seemingly mild inconveniences that on paper appear to barely deviate from those of their contemporaries but that actually result in big obstacles for complainants. For example, at least two people must file a complaint, only someone who resides in the project area or who is \textit{materially} affected by the project may issue a complaint, or the complainant must only use English or the official language of the borrowing country.\footnote{BENNEKER ET AL., \textit{supra} note 55, at 56–61.} Other than these problematic nuances, there is considerable uniformity among the banks regarding eligibility access to the mechanism, the scope of authority and control of the mechanism, and the outcome of the processes.\footnote{Suzuki & Nanwani, \textit{supra} note 37, at 203.} If the claim is eligible and valid, then the MDB’s mechanism initiates an investigation to see if a violation of the bank’s own policies or procedures caused the alleged harm.\footnote{BENNEKER ET AL., \textit{supra} note 55.} The dispute is then resolved through mediation, fact-finding, or other methods, with a report of the investigation and outcome usually made available to the public.\footnote{\textit{Id.}} And, lastly, after the other procedures are followed, the MDB’s President or Board of Directors determines the fate of the project.\footnote{\textit{Id.}}

1. \textit{The Foundation: The World Bank and the Inspection Panel}

This not only brings us to both the reason why accountability offices at MDBs exist in the first place and what influenced their existing features, but also
why the race to the bottom within the field is so aggressive: the World Bank’s Inspection Panel. The Inspection Panel was the first MDB accountability office, and although some applauded it as an innovative success in the beginning, it has since become one of the most opaque and least effective mechanisms.\textsuperscript{104} The Panel’s “structural deficiencies as well as its incongruity in a business-oriented Bank mean that, even operating at its best, it is usually unable to fully secure effective remedies for human rights violations.”\textsuperscript{105}

The Inspection Panel was formed in 1993 and only provides a compliance review function, determined by a panel of three members under the control of the Bank president, which means it is not an independent mechanism.\textsuperscript{106} Procedurally, the Panel does not make any recommendations of its own and only determines if the project followed the Bank’s policies and procedures.\textsuperscript{107} The Bank’s management makes recommendations to the Board for remedial measures if it thinks any are required, but this leads to issues of partiality since Bank employees must make recommendations to member states about how to move forward.\textsuperscript{108} Individuals who have brought complaints to or interacted with the Panel have questioned its “ability to handle complaints fairly and impartially, mainly due to a series of decisions made over the past few years,” and have found a “culture of defensiveness” in conducting compliance investigations.\textsuperscript{109}

Scholars first deemed the Inspection Panel an “extraordinary development” because it allowed an international organization “to hear and investigate complaints filed by private individuals and groups affected by the organization” in a way that had never existed.\textsuperscript{110} However, it has not done much since to keep up with the accountability field in the last twenty-three years. Ultimately, the Inspection Panel set a very low bar for other MDBs to base their own accountability mechanisms but nonetheless stimulated a global “ripple effect” in the creation of mechanisms at the MDBs (mainly a result of each MDB having the same major shareholders).\textsuperscript{111} This ripple effect, paired with both the Panel’s low standards and lack of functionality\textsuperscript{112} and the Bank’s unwillingness to revise

\begin{itemize}
  \item \textsuperscript{104} See \textsc{Benneker et al.}, supra note 55, at Annex 15 (describing the inadequacies of the Inspection Panel in meeting the UN Guiding Principles on Business and Human Rights); see, e.g., Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, \textit{The Concept of Legalization}, 54 Int’l Org. 401, 417 (2000).
  \item \textsuperscript{105} Bugalski, \textit{supra} note 9, at 39.
  \item \textsuperscript{106} See Goldman, \textit{supra} note 27, at 17.
  \item \textsuperscript{107} See Suzuki & Nanwani, \textit{supra} note 37, at 188, 215.
  \item \textsuperscript{108} See \textit{id.}; \textsc{Benneker et al.}, \textit{supra} note 55, at Annex 15.
  \item \textsuperscript{109} \textsc{Benneker et al.}, \textit{supra} note 55, at Annex 15.
  \item \textsuperscript{110} Suzuki & Nanwani, \textit{supra} note 37, at 187–88; see also \textsc{Benneker et al.}, \textit{supra} note 55, at Annex 15 (providing an overview of the Inspection Panel’s history and an assessment of its features and effectiveness).
  \item \textsuperscript{111} Suzuki & Nanwani, \textit{supra} note 37, at 188.
  \item \textsuperscript{112} See \textsc{Benneker et al.}, \textit{supra} note 55, at Annex 15 (discussing the implications of the World Bank not revising the Panel’s charter so it can conduct more functions than just compliance reviews).
\end{itemize}
its charter to meet the UN Guiding Principles on Business and Human Rights, furthered the race to the bottom.

Now, under the specter of the two new Global South development banks, the World Bank is accelerating the race to the bottom by further lowering its social and environmental standards and safeguards to maintain its competitive edge over the newcomers.  

Rather than ensuring compliance with safeguards and conducting thorough human rights due diligence, the Bank is shifting to “project commitments,” which are agreements between the Bank and the borrower on a project-by-project basis. This gives the borrower flexibility, makes human rights protections negotiable, and leads to vague and opaque project terms. If a complaint were brought to the Inspection Panel under these circumstances, the Panel would likely read the Bank’s responsibilities very narrowly and find it was in compliance. Even if a “strong” Panel were to say the Bank didn’t properly conduct due diligence, Bank Management would “defend its efforts and accuse the Panel of overreach.”

The NDB and AIIB are entering the world of MDBs with these prevailing downward trends in accountability and bank-led protection (or lack thereof) of human rights.

2. The Gold Standard for Accountability: The Compliance Advisor Ombudsman

There is one institution that should be used as a model for the NDB and AIIB to emulate: the Compliance Advisor Ombudsman (CAO), which is the accountability office of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). The CAO adopts virtually all of the principles underlying effective accountability mechanisms. It also implements them with commitment to a much greater extent than the other MDBs. Accountability advocates regard the CAO as the model accountability mechanism because it meets most of the best practice requirements outlined by the UN Guiding Principles on Business and Human Rights, as well as civil society and NGO advocacy groups.

Whereas the World Bank serves the public sector, the IFC and MIGA are the agencies in the World Bank Group that provide loans and guarantees to the

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113. See Bugalski, supra note 9, at 2.
114. Id. at 11.
115. Id. at 32.
116. The IFC is “the largest global development institution focused exclusively on the private sector.” About the World Bank, supra note 19.
117. MIGA’s purpose as an MDB is “to promote foreign direct investment into developing countries.” Id.
118. See generally Letter from Civil Society Organizations to Jin Liqun, President-designate of Asian Infrastructure Investment Bank (Oct. 23, 2015), http://www.ciel.org/wp-content/uploads/2015/11/Submission-to-AIIB-re-Accountability-10232015.pdf [https://perma.cc/8B7D-DNEG] (describing CAO as the model to emulate for the AIIB’s own accountability mechanism); BENNEKER ET AL., supra note 55 (highlighting CAO’s effectiveness across multiple issue-areas and using it as a model for which to compare other banks’ mechanisms).
However, the World Bank and IFC often collaborate on projects. The affiliation with the private sector does lead to some nuances for the CAO to address, which could arguably either favor or disfavor the success of the mechanism. One such nuance is that the IFC and MIGA’s clients are corporations and private entities rather than states. Some argue the corporations actually influenced the IFC to implement a rights-based approach and value human rights more than the other MDBs, because corporate borrowers were concerned about their public image and competitive pressures to engage in corporate social responsibility (CSR). However, accountability advocates who exalt the CAO’s establishment and work find that CAO’s successes are not only due to IFC clients pressuring the bank for higher standards, but are also due to a culture genuinely committed to its own independence, legitimacy, and accessibility.

Several factors contribute to making the CAO the model accountability office and underscore why new and existing MDBs should strive to emulate its practices. Firstly, the CAO is independent of the IFC and MIGA and is headed by the CAO Vice President (VP). Whereas the Bank management selects the VP for many other MDBs, a group of entirely external stakeholders selects the CAO VP. In fact, CAO even has restrictions on the VP or other CAO staff working for the IFC and MIGA before or after their terms at the CAO to negate any possible conflicts of interest. Independence and freedom from conflicts of interest are key when it comes to accountability in general. But, in a field dominated by voluntary standards and soft law, these principles are all the more valuable without mandated compliance and with more incentives for flexible commitments to accountability.

Secondly, the CAO is fully engaged in each possible function of an accountability mechanism. Whereas most MDBs’ mechanisms only monitor, evaluate, and investigate complaints about compliance, the CAO not only conducts compliance investigations, but also brokers dispute resolutions and operates in an advisory role on particular projects or policies. The CAO is one of the few mechanisms that actually provides for a dispute-resolution function for affected people and communities, bringing the aggrieved parties and the bank, corporate, or state actors together “to address the issues in the complaint with the goal of reaching a mutually agreeable solution” in a “flexible way

119. The IFC and MIGA are the private sector arms of the World Bank Group. About the World Bank, supra note 19. The Inspection Panel only conducts oversight for the World Bank, and CAO only applies to IFC and MIGA. Id.
120. ACCOUNTABILITY RESOURCE GUIDE, supra note 93, at 14.
121. About the World Bank, supra note 19.
122. See, e.g., SARFATY, supra note 26, at 26–29.
124. Id.
125. Id. at 55–56.
126. ACCOUNTABILITY RESOURCE GUIDE, supra note 93, at 14.
The goal for this process is to better identify problems and systemic issues underlying the problems in order to implement practical remedial actions. Accountability advocates and the CAO both emphasize how valuable a tool dispute resolution can be for aggrieved communities as it empowers them and allows them to bring their interests to the proverbial table. Because negotiations and mediations are leveraged on bargaining power, which vulnerable communities may lack, the CAO also considers possible judicial recourses so that human rights are not trampled on or compromised. However, despite the CAO’s palliative measures to level the playing field by supplementing the dispute-resolution function with the help of independent experts and investigators or the use of culturally sensitive mediators with local knowledge, critique of this process remains. With the lack of available judicial remedies, many advocates welcome the CAO’s dispute-resolution function as redress for community grievances. While they see dispute resolution as a “low cost alternative, that maintains privacy between parties, involves constituencies, links issues, and provides a neutral opinion,” others still see “stark power imbalances” at play.

Dispute resolution, with its myriad benefits and flaws, is, however, just one of the CAO’s more innovative approaches. The CAO is committed to accessibility and culturally appropriate solutions, which are key for making sure that accountability mechanisms are effectively reaching and responding to the needs of the communities that the development banks are supposed to be meeting. The primary hurdle for most aggrieved communities is figuring out who is accountable and where they should take their complaint. Many MDB mechanisms make this extremely difficult for individuals and communities to figure out by not displaying their names at project sites or by only allowing online access to complaint forms where internet access is already limited or expensive (or burying the relevant forms and links in the convoluted bank websites). The CAO, however, has the IFC and MIGA require within the loan agreement that the borrower disclose the existence of the CAO to project-affected communities; they also have outreach materials about the CAO.

127. Id.
129. CAO ADVISORY NOTE, supra note 10, at 17.
130. Id.
131. ACCOUNTABILITY & INTERNATIONAL FINANCIAL INSTITUTIONS, supra note 128, at 75.
132. Id.
133. BENNEKER ET AL., supra note 55, at 15, 52, 56–57.
134. See id. (detailing the different practices of MDBs which impede access to their own mechanism).
available at the project site and online in the relevant languages. While seemingly a small issue, having translated project materials available makes a significant difference in community access to information and opens up to more members of the community the opportunity to realize and bring forward a complaint. This is something many MDBs fail to do: many project materials, while made available, will be in English or the hegemonic language of the state where the project is taking place, but most projects disproportionately affect poor and minority communities that do not speak English or the official state language.

The CAO further promotes cultural inclusivity and culturally appropriate solutions at the project level by consulting communities, forming partnerships, and involving community members in project monitoring to prevent conflicts and allow people multiple access points to ease tensions and ensure transparency. Although not perfect, all of these factors make the CAO the MDB mechanism that far exceeds the rest in achieving the purpose of an accountability mechanism and holding its parent-MDB true to its development mission of helping vulnerable communities (or at the very least not harming them further). The NDB and AIIB should not just meet but, ideally, exceed this standard with their own mechanisms, rather than taking the path of the World Bank and Inspection Panel and further degrading industry practice and standards.

II.

THE NEW DEVELOPMENT BANK & THE ASIAN INFRASTRUCTURE INVESTMENT BANK

This Part introduces the NDB and AIIB, situates them within the wider landscape of MDBs, and provides an overview of accountability at both banks. Parts II.B and C assess the existing mechanisms and frameworks at both banks, and Part II.D provides recommendations for the NDB and AIIB to strengthen their policies and commitment to accountability.

A. The Role of the NDB and AIIB in the Field of MDBs

The NDB, formed in 2014 by the BRICS nations (Brazil, Russia, India, China, and South Africa), and the Chinese-led AIIB, formed in 2015 and opened in 2016, are just starting to face off against their Western-dominated counterparts. The BRICS and Global South have long called for the reform of shareholder and decision-making power at the World Bank and used their

135. Id. at Annex 12, 2.
136. See id. at 132–35.
137. CAO ADVISORY NOTE, supra note 10, at 13–14.
138. For some time, China has been pushing to have its place in the World Bank match its actual global economic power. Do the BRICS Need a Bigger Voice in the World?, WORLD ECON. F. (June 22, 2015), https://www.weforum.org/agenda/2015/06/do-the-brics-need-a-bigger-voice-in-the-world
critiques to gain a “common agenda of pushing international economic governance away from neoliberalism and western dominance.” 139 Skeptics of the BRICS nations’ banks cite the countries’ histories as economic rivals and deep divisions on foreign policy as evidence of inability to work together as an effective “counterweight to the west.” 140 However, shared experiences with harmful MDB policies and Western-elitist unwillingness to let nations like Brazil and India manage their own social and economic development were likely the catalysts for instigating an institutional-level South-South cooperation. 141

Since the 2008 recession, the BRICS nations and other developing countries have significantly grown their economies and their “weight in global GDP,” with some developing countries accumulating vast foreign-exchange assets. 142 BRICS currently accounts for “27 percent of global purchasing power, 45 percent of the world’s work force, 11 percent of global crude oil reserves, 29 percent of natural gas, and 43 percent of coal deposits.” 143 These percentages are significant in their implications for the global economy yet are not adequately captured by the percentage of voting power allotted to the BRICS countries at MDBs despite their higher numbers in GDP, purchasing power, and population. 144 For instance, China is the world’s second-largest economy but its representation at the US-led World Bank and Japan-led Asian Development Bank does not reflect this fact. 145 The post-World War II “Big Five”—the US, Britain, Japan, Germany and France—controls 38 percent of votes at the World Bank, while “the supposed owners of development—45 Sub-Saharan African countries—control an ineffectual five percent of the vote.” 146 This lack of voting and decision-making power is what has led to “very large unmet” development and infrastructure-related needs in developing countries, “where a deficit investment of up to around US$1 trillion annually has been identified beyond what is currently likely to be financed.” 147 Ultimately, BRICS-led banks,
especially those opening up membership to all countries, would “give voice . . . to all or most potential borrowers, thus improving significantly the governance of the BRICS bank . . . [and] increas[ing] the weight of BRICS countries in global governance of development finance institutions.”

The NDB aims to be a universal bank in direct competition with the World Bank and all of the regional banks for projects all over the globe, and the AIIB is a regional competitor of the ADB and the World Bank for Asia-specific projects. With competition in the air, the MDBs have the prevailing assumption that in order to be more attractive to borrowers, the NDB and AIIB will take advantage of the race to the bottom, skirt issues of accountability, and place fewer social and environmental requirements on borrowers. As outlined above in the World Bank’s changing procedures, the MDBs are clearly taking this worry seriously and amending their policies in hopes of edging out the new rivals. As a result, the MDBs limit the findings of their accountability mechanisms and the remedies available to aggrieved communities.

This strategy is utterly damaging to vulnerable communities that are faced with mechanisms that already present multiple obstacles and lack effective outcomes. As representatives of the Global South and emerging economies where the majority of communities that have been impacted by harmful MDB-financed projects reside, the NDB and AIIB cannot contribute to the accountability race to the bottom and further burden these victimized communities in their own countries. In fact, because accountability mechanisms increase institutional legitimacy and provide a social license to operate within a community, in order to bolster their lending portfolios and attract quality borrowers, the NDB and AIIB require mechanisms even more robust than existing MDB mechanisms. Setting a higher standard for these representatives of the Global South is, however, reminiscent of the climate-change burdens placed on emerging economies, which did not have the luxury to develop before the negative impacts of climate change were realized.

It is unfair that the Western banks had decades of trial and error to establish their inadequate safeguards and accountability mechanisms, but new banks from historically disadvantaged regions must overcome the preexisting race to the bottom, jeopardizing their own chances at attracting borrowers. Still, the NDB and AIIB, both as development banks and as institutional representatives of the Global South, must be held to a high standard for accountability and should not contribute to the race to the bottom.

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148. Id. at 11.
149. Bugalski, supra note 9, at 3–4.
150. See Cass R. Sunstein, Of Montreal and Kyoto: A Tale of Two Protocols, 31 HARV. ENVTL. L. REV. 1, 16, 25–26 (2007) (explaining that developing countries were disfavored in climate change agreements that harmed their economies and “held [them] to the same controls as wealthier nations, which were responsible for the problem in the first place”).
B. Accountability at the New Development Bank

Looking first at the NDB, there are clear accountability gaps that the Bank has not managed to address in either its Charter or its Environment and Social Framework. Article 15 of the Charter on Transparency and Accountability contains one sentence that says the Bank will “ensure that its proceedings are transparent” and provide operational guidelines for how to access documents. Under Article 29, the Bank identifies itself as possessing “full juridical personality” and full capacity to institute legal proceedings; however, Article 30 qualifies this by stating that the Bank still has many immunities. These immunities include every form of legal process except cases involving “its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities.” Thus, while possessing full legal personality is welcome, the Article makes it unlikely that a private individual or group from an aggrieved community will be able to hold the NDB liable in a legal proceeding or even compel it to take part in a legal proceeding.

While those instances are the only near mentions of accountability and redress in the Charter, the Environmental and Social Framework contains more of an operational discussion of the Bank’s standards, requirements for the borrowers or clients, and how human rights will be respected. Most strikingly, the NDB has no accountability mechanism of its own and places the entire responsibility of having a project-level grievance mechanism on the borrower; the NDB does not mention providing support to the mechanism or how aggrieved communities can access the bank directly. Moreover, the NDB only requires the client’s grievance mechanism to be “fair and effective,” without giving further guidance.

The NDB lays out its own responsibilities as (1) assigning a category to each project; (2) conducting due diligence of the client’s own environmental and social impact assessment; (3) determining the feasibility of Bank financing for the project; (4) monitoring the client’s compliance with its social and environmental commitments during the project implementation phase; (5) working jointly with the client to strengthen host country systems; and (6) sharing knowledge with clients of good practices. The NDB is primarily concerned with the Environmental and Social Standards, which address environmental and social sustainability, involuntary resettlement, and

152. Id.
153. Id.
155. Id. at 12.
156. Id.
157. Id. at 11.
indigenous peoples. While these are the only three explicit areas cited, the first issue-area is meant to encompass gender-disproportionate outcomes and other vulnerable groups as well. The broad inclusion of such rights-based language, however, is not supplemented by actual actions the NDB will take to remedy any violations of these standards or any forms of redress available to aggrieved communities.

C. Accountability at the Asian Infrastructure Investment Bank

The AIIB has somewhat more well-developed accountability language and standards in its charter and Environmental and Social Framework than the NDB. This is likely a result of Chinese leadership and China having more institutional knowledge and experience from its role at the World Bank and Asian Development Bank. However, that is still not saying much, because the Articles of Agreement only refer to an “oversight mechanism” once, which has yet to be established and have standards and procedures put in place. But, unlike the NDB, the mention of an accountability office in the charter has at least created a binding commitment to establish a mechanism “in line with principles of transparency, openness, independence and accountability” that member states and advocates can hold the Bank to and push for.

Along with its own mechanism, the AIIB’s Environmental and Social Framework also lays out the requirement for client borrowers to establish project-level grievance mechanisms in line with the Bank’s standards and operational policies. Also unlike the NDB, the AIIB provides clearer expectations of grievance mechanisms that are more in line with the World Bank and other MDBs. The AIIB expects the project-level grievance mechanism “to address affected people’s concerns and complaints promptly, using an understandable and transparent process that is gender-sensitive, culturally appropriate and readily accessible to all affected people.” The operational policies on grievance mechanisms also include “provisions to protect complainants from retaliation and to remain anonymous . . . . [and the] maintenance of a publicly accessible case register, and reports on grievance redress and outcomes.”

158. Id. at 14, 20, 23.
159. Id. at 15.
161. Id.
163. See id.
164. Id.
165. Id.
While this language shows that the AIIB is both attempting to incorporate best practices and that the Environmental and Social Framework closely resembles the World Bank and Asian Development Bank’s well-established practices, accountability advocates have still noted some shortcomings. For instance, a noticeable gap for human rights advocates is the AIIB’s failure to provide indigenous peoples with “the right to consent to activities taking place on their lands.” Despite certain gaps, from an accountability perspective, the AIIB has more building blocks in place than the NDB, but advocates worry about room for interpretation and how strong enforcement will actually be. The AIIB’s operational policies on project-level grievance mechanisms are an important starting point, but the Bank’s actual oversight mechanism must be equally well-developed and robust, as well as in line with best practices.

D. Accountability Mechanism Recommendations

The NDB and AIIB are in the unique position of being new to the field of MDBs. As a result, they have a lot of excitement and anxiety surrounding them as the counter-hegemonic lending institutions with access to all of the best practices of effective accountability mechanisms. Primarily, the banks need to establish their own mechanism, independent of bank management, rather than transferring this responsibility solely to the client or borrower. Their mechanisms should cover project-level and policy-related grievances, act as a compliance investigator, and have a dispute-resolution function in order to provide as many avenues to effective and equitable remedy as possible. Until the NDB and AIIB establish their own grievance mechanisms, they should at least have a form easily accessible on their websites to submit social and environmental complaints and policy-related concerns. Moreover, they should support the client’s project-level grievance mechanism by making sure it is accessible in terms of visibility and language. The banks should also take adequate measures to ensure affected communities know about the grievance mechanisms’ existence. The NDB and AIIB should follow the model provided by the CAO and abide by Article 31 of the UN Guiding Principles on Business and Human Rights. Lastly, the banks should consistently take part in community stakeholder engagements and create space for NGO and civil society advocates to provide feedback on both the environmental and social standards and the accountability mechanism.

167. Id.
168. Id.
CONCLUSION

As new banks rise up from the Global South, it is an empowering time to begin to mend the wounds from decades of damaging international development finance and lending frameworks. These BRICS-led banks are reappropriating their power and channeling it to match their weight in the global economy, which the Western MDBs neglected. This led to social and economic inequities in developing countries without a proper voice at those Western institutions. The predicted success of BRICS-led banks is likely based on the worry they have sparked at the World Bank and the Asian Development Bank, but the Global South’s economic and political success cannot come with a severe blowback to human rights for its communities. It is these vulnerable communities that have been most impacted by existing MDBs’ practices, lack of accountability, and inadequate redress.

The NDB and AIIB will have true success if they can not only attract borrowers for much-needed development projects in the South, but also have a strong and dedicated accountability mechanism for compliance and redress that meets the guidelines and best practices described. The NDB must establish its own accountability mechanism and broaden its environmental and social standards. And, the AIIB’s proposed “Oversight Mechanism” requires more work to address how a strictly Chinese-led bank might lead to the same problems of hegemony as the World Bank and ADB in a way that the more equitable NDB model will not. Overall, the NDB and AIIB, with their member states’ shared global economic power and now with the weight of these collaborative institutional powers, have the chance to reverse the race to the bottom in the field of accountability. They have the ability to implement effective accountability mechanisms now, at the very start of their operations, which will ultimately benefit them, their clients, and project-affected communities and ensure their success and sustainability within an already competitive field.

169. See generally Letter from Civil Society Organizations to Mr. Jin Liqun, President-designate of Asian Infrastructure Investment Bank, supra note 118.