

**REVISED REASSESSMENT AND REVISION OF THE TERMS OF  
REFERENCE FOR THE COMPLIANCE REVIEW OF THE MEDUPI POWER  
PROJECT, REPUBLIC OF SOUTH AFRICA**

On 21 June 2011, the Boards of Directors met to consider the “Reassessment and Revision of the Terms of Reference for the Compliance Review of the Medupi Power Project, Republic of South Africa” (the “Reassessment”). This Reassessment was prepared by the IRM Roster of Experts and the Director of CRMU (collectively “the IRM”) following the Boards consideration of the Eligibility Report on the Request received in connection with the Medupi Power Project at its meeting on 16 February 2011. At the 21 June 2011 meeting, the Boards of Directors requested the IRM to revise the Reassessment in light of the recorded Highlights of the Boards discussion of 16 February, 2011 and to resubmit revised terms of reference for the compliance review for consideration by the Boards on a lapse-of-time basis.

The IRM has carefully considered the views expressed at the Boards meeting on 21 June 2011 and, is hereby recommending to the Board that it authorizes an investigation of four of the six complaints raised by the Requesters, namely complaints nos. 1, 2, 3, and 5, while complaint no. 4 dealing with matters related to procurement and complaint no. 6 which claims that poor people will not benefit from the project shall not be investigated by the IRM. This memorandum constitutes the IRM’s response to the Boards discussion in accordance with Paragraph 46 (b) of the IRM Rules, which stipulates that, if the Boards decide to remit the Report to the IRM, the IRM should “reassess the recommendations regarding the draft Terms of Reference for the compliance review, with a new recommendation, if any, being submitted” to the Boards.

The IRM has reassessed the eligibility of the requestors and each of the six complaints of the request as follows:

First, with regard to the eligibility of the requestors, it is worthwhile to note that the requestors demand for keeping their identity confidential was honored by CRMU, however, that does not mean that they are anonymous complainants. The IRM has met with the requestors and verified their eligibility based on the same tests of *prima facie* evidence that would have been applied to any other “non-confidential” requestor. The alleged potential adverse harm caused by the project has also been verified by other affected people showing that the concerns raised in the request for compliance review of the Medupi Power Project are shared with many other individuals and groups of people in the project impacted area. Accordingly, the IRM maintains its determination that the requestors are eligible to submit a request for compliance review.

Second, on the eligibility of the different issues (complaints) of the request, the IRM acknowledge that the allegation expressed under complaint no. 4, while framed as an issue relating to procurement, in fact, raises allegations of fraud and corruption. Thus, as suggested by many Board members, this complaint could be better addressed by the department of the Bank entrusted with the necessary authority and competence to investigate allegations of fraud, corruption and misconduct. The IRM understands that this is the preference of the majority of the members of the Boards. Given this situation

and the fact that the Request, itself, also suggests that this issue could be referred to another relevant department within the Bank, the IRM recommends that the Boards should not authorize an investigation by the IRM of complaint no.4.

With regard to complaint no. 6, which claims that the poor people will not benefit from the project, the IRM, after careful consideration of the various views expressed at the meeting of the Boards of Directors, has concluded that this complaint shall not be investigated by the IRM.

With regard to the eligibility of the other four issues (complaint no. 1, 2, 3 and 5) for which the Boards did not disagree with the IRM recommendations, the IRM continues to maintain that they are eligible for compliance review as the concerns raised are relevant to the Bank's policies and procedures. Therefore, in accordance with Paragraph 46 (a) of the IRM Rules, it recommends the Boards of Directors to approve on lapse-of-time basis the investigation by the IRM of the following issues raised by the Requestors:

1. (Issue 1 and 2 in the Request): The Requestors allege that the Bank has not complied with its rules and policies in terms of promoting clean sustainable energy projects, and they express concern of the project's impact on South Africa's carbon reduction commitments, scaling up of investment in renewable energy technologies, and the efforts to deal efficiently with the threats of climate change.
2. (Issue 3 in the Request): The Requestors state that the communities living near the Medupi plant will bear the burden of hidden costs in terms of health impacts from air pollution, elevated SO<sub>2</sub> levels, and mercury residues in their water, air and land; constrained access to water; and the livelihoods impacts from degradation of land and water in the largely agrarian area.
3. (Issue 5 in the Request): The Requestors state that the Bank failed to consider community consultations and participation processes in the assessment of the project, and that local communities, who live close to the power plant were subjected to removals and the desecration of ancestral graves, which they say demonstrated a gross violation of their cultural and human rights.

The IRM is recommending an investigation of the above issues because it finds, pursuant to Paragraph 44 of the IRM Rules, that there is *prima facie* evidence of harm or threat of harm by a Bank Group-financed project and that the harm could be caused by the failure of the Bank Group's Management and staff to comply with the applicable Bank Group's policies and procedures. More information on these issues, the Management response and the IRM's assessment of eligibility are contained in the Eligibility Report submitted to the Boards of Director on January 20, 2011.

The IRM, pursuant to Paragraph 46 (b) and in accordance with the discussion at the meeting of the Boards on 21 June 2011, has redrafted the Terms of Reference for the compliance review. The new detailed Terms of Reference are attached hereto as Annex 1. They provide that, subject to the approval of the recommendations in this

memorandum by the Boards of Directors, and in accordance with Paragraph 45 of the IRM Rules:

- The IRM proposes an estimated budget of UA 165,000 to cover the total cost of the compliance review.
- The Terms of Reference of the Compliance Review Panel will be in accordance with the provisions of Paragraph 50 of the IRM Rules and more particularly as set out in Annex 1 to this Memorandum.
- The Review Panel intends to complete the compliance review within an approximate time frame of 3 months from the commencement of the investigation. It will submit a Compliance Review Report to the Boards of Directors within 30 days from the date of completion of the investigations in accordance with Paragraph 52 of the IRM Rules.
- In accordance with paragraph 57 of the IRM Rules, the Bank's Management will be requested to prepare a response and action plan for submission to the Boards of Directors within a period not exceeding 90 days upon receipt of the Review Panel's report.
- Upon submission of the Management response and action plan to the Boards of Directors, a date will be set for a joint presentation to the Boards of Directors of the Review Panels report and the Management response and action plan, for the Boards' consideration.

**ANNEX 1:**  
**TERMS OF REFERENCE OF COMPLIANCE REVIEW**  
**MEDUPI POWER PROJECT**

**I. BACKGROUND**

On 28 September, 2010, the Compliance Review and Mediation Unit (CRMU) of the African Development Bank Group [hereinafter, “the Bank Group”] received a request for compliance review from two individuals from South Africa [hereinafter “the Requestors”] who requested that their identity be kept confidential throughout the investigations and outcomes thereof in accordance with paragraph 8 of the IRM Operating Rules and Procedures. The Director of CRMU granted such confidentiality with the condition that their identity be made known to the IRM Experts who will undertake the eligibility review and the compliance review, if recommended and authorized by the Bank Group’s Boards of Directors. The Requestors have demanded that the IRM conducts a Compliance Review of the Medupi Power Project which was approved for financing by the Bank’s Boards of Directors on 25 November, 2009.

Upon a preliminary review and in line with the Operating Rules and Procedures of the Independent Review Mechanism (IRM), CRMU:

- Registered the request on 7 October 2010; and
- Received the Management’s response on 4 November 2010;

The IRM:

- Undertook a fact finding mission to South Africa from 30 November – 6 December, 2010 (mission comprised the Chairperson of the IRM Roster of Experts and the Director of CRMU);
- Prepared an Eligibility Report for the Boards of Directors’ consideration for approval on a non-objection basis;
- Recommended a Compliance Review Panel comprising the Chairperson and the other two members of the IRM Roster of Experts; and
- Recommended a budget of UA 165,000 for the compliance review.

These Terms of Reference (TORs) outline the Compliance Review Panel’s mandate, procedures, timeframe, conditions, tasks and limitations, but do not interfere with the independence of the Review Panel in conducting the compliance review.

**II. MANDATE OF THE COMPLIANCE REVIEW PANEL FOR THE INVESTIGATION OF THE MEDUPI POWER PROJECT**

The mandate of the Compliance Review Panel is governed by both the IRM Operating Rules and Procedures and the Bank’s relevant Policies and Procedures. In this respect, the **IRM Review Panel** will:

1. Assess the Requestors' alleged non-compliance with the Bank's policies and procedures as a result of which the Bank-financed Medupi Power Project may adversely affect in a direct and material way the people living in the vicinity of the project area with respect to the following issues raised by the Requestors:
  - a. The Requestors allege that the Bank has not complied with its rules and policies in terms of promoting clean sustainable energy projects, and they express concern of the project's impact on South Africa's carbon reduction commitments, scaling up of investment in renewable energy technologies, and the efforts to deal efficiently with the threats of climate change.
  - b. The Requestors state that the communities living near the Medupi plant will bear the burden of hidden costs in terms of health impacts from air pollution, elevated SO<sub>2</sub> levels, and mercury residues in their water, air and land; constrained access to water; and the livelihoods impacts from degradation of land and water in the largely agrarian area.
  - c. The Requestors state that the Bank failed to consider community consultations and participation processes in the assessment of the project, and that local communities, who live close to the power plant were subjected to removals and the desecration of ancestral graves, which they say demonstrated a gross violation of their cultural and human rights.
2. Recommend actions that are likely to remedy the problems, propose modifications of the Bank's systems and procedures in order to avoid the recurrence of similar harm in the future, and to ensure independent monitoring of the implementation of the recommended remedies.

### **III. PROCEDURES OF THE COMPLIANCE REVIEW**

Upon the Boards of Directors' approval of the Compliance Review, the IRM Review Panel will:

- a) Determine the methods of conducting the Compliance Review that at the outset appears to be the most appropriate, taking into account the nature of the particular Request;
- b) Determine the need and qualifications of required Specialists for the review;
- c) Prepare an initial schedule for conducting the review, including the ways of gathering information, conducting interviews with bank staff and other stakeholders; and
- d) Take the necessary steps in presenting and translating the findings and recommendations of the Review Panel's Compliance Review Report for distribution to the Boards of Directors and the Bank's Management to prepare a response and action plan.

#### **IV. DURATION OF THE COMPLIANCE REVIEW**

The proposed duration of the Compliance Review shall not exceed three (3) months (tentatively to commence on 15 August, 2011). The total input in terms of time of the Experts on the Review Panel shall not exceed 99 working days:

- i. Seven (7) days for each of the IRM Experts of the Review Panel to conduct desk review, interviews and to compile other necessary data at the Bank's Temporary Relocation Agency in Tunis.
- ii. Eight (8) days for each of the IRM Experts of the Review Panel to conduct a field visit to South Africa to interview the requestors and affected people, the project's implementers, sponsors and other stakeholders, including a visit to the project site.
- iii. Eighteen (18) days for research and report writing.

The use of additional Specialists shall not exceed a budget of UA 25,000, including fees and travel costs.

#### **V. THE TASKS OF THE COMPLIANCE REVIEW PANEL**

Taking into account the nature of the issues of the Request subject to compliance review and the use of a variety of review methods, including but not limited to, the IRM Review Panel will:

- a. Review all documents relevant to the project along with the relevant Bank Group's policies and procedures;
- b. Meet with the Bank Group's Management and staff, the Requestors, affected people, Government officials and project authorities, sponsors, and representatives of Government's institutions and other stakeholders as considered relevant;
- c. Visit the project site;
- d. Hold community meetings and focus groups discussions in South Africa and in the project area;
- e. Request written or oral submissions on specific issues from the Requestors, affected people, independent specialists, government or project officials, Bank staff, or non-governmental organizations;
- f. Undertake any other reasonable methods the Review Panel deems appropriate to undertake the Compliance Review.
- g. Consult with the World Bank's Inspection Panel which has received and is currently investigating a request on similar issues with regard to the Medupi Power Project.

## **VI. CONDITIONS**

### **i. Confidentiality**

The use of any document is subject to the Bank Group's Disclosure of Information Policy.

Confidentiality shall also be respected for information and documents shared with the IRM Review Panel by the World Bank's Inspection Panel.

### **ii. Independence**

The IRM Review Panel shall conduct an independent review within the established framework of the IRM Operating Rules and Procedures. In this regard the IRM Review Panel shall be neutral in its discussions and interview with Requestors, the Bank Group's Management and Staff and other stakeholders. The Review Panel shall always have in mind that the focus of the review shall be the Bank Group's compliance with its own policies and procedures.

### **iii. Information Release**

It is imperative that the IRM Review Panel ensures that:

- All interested parties in the project understand the objectives of the Compliance Review;
- Maintain open communications with parties involved including the projects' borrower, sponsors and implementing agency, Requestors, other civil society organizations and all other relevant governmental and non-governmental institutions and local communities;
- Notify the Requestors of any new material facts provided by Bank staff, or authorities in South Africa, and vice versa;
- Contact, during the field visit, all concerned parties and undertake to pay due diligence in its contacts with the media or any other party to maintain its neutrality;
- Decline to release information to any party if it deems that it will circumvent the independence of the Compliance Review or may directly affect the image or interests of the Bank Group, the Borrower and the Requestors.
- Accept any supplementary information collected during the course of the compliance review or provided by a member of the public either directly or through the Bank's field office, if found to be credible and relevant to the Compliance Review.

## **VII. LIMITATIONS**

The IRM Review Panel should not review issues considered as limitations under Paragraph 2 of IRM Rules.

Under Paragraph 53 of IRM Rules, the Panel should not recommend the award of compensation to the Requestors or any other person beyond that which may be expressly contemplated in a relevant Bank Group policy.

In the case that the IRM Review Panel encounters information related to fraud or corruption, the matter shall be reported to the responsible entity of the Bank Group.

## **VIII. PANEL DELIBERATIONS**

According to the IRM Operational Rules and Procedures, each of the members of the IRM Review Panel has one vote and decisions of the Panel shall be taken by simple majority.

## **IX. COMPLIANCE REVIEW REPORT**

Within 30 working days of the completion of its investigations, the IRM Review Panel shall report its findings and recommendations in a Report in English and French to the Boards of Directors of the Bank Group. The Report shall include:

- a) A summary description of the relevant facts, the respective positions of any interested party in relation to the subject matter of the Request and the steps taken to conduct the Compliance Review.
- b) The main findings on the basis of which the IRM Review Panel has determined whether or not any action by the Bank Group, or failure to act, in respect of a Bank Group-financed projects has involved one or more material violations of policies and procedures.
- c) The reasons of the IRM Review Panel's decisions as to whether the Bank Group's actions, or failure to act, in respect of a Bank Group-financed project has involved one or more material violations of its policies. In that respect, the Review Panel should, in accordance with paragraph 52 (c) of the IRM Operating Rules and Procedure, recommend:
  - i) any remedial changes to systems or procedures within the Bank Group to avoid a recurrence of such or similar violations;
  - ii) any remedial changes in the scope or implementation of the Bank Group financed project, subject to the consideration of any restrictions or arrangements already committed to by the respective Bank Group institution or any other relevant party in existing project-related agreements; and
  - iii) any steps to be taken to monitor the implementation of the changes referred to in (i) and (ii), and the person in charge of such monitoring (who shall be the Director of CRMU and an IRM Expert so appointed unless the Boards decide otherwise).

The Compliance Review report should include a copy of the original request, the Bank's Management response and a list of supporting documents used.