



EarthRights International: Comments on the Draft Asian Infrastructure Investment Bank Environmental and Social Framework

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EarthRights International (ERI) is a nongovernmental, nonprofit organization that works to defend and protect the right to a healthy environment, the right to speak out and act to protect the environment, and the right to participate in development decisions. We specialize in fact-finding, legal actions against perpetrators of environmental and rights abuses, training for grassroots and community leaders, and advocacy campaigns. ERI has pioneered corporate accountability litigation in US courts, winning landmark judgments and successful settlements. We currently litigate cases against Chiquita, Chevron, Union Carbide/ Dow, and the International Finance Corporation of the World Bank Group. ERI's legal program has extensive experience in working to build strong domestic, regional, and international legal mechanisms for corporate accountability, and has familiarity with the strengths and weakness of existing financial institutions environmental and social safeguard policies and the impacts of project financing.

ERI would like to note the following serious concerns and questions regarding the Consultation Draft of the Asian Infrastructure Investment Bank's (AIIB) Environmental and Social Framework (ESF), as well as the consultation process. An overarching concern is that the ESF language is framed in terms of risk management and operational procedures instead of an ESF *ensuring* accountability and protection of the environment and the rights of affected communities. Furthermore, the Framework emphasizes reliance on national legal frameworks and corporate policies over ensuring compliance with international standards and laws. Issues stemming from this overarching concern are categorized and elaborated upon below.

In addition to the lack of accountability and rights protection, a number of our concerns relate to the inadequacy of the consultation process during the drafting of the ESF. These concerns revolve around the non-participatory nature of the process, including a short initial window for comments, the lack of face-to-face interaction, and the English language medium for the consultations, and indicate that the consultation process is all but a façade with respect to inclusion of input from community and civil society members that will be affected by AIIB funded projects.

Below follows a set of general comments on the draft ESF, comments on the consultative process, and specific subject-area comments. Key areas of concern highlighted in our comments are: (1) public participation; (2) project categorization, appraisals and approvals; (3) country and corporate Systems; (4) oversight and grievance mechanisms; (5) phased approach, (6) indigenous peoples and involuntary resettlement, and (7) climate change.

GENERAL COMMENTS

1. Overall, the ESF is framed in terms of risk management and improving quality of operations—prioritizing these aspects of financing over ensuring accountability and rights. There is weak mention of labor rights, and limited reference to human rights, or internationally binding documents that protect these rights, such as the Universal Declaration of Human Rights.
2. Rather than delineating clear standards and criteria for accountability, the ESF details the use of incentives to promote good environmental performance. In addition to implementation of the ESF being primarily the role and responsibility of the Client, there is a lack of detail regarding how the AIIB will monitor and ensure compliance with the ESF in the post-approval phase of the project. It is unclear what actions the AIIB will and can take in response to non-compliance with the ESF on the part of the Client.
3. There should be an overarching set of principles that serve as guidance for the implementation and operation of the Framework as a whole based on fundamental principles of international law and best practice. These should include (but not be limited to) the following: polluter pays; precautionary principle; promotion of sustainable development; adherence to international human and labor rights; free, prior and informed consent (FPIC); and gender equity and inclusion.
4. The ESF should also promote Client adoption of sector-specific environmental and social safeguard policies, in conformity with international standards for each industry. Different sectors such as agriculture, mining, oil and gas extraction, palm oil, and hydropower come with unique sets of associated social, human rights, and environmental impacts, with some sectors being notoriously high-risk. This reality should be incorporated into the Framework to ensure that appropriate standards are used for each financed project.
5. There is lack of clarity on the internal processes and implementation of the ESF, including what departments will be involved, how coordination between departments and officers responsible for the ESF and loans will occur, and how environmental and social concerns will be integrated across operations.

For example, while the World Bank has strong environmental and social policies, there are well-founded critiques that point to problematic internal performance management metrics such as tying employee promotion to the volume of loans they finalize, which can serve to undermine the effectiveness and priority accorded to otherwise strong environmental and social policies. More transparency is needed on internal processes to ensure that past mistakes of other financial institutions are turned into learning opportunities for the AIIB, and to ensure that there is bank-wide coordination and oversight of measures to support the full integration of environmental and social concerns across all operations and supported programs and projects.

6. Clarification and additional information is requested on the complementary policies regarding access to information and proposed accountability mechanisms, including whether or not these will be mandatory or mere guidelines and whether their development will involve meaningful public consultation. These complementary policies are integral to the operation of the ESF and must be subject to comprehensive and meaningful public consultation.

COMMENTS ON CONSULTATION PROCESS

The process for issuing comments on the draft ESF has been rushed and under-inclusive. Although ERI appreciates the extension of the submission of comments beyond the initial deadline, we believe there is still an insufficient time to properly absorb and conduct a detailed examination and analysis of the provisions. In general, ERI supports a consultation process that incorporates comments on drafts obtained through a transparent process that contains sufficient information and notice on issuing drafts, face-to-face meetings and consultative dialogue, and the circulation of further updated drafts that address comments and concerns for further public review and input.

A major concern for ERI is that the consultation process has not allowed for adequate time to share the provisions of the draft to and consult with our local partners. This is due both to the brevity of the allotted time period, and to the decision of the AIIB to only publish an English-language version of the draft ESF. Our local partners need more time to absorb the information and develop input, and ERI recommends that translations as well as face-to-face consultation meetings should be provided for the purpose of gathering quality input from actors and communities that will be affected by AIIB-funded projects. There should be a targeted effort to ensure opportunities for equitable participation and inclusion in consultation proceedings, so that the input of vulnerable and marginalized groups such as women and indigenous peoples are incorporated and considered.

SPECIFIC COMMENTS

Public participation

1. Public participation appears to be required only in the operation design phases and onward of projects. Clarification is needed on whether public participation will be required by Clients as a component of initial decision-making phases of projects, and project appraisal.
2. It is unclear whether the public participation requirements as set forth in the ESF also apply to AIIB appraisal, categorization, and approval. ERI recommends that public participation be required at all stages.
3. Quality and transparent public consultation should be facilitated during the development of the access to information policy.
4. Standards and guidance should be developed to detail what constitutes meaningful and adequate public participation in the context of AIIB projects, and such guidelines should ensure that stakeholders have adequate time and ability to comprehensively review and offer input prior to AIIB making decisions surrounding project financing.

Project categorization, appraisals and approvals

1. The current draft of the ESF lacks detailed criteria for project categories. For example, ERI has concerns over which type of projects fall under Category B, and that projects which fall under this category will require environmental and social assessments on a “case-by-base basis,” allowing for an excessive amount of flexibility. Greater specificity

of language is needed on how this will be determined, and what criteria will be used. Environmental and social assessments should occur for all Category B projects.

2. There is no clear criterion for understanding the AIIB appraisal and approval process with respect to environmental and social issues. For example, are there categories of projects that would not be supported due to level, type, and severity of environmental and social concerns?
3. Greater specificity of language and criteria for appointing and requiring independent advisory panels and/or experts is needed.

Country and Corporate Systems

1. Greater clarity is needed on the relationship between the ESF and national-level legal frameworks. ERI has concerns that the ESF grants an abundance of self-regulatory and self-assessment power to Clients without clear guidelines for AIIB oversight. AIIB should explicitly delineate which managerial and monitoring responsibilities fall on the Client, and what AIIB's oversight role will be in facilitating and managing environmental and social risk in order to make clear that AIIB is not excusing itself from liability by placing the burden of implementation and monitoring entirely on the Client.
2. How will AIIB offer assistance to the Client to ensure compliance with legal obligations, including those under international law? What procedures will be used for addressing issues with Client or Country compliance or lack of implementation of national and international legal obligations? In order to ensure compliance, ERI recommends that AIIB's loan contracts contain detailed environmental and social clauses that reiterate the principles of the ESF, identify environmental and social conditions precedent to loan disbursement, outline reporting requirements, apportion managerial and environmental assessment responsibility, and dictate adherence to national and regional law and standards as well as sector-specific international human rights and environmental best practice.
3. What will AIIB's role in supporting the strengthening of local legal mechanisms be? How will issues of weak legal capacity at the national level, for example in conducting EIA reviews and monitoring or implementing resettlement processes according to legal requirements, be addressed?
4. What criteria will be used to ensure that the "Country and Corporate Systems" are adequate both from a legal frameworks perspective, but also in terms of implementation and enforcement? How will issues such as legal non-compliance, weak rule of law, lack of independent judicial systems, and corruption, in countries with weak legal governance be addressed? For example, many countries conduct environmental impact assessments that lack social and health impact assessment components, and serve as rubberstamps for projects. There should be clear and unambiguous guidelines set forth to help determine adequacy of country and corporate systems and procedures.
5. Further clarity is requested as to how the process of "gap-filling" against AIIB requirements will be assessed, operationalized and ensured? What detailed assessments of Country and Corporate Systems will be undertaken?

Oversight and grievance mechanisms

1. Greater elaboration on the requirements for operational-level grievance mechanisms is needed. Will grievance mechanisms be required at the project level, and if so, how will AIIB ensure high-quality functioning and oversight? What will be the standards for determining whether these are fair and effective and how will outcomes from such mechanisms be reviewed? How will civil society and communities access and use these mechanisms?
2. Further information is required regarding the AIIB grievance mechanism, its independence and the relationship between this mechanism and project or country-level grievance procedures. The standards and operating guidelines for the mechanism should be released for public comment and consultation.
3. ERI recommends that all grievance mechanisms, even if meant to be tailored to specific country contexts, should adhere to certain guidelines, and should comply with international human rights norms, the *United Nations Guiding Principles on Business and Human Rights* and international best practices regarding grievance mechanisms, including accessibility, transparency, accountability, access to the judicial system, and non-discrimination.
4. How does AIIB plan to ensure on-going Client compliance with policy and frameworks given its small expected staff size, and will specific staff or departments have the mandate to focus on and review community-Client disputes?
5. How will the AIIB oversight body operate? What will its relationship with the operational-level grievance procedures be?

Phased approach

1. There is a major concern that, in certain circumstances, aspects of AIIB's environmental and social appraisal, including the development of Resettlement Action Plans, and for certain activities, can take place after approval is given. This appears to significantly water down other requirements and indicates that projects can begin without environmental and social impact appraisal, including proper risk assessment and mitigation analysis.
2. Under what circumstances will approval of a project be granted without initial comprehensive environmental and social appraisal, including assessment of impacts to communities, and what protections will be in place to ensure that this does not facilitate the commencement of irreversible and deleterious project impacts? Best practice and current World Bank standards require environmental and social assessments to be conducted prior to project finance decisions are made.

Indigenous peoples and involuntary resettlement

1. The FPIC requirement in the draft ESF is not plainly defined, and it is not clear whether a project could proceed even if FPIC is not obtained. FPIC should be defined in accordance with established international law, interpretations, and standards, as contained in the

United Nations Declaration of the Rights of Indigenous Peoples, and emphasis must be given to the importance of consent over mere consultation.

2. The ESF needs to include specific measures to ensure respect for indigenous governance and decision-making processes, as well as protection of indigenous traditions, cultural practices, and sites.
3. The policies on involuntary resettlement should be clearly in line with international standards, including the *United Nations Basic Principles and Guidelines on Development Induced Evictions and Displacement* and international human rights principles, and should ensure that communities remain in the same position or better following resettlement, including guarantees to rights such as rights to food, housing, health, and the right to an adequate standard of living. This must include extensive impact studies and an expanded vision of those impacted by the project, beyond communities directly subject to involuntary land acquisition or use. It must further include compensation for lost access to natural resources at a level that supports livelihoods, as well as non-economic losses that occur, such as those relating to cultural heritage sites, etc. Further clarification is needed on how the issues of non-registered land rights and tenure will be addressed, and how customary title will be protected. Issues faced in previous World Bank and IFI supported projects, around cash compensation schemes for livelihood replacement and lack of ongoing support and monitoring of livelihoods replacement must be taken into consideration and addressed in the AIIB Framework.

Climate change

1. While climate change is mentioned in the overarching objectives of the Framework, it is not mentioned or considered in detail in the substance of the Framework.
 2. ERI recommends that AIIB's Exclusions List cover projects that are particularly deleterious towards climate change, including any project that involves coal-related activities such as coal-fired power plants and coal mining, as well as other carbon intensive projects.
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