

The International Network on Displacement and Resettlement

www.displacement.net

23 October 2015

Secretary General Lin Liquen
Asian Infrastructure Investment Bank
9 Financial Street, Xicheng District
Beijing, China

RE: Commentaries on the AIIB draft Environmental and Social Framework from the International Network on Displacement and Resettlement (INDR)¹

Founded in 2000, the International Network on Displacement and Resettlement (INDR www.displacement.net) is a global, professional association of specialists working on all aspects of development-induced involuntary displacement and resettlement, within the wider context of sustainable social development and poverty reduction.² INDR's comments on the Asian Infrastructure Investment Bank (AIIB) Consultation Draft of its Environmental and Social Framework (ESF) focus on its involuntary resettlement including the taking of the land and resources of indigenous peoples.³

The draft ESF defines AIIB policies to avoid undesirable social, economic and environmental outcomes that accompany their infrastructure investments. Properly formulated, an ESF framework anticipates and resolves project-associated, social and environmental risks. It may also increase AIIB competitiveness for attracting strong co-financing partners and avoid pitfalls that have delayed and sometimes shipwrecked well-meaning infrastructure investments that have haunted international financial intermediaries.

Quagmire mitigation. INDR finds that some features of this draft show increased sophistication and merit further refinement. Its intent to enhance policy effectiveness through science and experience based, dynamic continuous learning with a focus on outcomes is laudable. Unfortunately, the 3 August 2015 draft has many undefined and ill-defined ambiguities, gaps and pitfalls, threatening peoples in the path of its investment projects, especially Indigenous Peoples. It also threatens AIIB projects with costly and time consuming quagmires and controversies.

¹ To address this effort, INDR President Theodore Downing named an Ad Hoc Committee on AIIB Social Risks. The Committee's charge was to review the consultation draft, noting its strengths and shortcomings. The Committee was to suggest enhancements to make the ESF an exemplary policy framework amongst international financial intermediaries. The Committee and INDR have strong backgrounds in project implementation - including policy formulation, project preparation, appraisal, supervision, evaluation, and compliance with internal accountability mechanisms. INDR's membership includes internationally recognized, leading theoreticians and social scientists in the field of involuntary resettlement. Committee members included Susanna Price and Ted Downing (co-Chairs), Ruwani Jayewardene, Carmen Garcia-Downing, Inga-Lill Aronsson, Brooke Wilmsen.

² INDR is not a CSO or NGO, it is an international professional association.

³ Draft of 3 August 2015.

1. **Defining Sustainable Social Development.** AIIB's Articles of Agreement view infrastructure development as significant to promoting economic growth and sustaining social development for the people in Asia. A half-century of research and experience has unquestionably established that involuntary resettlement risks will destabilize the economic and social base of people who are in the way, leading to counter-development and multidimensional impoverishment. At minimum, an ESF should identify, avoid and mitigate these risks and assure that those in the path of an infrastructure investment benefit from sustainable economic growth and social development.⁴ To begin, the draft lacks an operational definition of sustainable social development specifically directed at this primary risk - project affected peoples. In addition, an operational objective of "sustainable development" should be aligned with the multidimensional globally endorsed Sustainable Development Goals (SDGs) as an outcome objective for people impacted by AIIB investments. This would help to ensure upstream selection of projects that would be defensible on socially sustainable development grounds, thereby reducing the very real spectra of controversy as AIIB loans roll out.
2. **Scope of Application.** INDR supports the ESF's proposed uniform scope of application whereby all its projects are subject to the same criteria. This reduces administrative costs that have burdened other financiers. However, INDR finds the proposed case-by-case use of the co-financiers environmental and social policies and procedures in ¶9 may create an unresolved contradiction within the proposed policy by permitting its Management to work around ¶ 7 and 8. The adjective 'broadly' should be struck out from this paragraph as it opens up AIIB's Board and Management to time consuming and costly disagreements over an ambiguity.
3. **Adoption of Proportionality and Precautionary Principles.** INDR endorses the AIIB goal of becoming a knowledge-based, learning institution (AIIB website) through incremental advancement of scientific and experienced based policies. However, the draft does not yet incorporate a methodology for routinely modifying policies and procedures by incorporating internal experience and external, non-AIIB generated scientific knowledge. The draft policy needs to incorporate specific language to stay consistent with AIIB's intentions. That said, we are encouraged by the ESF's significant, improvement over its sister institutions by moving away from an unrealistic "direct/indirect" bifurcation of impacts in favor of a more sophisticated policy approach based on the proportionality of project impacts. A proportionality approach encourages an assessment of actual, on-the-ground impacts. Residual references to the antiquated direct/indirect approach remain in the draft and should be revised.

In situations of scientific uncertainty, as is often the case in hydropower downstream impacts and difficult-to-ascertain social risks, INDR recommends the ESF policy adopt the precautionary principle - the precept that an action should not be taken if the consequences

⁴ Well researched, project-induced, impoverishment risks that accompany an involuntary displacement are, inexplicably, not mentioned?

are uncertain and potentially dangerous.⁵ These policy enhancements permit a robust structure for managing operational and reputational risks of AIIB and its shareholders.

Recommendations on the Involuntary Resettlement Policy (ESS2)

The involuntary resettlement standard (ESS2) list seventeen specific requirements for the Client. Some advance, others retreat from leading to positive outcomes for project-affected-people. Specific, correctable shortcomings, include:

4. **The proposed objectives will increase the likelihood of impoverishment and social risks outcome.** INDR is certain that the standard's proposed objective to "*avoid involuntary resettlement (IR) wherever possible; to minimize involuntary resettlement by exploring operation and design alternatives; to enhance, or at least restore, the livelihoods of all displaced persons in real terms relative to pre-operational levels; and to improve the standards of living of the displaced poor and other vulnerable groups*" will result in counter-development and will impoverish project affected peoples. First, research and lender's experience has shown that unmitigated involuntary resettlement increases landlessness, homelessness, degrades health, disrupts family and community structures, dismantles livelihood systems, and may even risk human rights violations. Second, allowing opt-out provisions into the objectives (e.g. "when needed", "as required", "wherever possible", "at least restore" and "in real terms relative to pre-operational levels") lowers the outcomes for those being displaced. Third, the standard a) lacks effective sustainable development outcome objectives for those who will be displaced that are the cornerstone of other involuntary resettlement and land acquisition policies;⁶ Fourth, setting the objective to enhance or at least restore the livelihoods in real terms relative to pre-operations level is also flawed economics since "restore or enhance" offers a contradictory choice of outcomes. Restoration will usually be less costly than enhancement, making it the most likely choice. This approach calls for a denial of any intervening development benefits that might have otherwise accrued to the displacee, favoring forcing them back to a previous status. Finally, the policy asks that those in the way subsidize the project infrastructure by contributing a substantial portion of their assets, their livelihoods and life securities in order for the project to move forward, often against their will. Externalizing project costs is not only poor development practice, it borders on state or internationally sanctioned robbery.

INDR recommends that the outcome objectives for people being displaced be sustainable social and economic development. At minimum, AIIB should incorporate the highest objectives of The World Bank, IFC Performance Standards, the Equator Principles and the Asian Development Bank such that involuntary resettlement be conceived, executed and financed as a stand alone, sustainable development project and those displaced benefit from the revenue stream of the

⁵ The precautionary principle is defined as when human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm.

⁶ For example, the World Bank's OP 4.12, Para. 2.

project as relevant and proportional to the degree of monetary and non-monetary impacts.⁷

5. **Accountable outcomes rather than procedural focus.** Consensus is building among international financial intermediaries that they have overemphasized rigorous compliance with procedures – approaching a check off list – to mitigate undesirable social, economic and environmental impacts.⁸ The uprooting of peoples displaced by infrastructure unleashes exceedingly complex psycho-socio-cultural and economic changes. Experience from sister organizations is well documented, compensation alone is not sufficient to mitigate these, often irreversible, impacts. In this context, a restoration objective is meaningless. Operationally, this translates into a) the need for clearly stated objectives and outcomes that are shared with those being displaced (point 4 above), b) sufficient time and resources to take corrective or innovative actions, and c) the need for more operational flexibility to deal with uncertainties and constantly updated on-the-ground information. Inflexible procedural compliance approach may put projects into straightjackets that restrict innovative adaptations to avoid socioeconomic risks and find new livelihoods for the displaced. A move to more outcome-based approach and increased management flexibility carries with it the responsibility for achievement of specific objectives and outcomes. Flexibility should not be an excuse for underfunding, incompetence, or avoidance of risk mitigation that may exacerbate harm. Sufficient internal checks and balances are not yet in place to assure effectiveness, with accountability.
For this reason, **INDR’s support for flexibility is contingent upon disbursements that are strongly linked in legal covenants to outcomes as other provisions.** INDR recommends that the AIIB ESF objectives (Part 2) must include measurable improvement of the incomes, livelihoods, living standards and sustainable social development for those in the path of its projects (cf 4 above). Involuntary resettlement as guided by the ESF involves people’s lives, livelihoods and cultural sustainability. Planning, allocation of resources, the sequencing of actions cannot be set behind closed doors in project negotiations.⁹ Although the decision to move forward with a project may be non-negotiable, the fate of people to be displaced, including the details on how that displacement takes place, must be negotiated following meaningful consultations, informed consent and participation of the project affected peoples. Such negotiations increase the likelihood of successful outcomes for those displaced and AIIB.
6. **Equitable legal representation.** Fairness and impartiality demand that if the investment finances legal assistance to the Client for land acquisition and displacement, financing should also be provided for independent, legal work on behalf of project affected parties. All components of any legal agreements between AIIB and the Client that impact the future and

⁷ The draft asks the Client to “consider” implementing a IR component of its operation as a stand-alone operation, making the decision optional.

⁸ The 4 March 2015 release of the World Bank’s internal studies on involuntary resettlement revealed a systemic shortcoming in policy and performance.

⁹ The American Anthropological Association ruled the International Finance Corporation violated the human rights of the Pehuenche Indians in Chile for secretly negotiating an infrastructure project that required their involuntary resettlement with disclosure to them (1998). <http://new.aaanet.org/committees/cfhr/rptpehuenc.htm>

rights of project affected peoples or their resources should be opportunely made public, in a culturally appropriate manner, to the affected peoples.

7. **Screening and Project Categorization:** Project categorization and, hence, all subsequent action, depends on the ESF screening process – but the method, timeframe and operational point in the planning cycle await elaboration. The current wording allows for desk assessments which increase the probability for costly downstream errors. A field assessment for all projects involving involuntary resettlement should be mandatory at the earliest phase of the project cycle. All screening and categorization should be completed well before Board approval in order to allow for work to avoid, reduce, or mitigate impacts. We also do not recommend common screening criteria for social and environmental factors which by their very nature result in very different impacts. We recommend screening each safeguard separately based on the project footprint and its differing impacts. The ESF framework should state the fact that any involuntary relocation for example, is an irreversible impact irrespective of scale.
8. **Obfuscating International Law and National Laws.** For effective legal agreements, distinctions in international law should be mappable onto national legal frameworks. The INDR recommends renaming ESS2 as Land Acquisition and Involuntary Resettlement. And it strongly recommends deleting footnote 13. This footnote defines an involuntary resettlement that uses eminent domain as not being a “forced eviction”; does not guarantee any basic rights to informal dwellers; and does not deal with the case of countries that either lack, or do not have satisfactory eminent domain laws that do not, for example, require compensation at replacement rate. Consequently, INDR recommends ESS2 require a **mandatory Gap Analysis** between its standards and measures and the recipient country regulatory framework; backed up by legal agreements. Such an analysis has been part of the routine actions of other IFI since the late 1980s.
9. **Missing Selection and Review for the Use of Country Safeguard Systems.** INDR agrees with AIIB that strong country and corporate systems are essential to achieving sustainable environmental and social safeguards (para 11 page 4, for example). But the ESP proposes using Country Environmental and Social Assessment System in specific instances to substitute for safeguard policy coverage, instead of its own policy framework, with little clarity on the criteria and arrangements for 'selectively' reviewing the country system to determine its equivalence and effectiveness. Similarly, the arrangements for reviewing and assessing the outcomes of using country systems in social and environmental terms are unclear. Transparent arrangements are required. INDR cautions against what could become a seemingly arbitrary and very damaging practice without the adoption of stringent criteria for selection and review.
10. **Baseline surveys and a full census.**¹⁰ The ESF appears to recognize, but could more clearly state that entitlements, project socio-economic impact ranges, compensation estimates, and benefits should be proportional to losses determined by a full population, updated census and asset inventory of anticipated losses (Item 3). Adoption of the

¹⁰ Scores of complaints to the World Bank's Inspection Panel can be traced to conflicts and underfinancing because the lack of a baseline survey or a survey was substituted for a full assessment and a baseline population and socio-economic conditions, including an initial baseline census.

proportionality principle (see item 3) requires accurate, detailed risk assessments. The ESF scope of planning introduces the option of either a survey OR a census requirement. INDR recommends removal of language that might allow a Client to misunderstand the need for a full census and socio-economic assessment, a technical obligatory instrument for all involuntary resettlements.

11. **Financing involuntary resettlement ambiguity.** The proposed involuntary resettlement standards require the Client to undertake 17 actions (surveys, census, consultations, social support, livelihood restoration, resettlement assistance, etc.) and include the full costs and benefits in the operation's presentation. The policy leaves unclear, however, whether or not the involuntary resettlement costs will or will not be part of the actual project budget and who is responsible for paying them. For the overall investment budget, the lack of accurate cost calculation or exclusion of the involuntary resettlement component conceals project liabilities, pushing conflicts or remediation costs down the road - leaving the project's ledger with unspecified liabilities. INDR recommends an unambiguous statement to resolve this issue.¹¹
12. **Synchronization.** Whereas environment management is a post-construction activity, land acquisition and resettlement is considered a pre-construction, investment cost and often an ongoing project cost. This presents significant upfront pressure to finalize RAPs before Board approval because international policy standards are not always well synchronized with national regulatory frameworks. The lack of synchronization presents a continuous risk to international standards - and to affected people - in resettlement identification, planning and implementation. INDR is deeply concerned that the draft ESF offers the Client the option of avoiding doing preparation of a resettlement action plan before Board approval if "details have not been identified". This option rewards laxity and inattention to project preparation, substituting a commitment to do a resettlement action plan for the hard work of informing the Board of the full involuntary resettlement risks. In so doing, the ESF gives an unfair competitive advantage to investments with the weakest preparation.
13. **Ill-defined Protections for the Vulnerable Peoples.** An involuntary resettlement exposes vulnerable people to asymmetric negotiations with AIIB's powerful clients. The ESF definition of vulnerable is problematic and confusing.¹² The broader protections of vulnerable peoples found in other IFI involuntary resettlement policies are obfuscated in the proposed ESF. The policy states that people living below the poverty line, the landless, the elderly, children, women and children headed households, refugees, internally displaced people, ethnic minorities, natural resource-dependent communities, or displaced persons whose interests may not be legally protected may or may not be included as vulnerable. Permitting the Client to decide who may or may not be "vulnerable" using definitions is

¹¹ Frequently, the cost of land acquisition and involuntary resettlement, even though required up front, is not accurately calculated or it is excluded from the overall project budget, externalized to project affected people or assumed to be the obligation of the private sector with inadequate oversight by state functionaries.

¹² According to its social coverage (page. 25) vulnerable groups refer to people who, by virtue of age, gender, disability, ethnicity, indigenous status, gender identity, sexual orientation, religion, economic disadvantage or social status: (a) may be more adversely affected than others by Operation-related risks and impacts; and (b) may be limited in their ability to claim or take advantage of Operation benefits.

problematic. This option creates a conflict of interest for the Client who will favor the most cost-effective, restrictive definition. Moreover, the criteria for the “may or may not” exclusion or inclusion are not specified. The ESF statement that “particular attention” should be paid to those without legal title to land, those below the poverty line, landless, elder, children and women during consultations is vacuous as long as “particular attention” is undefined. And provisions that the standards of living for displaced people and other vulnerable groups, including women, meet at least national minimum standards is antithetical to a resettlement with development outcome. Indigenous Peoples may or may not be particularly vulnerable. INDR finds the draft’s approach to protecting the vulnerable from harm arbitrary and idiosyncratic, in need of rethinking.

14. **Grievance and legal representation.** Adding a Compliance Function /Inspection Panel would put AIIB on a par with other comparable international financial institutions and allow affected people a mechanism to channel any complaints they may have.
15. **Independent Monitoring and Evaluation.** Provisions called for in ESS3 requiring the use of qualified and experienced experts, adoption of participatory monitoring and evaluation approach and assessment of whether the resettlement action plan’s objective and desired outcome have been achieved, taking into account the baseline conditions, should be incorporated in ESS2 and not limited to the displacement of IPs. INDR recommends that timely disclosure of monitoring findings be mandatory in both cases. Given the potential conflict of interest between the Client and those displaced, INDR also recommends that the external monitoring and evaluation be done by an independent party and costs be included in the Client’s project budget.
16. **Deployment of Resettlement and displacement professionals.** Clients specializing in infrastructure seldom if ever have these skills, incorrectly perceiving involuntary resettlement as a real-estate transaction or a construction task. For this reason, INDR recommends the policy explicitly call for the use of experienced, involuntary resettlement professionals through its investment cycles.

Recommendations on Indigenous Peoples Standard (ESS3)

INDR’s comments on ESS3 focus on involuntary resettlement of Indigenous Peoples, not on the overall standard. The forced resettlement of IPs is globally recognized as an undesirable, human rights risk that should be strenuously avoided. As with ESS2, the Indigenous Peoples standard (ESS3) fails to provide appropriate objectives that will safeguard indigenous livelihoods. In so doing, the AIIB policy itself puts Indigenous Peoples who are resettled at risk of impoverishment and a high risk of irreversible, project-induced, socio-cultural destruction. It obfuscates internationally acceptable guidance on the application of FPIC for Indigenous Peoples. It exposes them to asymmetric negotiations with powerful Clients which are likely to weaken and divide them. It fails to protect the integrity of indigenous collective land, that is often the cornerstone of their identity.

The Draft AIIB policy unequivocally attempts to redefine international law on the rights of Indigenous Peoples in the path of their investments. The concept of Free Prior and Informed Consent appears in international law explicitly, but not exclusively, with reference to forced relocation.¹³ In an outrageous departure from International Law, the draft policy restricts Free Prior and Informed Consent for Indigenous People who pass one of three tests on the nature of their relationship to land and other resources. The operation must 1) have impacts on land and natural resources subject to traditional ownership or under customary occupation or use; OR 2) cause relocation of IPs from land and natural resources subject to traditional ownership or under customary occupation or use; OR 3) have significant impacts on Indigenous Peoples' cultural heritage. AIIB has unilaterally claimed the right to make judgments on the complex relationship between Indigenous Peoples and their land and resources and then delegated this right to its Client. Many would claim that neither AIIB nor its Clients have standing, under international law, to make this critical determination.

The ESF limits the scope of FPIC, introduces the minimalist requirement of good faith negotiations, and establishes what evidence the Client, not the IP must provide of FPIC. It defines what is and is not acceptable agreement among an Indigenous Peoples. The INDR recommends aligning ESF and its standards to meet United Nations standards on definition of IPs and FPIC and current international law. INDR finds the option whereby a Client who is unable to obtain the IPs FPIC (Para. 47) may ensure AIIB that the proposed investment does not have adverse impacts on Indigenous peoples is a serious misunderstanding of FPIC. The INDR finds that the proposed loophole protects neither AIIB nor the Client from a violation under international law. A development Bank cannot grant itself a social license to ignore decades of international law and forcefully relocate Indigenous Peoples. It must be stricken out.

INDR respects the herculean task that AIIB faces in drafting a new ESF. More work remains. Our professional association is committed to work with AIIB as it defines this policy's mandatory operational procedures and non-mandatory guidance and information notes that are essential for staff and clients for projects that assure environmental and social sustainability.

We look forward to your response.

Sincerely,



Theodore E. Downing
President, The International Network on Displacement and Resettlement
www.displacement.net
president@displacement.net

¹³ United Nations Declaration of the Rights of Indigenous People, Art. 10 "Indigenous Peoples **shall not be forcibly removed from their lands or territories**. No relocation shall take place without the free, prior and informed consent of the Indigenous Peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." And UN ILO (1957) 169, Part II, Land, Articles 11-12, including India, Pakistan, Bangladesh are signatories.