

October 23, 2015

Via Electronic Mail

Mr. Jin Liqun
President-designate
Asian Infrastructure Investment Bank (AIIB)
9 Financial Street
Xicheng District, Beijing, China

Re: Ensuring a Robust Accountability Framework at the AIIB

Dear President Jin:

We commend the Asian Infrastructure Investment Bank (AIIB) for recognizing that environmental and social policies are needed to guide its future operations. However, as discussed below, we have concerns regarding the lack of meaningful consultation and clarity surrounding the development of the Environmental and Social Framework (ESF), including AIIB's accountability framework, which includes the Oversight Mechanism and Operational-Level Grievance Mechanisms, as referenced in the draft ESF.¹ In line with China's recent commitments to ensuring "transparency . . . [and] high environmental and governance standards of international financial institutions,"² we urge the AIIB to adopt a robust ESF that can ensure that its activities meet the needs of poor or marginalized communities and the development needs of the region.

As organizations that work with communities, in Asia and elsewhere, who have suffered harm from projects supported by international financial institutions (IFIs), we understand the importance of a robust accountability framework in order to ensure project success and access to remedy for project-affected people. Many of us have extensive experience with the grievance mechanisms³ at other IFIs, such as the Asian Development Bank and the World Bank Group, and have provided guidance to these institutions on how to develop effective mechanisms that provide recourse for negative impacts, while advancing sound and sustainable project goals.

There is growing recognition among IFIs and the business community of the connection between responsible development practices and the long-term success and viability of their investments. This success depends, in large part, on avoiding—or, where avoidance is not possible,

¹ AIIB, Consultation Draft Environmental and Social Framework (hereafter, the "Environmental and Social Policy"), Aug. 3, 2015, paras. 50 and 51.

² Fact Sheet: US-China Economic Relations, Sept. 25, 2015, noting "Both sides acknowledge that for new and future institutions to be significant contributors to the international financial architecture, these institutions, like the existing international financial institutions, are to be properly structured and operated in line with the principles of professionalism, transparency, efficiency, and effectiveness, and with the existing high environmental and governance standards, recognizing that these standards continuously evolve and improve."

³ For purposes of this submission, and unless specified otherwise (i.e., operational-level grievance mechanism or independent accountability mechanism), we use the term "grievance mechanism" to refer broadly to non-judicial procedures that provide a formalized means through which individuals or groups can raise concerns about and seek remedy from the impact a project/investment has on them.

mitigating—adverse environmental and human rights impacts and, where projects cause harm to communities, accounting for that harm. While infrastructure is needed to provide basic services for the poor, our experience has shown that such investments must be done responsibly; otherwise, these investments can exacerbate impoverishment.

Grievance mechanisms can play an important role in ensuring a responsible approach to infrastructure investment by providing a way for IFIs to reduce the risk of harm and mitigate adverse impacts that can threaten the sustainability of their investments and the projects they implement. Furthermore, a well-functioning grievance mechanism can provide valuable feedback about possible systemic problems and indicate necessary changes to improve project management and implementation.⁴

We would like to take this opportunity to engage with you and share our experiences and lessons learned as you develop an accountability framework that incorporates the AIIB Oversight Mechanism and Operational-Level Grievance Mechanisms. Due to the limited consultation period, the scope of this submission is confined to: (1) concerns regarding the consultation process; (2) the AIIB Oversight Mechanism; (3) operational-level grievance mechanisms; and (4) ensuring accountability in the use of Country and Corporate Systems.

1. Concerns regarding the Consultation Process

We wish to reiterate the concerns and recommendations of other civil society groups on the ESF consultation process,⁵ which has suffered from fundamental problems. We urge the AIIB to extend the consultation timeline to a minimum of 4 to 6 months, following release of the draft ESF and relevant documents, including the information and disclosure policy, in local and regional languages. Further, the AIIB should hold in-person consultations at the regional, national, and local levels – in a manner that enables the meaningful participation of various stakeholders, including Asian civil society and local groups, indigenous peoples representatives, and those who may be directly impacted by AIIB-financed projects.

In developing the Oversight Mechanism, it is equally important that the AIIB hold meaningful public consultations—particularly with civil society and project-affected communities that will potentially be the users of the mechanism—on the Mechanism’s mandate, operating procedures, and guidelines for its staff. This will help establish both the AIIB’s and the Oversight Mechanism’s credibility and legitimacy.

2. The AIIB Oversight Mechanism

Paragraph 51 of the draft Environmental and Social Policy states that the AIIB will have an “Oversight Mechanism” to which people can submit complaints when they have been adversely affected by the environmental or social impacts of an AIIB-funded Operation. In a footnote, the

⁴ Office of the Compliance Advisor/Ombudsman (CAO), Advisory Note: A Guide to Designing and Implementing Grievance Mechanisms for Development Projects, p. 11, available at: <http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>.

⁵ NGO Forum on ADB submission to the AIIB, dated Oct. 23, 2015, available at: <http://forum-adb.org/main/global-call-for-aiib-to-make-safeguards-consultation-open-inclusive/>.

AIIB notes that the Oversight Mechanism is currently being developed and will be reviewed by the Prospective Founding Members (countries) before the Policy is finalized. As stated above, we encourage the AIIB to hold meaningful public consultations on the mechanism's policy and procedures.

To maximize the benefits that an independent accountability mechanism can provide, the AIIB should ensure that the Oversight Mechanism is based on best practices.⁶ An accountability mechanism that is poorly designed or implemented not only diminishes its value to the IFI, but it also risks compounding grievances among affected people and overlooking project deficiencies.⁷

The UN Guiding Principles on Business and Human Rights set forth criteria for best practice among grievance mechanisms:

- **Legitimacy:** The Oversight Mechanism should have an independent governance structure to ensure that the process is fair and has the trust of the affected communities. It should be able to function independently of political influence or pressure from the AIIB's management, whose actions may be the source of grievances. The mechanism should also have sufficient authority to handle grievances and make redress decisions objectively. The Oversight Mechanism must be housed, staffed, and granted authority in a manner that promotes its ability to maintain independence from AIIB management. In this regard, the AIIB should draw from the best practice of members of the Independent Accountability Mechanisms Network, which is composed of the mechanisms established by multilateral and bilateral development finance institutions. For instance, the Compliance Advisor/Ombudsman (CAO), the accountability mechanism of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), requires post-employment "cooling off" periods for its staff. Notably, the CAO Vice President is independent from the operational management of IFC and s/he is not only prohibited from obtaining employment with the World Bank Group for life, but the selection committee tasked with her/his appointment includes a representative from civil society. Additionally, the Oversight Mechanism's reporting lines can further bolster its independence and effectiveness. The Oversight Mechanism should report findings and recommendations directly to the Board, rather than to management.
- **Accessibility:** In order to serve as a reliable forum for providing access to remedy, the Oversight Mechanism should be well known to all potentially affected people and provide adequate assistance to help them overcome barriers to accessing it, including "language, literacy, costs, physical location and fears of reprisal."⁸ In order to ensure direct access to the mechanism, the filing requirements for complaints must be simple

⁶ The International Finance Corporation's CAO is often cited as an accountability mechanism that has adopted a number of best practices.

⁷ UN Guiding Principles on Business and Human Rights, *Implementing the United Nations "Protect, Respect and Remedy" Framework*, Principle 31 Commentary (providing, in part, that "[p]oorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process...").

⁸*Id.* at Principle 31(b) and Commentary.

and not burdensome, which is best practice for existing IAMs.⁹ To further increase access to the mechanism, the AIIB should include a requirement (for instance, in the project loan agreement) that project management clients inform affected people of the existence of the mechanism and its functions. Equally important, the Oversight Mechanism should not impede access to remedy through other means, whether non-judicial or judicial, or require affected people or their representatives to use the mechanism before pursuing other avenues for remedy.

- **Predictability:** The Oversight Mechanism should have clear and known procedures with timeframes for each stage of the process. The timeframes should be explicit and clearly communicated to potentially affected people, and the mechanism should have a way to monitor that the process and parties are respecting those timelines.
- **Equitability:** To ensure that affected people can engage in a process on fair and equitable terms, they must receive non-biased information and advice. Affected people are often not well informed of their rights or options for recourse, and may be severely disadvantaged in their access to resources and information compared to IFIs. In order to facilitate an equitable and fair process and maintain trust, the mechanism should provide information on the process and inform affected people of their right to consult with and be accompanied by counsel and/or advisors at any time during the process. Complainants should have an equal opportunity to review and comment on draft reports as bank management.
- **Transparency:** Transparency is key to building and maintaining confidence in the Oversight Mechanism within affected communities, as well as with shareholders and the general public. Transparency includes keeping parties to a complaint process informed about its progress and reporting to the public regarding the mechanism's activities. The mechanism should maintain a publicly available case register, including an online version, in addition to any other culturally appropriate means of disseminating this information. The complaints registry should publicize information on each complaint filed, whether closed or open. Additionally, Oversight Mechanism communications and materials should be available in multiple languages. The Oversight Mechanism should not require parties to agree to a blanket confidentiality agreement as a prerequisite to participate in the complaint process. However, it should protect the identity of any party that requests confidentiality.
- **Rights-compatibility:** In order to be considered effective and legitimate, the Oversight Mechanism must provide outcomes and remedies that align with internationally-recognized human rights. Outcomes and remedies should respect applicable rights under national and international law. Any monitoring and evaluation efforts of the mechanism should also include a review of these outcomes and remedies for their rights compatibility. Further, the Oversight Mechanism should have the mandate to make recommendations to suspend an AIIB-funded project, where there is imminent harm. In

⁹ By way of further illustration, there are no format requirements for filing a complaint to the CAO – other than they be in writing. Complaints can be in any language. Additionally, an individual can file a complaint.

addition, the Oversight Mechanism should allow for confidential complaints to ensure that complainants are protected from fears of or actual reprisals for filing a grievance. Finally, we recommend that the Oversight Mechanism adopt protocols in place based on best practice to prevent and address reprisals against complainants.

- **A source of continuous learning:** In addition to resolving individual grievances, the Oversight Mechanism can serve a valuable role by providing feedback for the project cycle and the AIIB's operations in general. The AIIB should develop and make public a process for identifying lessons learned from the Oversight Mechanism, implementing improvements, and monitoring progress to avoid harm to project-affected people in future projects. There should also be a monitoring and evaluation process of the mechanism itself to verify that it is fully carrying out best practice. Finally, similar to the CAO, the Oversight Mechanism should also have the mandate to analyze, document, and publish lessons learned from cases for both the AIIB and the mechanism.
- **Based on engagement and dialogue:** The Oversight Mechanism should standardize the public consultation process for review of the design, performance, and monitoring and evaluation of the Oversight Mechanism. This will ensure that it maximizes value to the AIIB in the form of useful feedback and that it meets the needs of communities. The participation of potentially affected communities and the public is critical to the development of a culturally appropriate mechanism that can respond effectively to their concerns and address harm caused by a project.

Based on our experiences, for the Oversight Mechanism to be effective, it must incorporate these criteria and develop appropriate and robust operating procedures that are publicly available. Additionally, the AIIB should conduct public consultations on these procedures through periodic reviews.

3. Operational-Level Grievance Mechanisms

The AIIB requires clients to establish Operational-Level Grievance Mechanisms to receive concerns from “people who believe they have been adversely affected by the Operation’s environmental and social impacts.”¹⁰ Of note, the Environmental and Social Policy says that it will receive “concerns” not “complaints” and it does not specify the parameters for what the grievance mechanisms should look like.¹¹ The Policy says that they have to be “suitable”;¹² however, this remains undefined.

The AIIB’s Environmental and Social Standards (ESS) on Involuntary Resettlement (ESS2) and Indigenous Peoples (ESS3) require the Client to establish a grievance mechanism that is culturally appropriate and gender-sensitive. As highlighted in the overarching policy language, the ESS specifies that the mechanism should be “suitable” for receiving and addressing concerns of operations-affected people. Additionally, it allows for the grievance mechanism to use

¹⁰ AIIB Environmental and Social Policy, para. 50.

¹¹ *Id.*

¹² *Id.*

existing formal or informal grievance mechanisms so long as they are “properly designed and implemented, and deemed by AIIB to be suitable for the Operation.”¹³ However, there is nothing in the policy that provides guidance to clients for developing them. The AIIB should develop requirements based on the criteria above for clients’ operational-level grievance mechanisms.

Without establishing clear requirements in the ESF based on best practice, project-level grievance mechanisms can increase reputational and legal risk, undermine project outcomes, and deteriorate the legitimacy of the AIIB. Accordingly, we strongly discourage the AIIB from relying on operational-level grievance mechanisms, particularly without appropriate precautions.

It warrants emphasis that many of these mechanisms suffer from the following fatal flaws: (1) they are often inappropriate for remedying serious environmental and human rights abuses; (2) they lack independence and the trust of affected communities; (3) there is no oversight or accountability for the mechanism’s actions; (4) they can be used to create barriers to other forms of remedy; (5) they do not provide protection against reprisals; and (6) there is a lack of community consultation and participation in the design, implementation, and monitoring of the mechanism’s process and outcomes.

Furthermore, the draft ESF does not define the roles of the Oversight Mechanism and Operational-Level Grievance Mechanisms. In developing the Oversight Mechanism and requirements for Clients’ mechanisms, the AIIB should ensure that affected people are clearly informed that they have the option to select the mechanism they want to use without any restriction and that they are not precluded from going to both if they so choose, or of switching from the Operational-Level Grievance Mechanism to the Oversight Mechanism at any point in time.

The AIIB should also include provisions to protect complainants from retaliation for raising concerns and complaints. The Operational-Level Grievance Mechanisms should also have provisions that include, but are not be limited to, allowing for complainants to remain anonymous,¹⁴ if so requested.

4. Ensuring Accountability when using Country and Corporate Systems

Strong Country and Corporate Systems are crucial to ensure the adequate management of environmental and social risks of projects. It is, therefore, critical for development institutions and financial institutions, such as the AIIB, to support the strengthening of these systems in line with international best practice. However, it bears emphasis that many of the countries in which the AIIB will operate have weak regulatory and governance frameworks, insufficient institutional capacity to implement environmental and social policies, and/or the absence of a

¹³ AIIB Environmental and Social Policy, ESS 1, 2, and 3.

¹⁴ In comparison to an independent accountability mechanism, we believe that it would be more appropriate for project-level grievance mechanisms to have the option of submitting an anonymous complaint, given the lack of “firewalls” to ensure the mechanism can keep the identities of the complainants from the client.

functioning, independent, and impartial judiciary. We caution against this approach being the default.

Additionally, we have serious concerns about the lack of clarity around the use of Corporate Systems. Our experience has shown that many companies (or clients) involved in developing mega-infrastructure projects, including those financed through financial intermediary lending, have failed to adequately manage the environmental and social risks of projects. Accordingly, reliance on Corporate Systems could lead to weakened protections for the environment and project-affected communities. We caution against this approach.

Where Country or Corporate Systems are used, the AIIB should ensure that the ability of local communities to access accountability is not reduced. To this end, the policies and procedures of the AIIB and the Oversight Mechanism should be explicit that the use of Country and Corporate Systems does not preclude access to the Oversight Mechanism.

Moreover, we urge the AIIB to provide greater detail on the methodology that will be used to assess a Country or Corporate System,¹⁵ along with the measures to monitor implementation. As part of its methodology, the AIIB should conduct an assessment of the availability, credibility, independence, and track record of local and national authorities to implement an Operational-level Grievance Mechanism. Where the client does not have a positive track record, or where gaps exist in grievance mechanism capacity, this analysis should then inform an action plan to implement and strengthen grievance capacity. This action plan should be in place prior to the appraisal of any project support before using Country and Corporate Systems. Further, the AIIB should provide clear guidelines and practical tools to support grievance mechanism implementation and borrower capacity. Grievance mechanism implementation, including budgetary allocation and capacity building, should also be included in the AIIB's assessment and action plan.

Conclusion

Accountability mechanisms that incorporate best practices can serve as an effective tool for IFIs to engage in responsible development practices and improve the sustainability of their investments. With a strong Oversight Mechanism and appropriate Operational-Level Grievance Mechanisms, the AIIB can ensure respect for its social and environmental policies, prevent abuses and poor project outcomes, and appropriately respond to harm. These mechanisms not only provide a way to bring value to the people affected by the AIIB's investments, but they also contribute to the long-term success and legitimacy of the institution.

Thank you for taking this letter into consideration. We welcome the opportunity to discuss the AIIB accountability framework with you.

¹⁵ See, e.g., World Bank OP 4.00 and Table A1 as an example of a methodology for assessing the equivalence of a borrower system to bank safeguards.

Sincerely,

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