

Both ENDS submission to Phase One of the ESF review of the AIIB March 20 2020

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1. Introduction

In the context of our long history of engagement with different international financial institutions (IFIs) on safeguards, this briefing note presents an initial analysis of the Asian Infrastructure Investment Bank's Environmental Social Framework (ESF), in which we assess if it will provide for adequate and timely protection to communities and the environment. In this first phase we (mainly) limit ourselves to recommendations, with regard to the following topics: gender (including gender based violence), biodiversity, development partner policies and common approach in co-finance.

2. The Consultation process

The AIIB adopted its ESF shortly after it opened for business in 2016. In fact, the AIIB didn't consult widely for the draft policy in 2015/16. The consultation process of the draft ESF was rushed at the time of the Bank's inception. It took the Bank no longer than a few months to consult stakeholders and come to a policy. In contrast to the brief consultation held by the AIIB the Asian Development Bank underwent a five-year long review of its safeguards in order to update them.

The AIIB invoked mitigating circumstances for rushing. There was a dire need for infrastructure investments and it was being argued that as a new bank, it would take some time for being on a par with other banks. Its ESF would mirror those at other institutions and in the first years the Bank would mostly participate in co-financing operations led by other multilateral banks anyway.

The AIIB was garnering the views from a selected group of stakeholders only and held a limited number of face to face meetings and an erratic series of video-conferences. During the consultations, much of the input from civil society didn't make much of an impact on the structure and contents of the draft and the final policy. Then, as well as now, a Terms of Reference of a public consultation to garner views from the public at large was lacking.

To meet the requirement that consultation has to be equitable, inclusive and transparent the Bank has to ensure adequate coverage of those affected by the policy and should choose to maintain an inclusive approach in line with the principle of open governance. Publication of the draft for comments on the website (in English only) is only one way to communicate, but is not sufficient for the consultation to be equitable. A Terms of Reference (or Approach paper) would have provided general principles and standards for consultation that would

have helped the Bank to rationalize its consultation procedures, and to carry them out in a meaningful and systematic way.

To conduct a full review of a policy after three, nearly four years is not standard for the review of a policy at IFIs. However, given the above, there would have been good reason to choose for a full review in this particular case of the AIIB ESF. The Bank instead has chosen to examine the initial years of implementation and reflect on lessons learned in a 'targeted review'.

From a perspective of public reliability, as a follow up step it would be important to determine the date in time that a full review will be conducted, and to indicate the time frequency for an evaluation and a full review to be held.

3. Overarching concerns

Before going into development partner policies, gender and biodiversity, a more overarching structural assessment of the ESF as a whole leads to the identification of the following key shortcomings:

3.1 Over-reliance on borrower systems.

- The AIIB is over relying on borrower systems, while falling short in having clearly defined due diligence requirements in place.
- The AIIB doesn't spell out on what criteria, principles and rules the due diligence of the borrower's system is based.
- The AIIB tends to rely on the due diligence information provided by the borrower. There is no routine way for any provision of information from civil society or for any independent assessment of the borrower's track record. It is necessary that the AIIB's due diligence process goes beyond depending on self-reported information from the borrower for the so called 'gap-filling' arrangements to strengthen the borrower's system and capacity.

3.2 Ex-ante requirement versus phased approach.

- Flexible and negotiated agreement between the AIIB and borrowers supersedes mandatory policies (e.g. p9, §11: the bank reviews the work, and in consultation with the client determines whether any additional environmental or social work is required, p 10, Cat B: the Bank in consultation with the Client, determines the appropriate instrument for the Client to assess risks and impacts, p 11, §14: on a case-by-case basis and in consultation with the client, p 23: adaptive management, p 16, §38 the bank in consultation with the client determines which among a wide variety of assessment instruments may be used, p 17, §45 use of ESMPF, p18, §50 use of phased approach).
- The Bank wants to overcome the defects occurring during the different stages in the project cycle by finding solutions at the moment they occur.

Moreover, the timing of the assessment and due diligence may follow a phased approach (p 12, §23), (p 18, § 50).

- Ex-ante assessment of environmental and social risks is critical. Board members might not always receive all the documents, including inputs of public consultations needed to be able to base their decision making and project approval on a fully informed basis (p 17, §45 use of ESMPF, p18, §50 use of phased approach). Moreover it is crucial for affected communities to know beforehand what impacts are expected and what mitigation measures are to be carried out. Only then can they make the right assessment of the project.
- The ESF does not specify what the Bank's minimum due diligence requirements prior to Board approval are. One should take into account here that after disbursements, most leverage to assure that projects meet requirements is lost.

Concluding for now, to use an earlier comment of *Vinod Thomas*, former head of the World Bank and ADB Evaluation department, on the then new World Bank ESF: "The nub is whether this flexibility in approach and self-assessment will be accompanied by enhanced oversight and accountability."

3.3 Oversight

Strong oversight is crucial to ensure accountability, especially when opting for a flexible approach, as the AIIB does.

At other IFIs discussing project proposals would be a routine part of the Board oversight. We are concerned however that at the AIIB the oversight of the Board is seriously weakened though by the adoption of the so called 'accountability framework' in 2018. The accountability framework delegates decision making to the President. It is also not clear what detail of project information is provided to the board.

3.4 Public Disclosure, access to environmental information (ESS1).

Oversight is not only weak due to the adoption of the accountability framework. The AIIB also lacks clear rules on public information disclosure, compared to for example the World Bank, which would allow for corrective measures to be introduced (by civil society) early on.

World Bank and Asian Development Bank have a requirement, put in place by the US as their major shareholder that allows potentially affected communities to provide input on the Environmental Impact Assessment of any high risk project, prior to the project's approval; this normally means 120 days prior to Board vote (publicly known as the *Pelosi act*).

4. Specific policy concerns and recommendations for improvement

Now following is a brief overview of some policies concerning *development partner policies, biodiversity and gender* at other IFIs that should be of use in comparison with the ESF. These comments are still preliminary in nature and will be further elaborated for the second phase of consultation in a full policy briefing paper.

Before doing so, the following side remark is inevitable:

The overall trend among IFIs appears that they scramble to compete for investment opportunities, hence cutting costs and downgrading protections, afraid as all are that they scare of borrowers otherwise. Given this background a technical benchmarking exercise, as a means to get stronger protections in place, unfortunately might fail beforehand, as the prevailing banking culture to lend money to clients as leniently as possible exists.

As a result of this behavior the AIIB and World Bank ESF are in many ways now similar to each other. In both banks there is a move towards non-binding, open-ended and vague flexibility on what safeguards or standards will be applied to each project and when.

Furthermore, the use of non-directive, vague language, to give some examples: - in a manner consistent with the ESS, in a timely manner, in exceptional cases, common approach, etc, etc, - makes it impossible to come up with a detailed meaningful text comparison.

We will therefore, besides naming useful benchmarks, base our recommendations on what is needed to protect communities and the environment and go beyond what currently exists at other banks.

4.1 Development partner policies

Reference: p 6, § 21 Cooperation with Development partners, p 9, § 10 Development partner policies.

4.1.1 Brief description of the status quo

International and bilateral financial institutions do not follow equal standards and are risking the weakening of environmental and social standards through increased competition. The crucial question here is how it can be guaranteed that protections are at par with each other, or even better that strongest regulations and standards prevail.

P6, § 21 of the Vision states that a common approach will be chosen for in co-financed projects. The AIIB should clarify how it determines the commonness in the policies and standards, and do this in a transparent matter.

The common approach should not allow the Bank to shy away from its own accountability. According to the AIIB ESP (p 9, §10), the Bank may rely (on a case by case basis) on the application of a co-financier's policies and procedures (and borrower systems), as well rely on the co-financier's determination as to

whether compliance with the co-financier's policies and procedures has been achieved. The Bank should always keep its own due diligence and the application of its own policies in place, also in co-financed projects.

4.1.2 (Potential) problems arising from the status quo

When the AIIB relies on the standards of other lenders and cannot clearly show that these standards are equal or stronger than its own, the bank runs the risk to invest in projects that harm people and planet and do not adhere to its own policies and standards.

Moreover, this provision prevents affected communities of AIIB's (co)-financed projects to use the PPM when grievances occur.

The importance of defining the commonness in a common approach gains extra relevance in the light of the many observer's expectations that the AIIB is going to contribute to the financing of Chinese Belt Road Initiative (BRI) projects. AIIB President Jim Liqun already made the point that both China and the AIIB had very high standards and considers more cooperation in the context of BRI natural.

In practice the Chinese BRI has no policies in place to protect communities against potential spill-over damages of large-scale infrastructure projects. Chinese investors claim to follow host country rules.

4.1.3 Reference points for improvement (e.g. at other banks)

The World Bank ESP (p 5, §9) demands a common approach (with its co-financiers) to be included in a contractual agreement (Environmental and Social Commitment Plan - ESCP).

World Bank ESF (p 5, footnote 16): measures and actions that have been agreed under the common approach will be included in the ESCP, which means that the Bank relies on the own determination by itself as to whether compliance has been achieved.

4.1.4 Suggestions for improvement

- It has to be clearly demonstrated that co-financiers and or borrowers provide the same level of environmental and social protections. There has to be a requirement as well for the full disclosure of such an 'equivalence-testing'.
- The AIIB should take full responsibility of its own due diligence, also in co-financed projects, as other banks do.

4.2 Biodiversity

Reference: (vision p 5, §17) 'The Bank assists its Clients in protecting and conserving biodiversity and promoting the sustainable management of living

natural resources through the adoption of practices that integrate conservation needs and development priorities.'

4.2.1 Brief description of the status quo

Since the bank as an infrastructure bank prioritizes infrastructure development, development priorities will more often than not go at the cost of conservation needs. Therefore the vision should explicitly include a **precautionary principle**, build in stronger warrants of **do no harm and choose for an inclusive and holistic** approach. Nature is everywhere, and plants and animals interact and are interdependent. So are nature reserves and habitats. Nature does not stop at borders either, a lot of nature follows seasonal migratory patterns.

Note as well that critical habitats can include areas that are not being protected or managed, and they may be outside legally protected and designated areas. Habitats may be considered critical if their ecosystem functions or species rely on or provide connectivity with other critical habitats, including legally protected critical habitat areas.

The ESS 1 already recognizes to '*Consider direct and indirect Project-related impacts on biodiversity, for example habitat loss, degradation and fragmentation, invasive species, overexploitation, hydrological changes, nutrient loading, pollution and incidental take, as well as projected climate change impacts. Also take into account the differing values attached to biodiversity by affected communities and other stakeholders.'*

However, greater attention should be paid to cumulative environmental impacts, as projects - in particular large infrastructure projects- may have impacts far beyond their boundaries.

Indirect (and accumulating) impacts of infrastructure development outside natural habitats and protected areas, e.g. the CO₂ emissions of industries, agriculture, energy generation, transport, tourism and urbanization already cause a climate crisis. Even small changes in average temperatures can have a significant effect upon ecosystems. On top of the climate crisis impact, the atmospheric depositions of nitrogen and sulfur cause nutrient loading in nature reserves.

4.2.2 (Potential) problems arising from the status quo

In Laos at present a BRI associated expressway is rolled out by Chinese companies parallel to the AIIB and World Bank co-financed National Road 13 North project. The Laotian government is effectively treating the roads as two separate projects, and so are they treated by the financiers. The ESIA for NR13 North in its comparison of feasible options does not include any mention of the express-way.

What the Laos road example shows us is that strategic planning seems not provided by the borrower and that cumulative impacts are not taken into account. Social and environmental issues should be considered beyond the individual project level, and take into account regional or national level

environmental analysis, as well as landscape and watershed analysis.

The language on **natural resources depending groups** needs further strengthening as well. Now the vision states (p5, §17) that *'through it's financings, the Bank assists it's clients in maintaining the livelihoods of Indigenous Peoples and other affected communities whose access to, or use of, biodiversity or natural resources may be affected by a project.'* And ESS 1 B Environmental Coverage Biodiversity conservation (p31) reads *'Also take into account the differing values attached to biodiversity by affected communities and other stakeholders.'* The wording 'to consider' and 'to take into account' leave the client space to self- decide and prioritize infrastructure development above conservation. In addition the policy part dealing with biodiversity explicitly should mention the recognition of rights of forest peoples.

Our biggest concern though is that the paragraphs about **critical habitat and protected areas**, leave open the option for the AIIB to finance activities on territory within the designated areas and leave open the option of **biodiversity offsets** (Biodiversity impacts p 31) as a last resort.

The Client should in no circumstances be allowed to carry out operations that negatively impact forests in proposed or legally designated protected areas or designated protected area buffer zones. The notion that a loss of any protected ecosystem can be compensated by restoration/ reforestation in another ecological system lacks any scientific basis.

4.2.3 Reference points for improvement (e.g. at other banks)

The World Wildlife Fund (WWF) developed its own ESF which considers offset in the mitigation hierarchy as a last resort, as the AIIB does. The WWF however adds the condition that offsets are implemented in a critical habitat only if the parameters for which the area is classified as critical are not involved.

4.2.4 Suggestions for improvement

- Social and environmental issues should be considered beyond the individual project level. The cumulative mixed (scale-) impact of all indirect impacts together on biodiversity needs measurement. This would ask for assessments at the aggregated regional, national and international levels. And to tackle the problems, caused by the accumulation of impacts, emissions should be limited by caps.
- In addition, regional and local spill over impacts of operations nearby critical habitat and protected areas demand for protected buffer zones, to minimize the impact of economic activity.
- The wording on protecting natural resources depending groups should be strengthened. In addition the policy part dealing with biodiversity explicitly should mention the recognition of rights of forest peoples.

- The Client should in no circumstances be allowed to carry out operations that negatively impact forests in proposed or legally designated protected areas or designated protected area buffer zones. Additionally the AIIB should attach the condition to offsets as a last resort that offsets are implemented in a critical habitat only if the parameters for which the area is classified as critical are not involved.
- To integrate conservation needs and development priorities strategic spatial planning at the regional and national level and landscape analysis could prevent further fragmentation of nature.
- A further recommendation for the section on *Natural habitat* is to explicitly mention Primary forests, well-developed secondary forests and sites of major environmental, social or cultural significance as habitat that shall be conserved. Such areas shall not be replaced by tree plantations or other land uses.

4.3 Gender

Reference: Vision p 4, § 14 Importance of Gender equality

4.3.1 Brief description of the status quo

The current ESF has a paragraphs on 'the importance of gender inequality' and mentions gender in various Requirements and ESSs. While we appreciate the reference to gender, the language is often too flexible.

On pp 4 it for example states that "The Bank support its clients to identify potential gender-specific opportunities as well as...risks". And on pp 4 "The Bank encourages Clients to enhance the design of their Projects in an inclusive and gender-responsive manner..."

Paragraph 34 on pp 34 states that the client should "Where relevant, use gender disaggregated data and analysis, and consider enhancing the design of the Project to promote equality of opportunity and women's socioeconomic empowerment, particularly with respect to access to finance, services and employment."

4.3.2 (Potential) problems arising from the status-quo

The flexible language on gender leaves too much discretion with the borrower. This leads to projects financed by the AIIB where impacts on gender have not been properly assessed and are not sufficiently mitigated.

4.3.3 Reference points for improvement (e.g. at other banks)

ADB safeguards policies: the ADB's Safeguard Policy Statement systemically integrates gender dimensions.

4.3.4 Suggestions for improvement

- Language on the requirements for borrowers regarding gender should be less flexible and more binding.
- While gender equality is important, the ESF should be more sensitive for the potential negative impacts on women of its projects. Clients should not only be obliged to “enhance the project to promote equality of opportunity” but also to analyses and mitigate the differentiated negative impacts on women. It is important to also include indirect negative impacts, such as an increase in gender based violence (see the next point in our submission).
- The AIIB should require its clients to use gender-disaggregated data and analysis
- Gender should be integrated into all the ESF standards.
- There has to be ESF adherence to the CEDAW treaty as well.

4.4 Gender based violence in infrastructure development

4.4.1 Brief description of the status quo

There is currently no specific reference to gender based violence in the ESF.

4.4.2 (Potential) problems arising from the status quo

Two common features of infrastructure investments are first, an influx of male workers and second women and men’s loss of land and other assets. These features trigger an array of harmful gender impacts for example resulting in some male workers assaulting and raping women and girls and some women and girls turning to sex work out of desperation to make ends meet when they lose their land livelihoods.

4.4.3 Reference points for improvement (e.g.. at other banks)

The World Bank has tools and processes to prevent and mitigate the risks of sexual exploitation and abuse (SEA), as well as other forms of gender-based violence (GBV), in World Bank-supported infrastructure. This is captured in the ‘Good Practice Note, Addressing Gender Based Violence in Investment Project Financing involving Major Civil Works’.

4.4.4 Suggestions for improvement

While the Good Practice Note of the World Bank is an important step forward, it is not enough. Avoidance and mitigation of gender based violence has to be addressed in the binding policies of the banks. We therefore recommend the AIIB to add a provision on gender based violence in the ESF policy. This should include obliging the borrowers to detect and mitigate gender based violence in each stage of the project implementation.