

Office of the United Nations High Commissioner for Human Rights

Comments on the Draft Environmental and Social Framework (ESF) of the Asian Infrastructure Investment Bank (AIIB)

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Introduction

OHCHR welcomes the opportunity to comment on the draft Environmental and Social Framework (ESF) of the Asian Infrastructure Investment Bank (AIIB). We welcome numerous positive features of the draft ESF from a human rights perspective, some of which flow from the original version, including its commitments to social development and inclusion and to remove barriers faced by vulnerable groups (Vision, para. 2.3, and ESS 1, para. 2.38), stakeholder engagement and recognition of retaliation risks (Vision, para. 2.8, Policy para. 7.11, ESS 1, para. 2.19), gender equality including gender-based violence (GBV), sexual exploitation and abuse (SEA), sexual harassment (SH) and tenure security (ESS 1, paras. 2.39-2.40, and ESS 2 para. 2.1.17), persons with disabilities (Vision, para. 2.10 and elsewhere), respecting the human rights of indigenous peoples (ESS 3, para. 1.1), explicit linkages to International Labor Organization standards (ESS 1, para. 2.46, ESEL para. 1.1) and clear minimum age prohibition, ESS 1, para. 2.46), clear prohibitions on forced evictions, forced labor and other contraventions of international law in the ESEL, and the inclusion of international agreements within the definition of the client's social and environmental management system (ESS 1, para. 6.29.2).

We welcome the strengthened attention to climate change risks in the draft ESF, an issue intimately connected to human rights in principle and practice, and to the additional detail in the draft ESF on financial intermediary (FI) requirements and, subject to the comments below, grievance redress. We also welcome the strengthening of the draft ESF in the area of information disclosure, including indicative timeframes for information disclosure (Environmental and Social Policy, ESP, para. 7.2.2), though we'd suggest making the timeframes binding and aligning them more closely with international best practice particularly insofar as Category A projects are concerned (ie. 60 days prior disclosure of draft documentation for non-sovereign operations and 120 days for sovereign operations).¹

A number of suggestions for strengthening of the draft ESF are offered below, in the spirit of continuing constructive engagement and as a foundation for strengthened operational collaboration between our organisations. The suggestions are intended to encourage closer alignment and policy coherence with international law, respond to evolving contextual risks and social trends in the region including in the COVID-19 context, promote harmonization with best practice in multilateral development bank (MDB) due diligence and risk management practices, and promote the achievement of the AIIB's mandate and sustainable development outcomes.

The main contextual factors and risks addressed by this submission stem from increased discrimination, inequalities in opportunities and access to essential services, and threats to

¹ See e.g. EBRD Access to Information Directive (2019), para. 1.4.6.i.; ADB Safeguard Policy Statement (SPS) 2009, para. 54(i).

civil society and closure of civic space in many countries in the region. These trends were already evidence prior to the onset of the COVID-19 crisis, but have been exacerbated by it,² as discussed in recent communications between High Commissioner Bachelet and the AIIB President. We note that these trends coincide with the changing risk profile of AIIB's projects (the majority of pipeline projects now being Category A) and the increasing proportion of stand-alone projects.

Our comments below address the following issues: (A) aligning the AIIB's human rights due diligence with international standards; (B) the importance of "leveling up", and consistently applying the strongest applicable source of law in connection with the client's social risk assessment and management; (C) the need to strike a judicious balance between strengthening, versus using, client risk management frameworks and/or country safeguards systems; (D) the need to balance downstream ("adaptive") risk management with continued, rigorous up-front requirements; (E) the need for a self-standing policy and procedures to deal with reprisals against project-affected individuals; (F) the need for a proactive and consistent approach to remediating adverse impacts; (G) capital market investments, indigenous peoples, womens' rights and gender equality, labour rights, and safeguards for digital technology. The NYU Law School's International Organizations Clinic furnished research on which the recommendations on digital technology safeguards were based.

A. Aligning human rights due diligence with international standards

The G20 Principles for Quality Infrastructure Investment contain a commitment that the "design, delivery and management of infrastructure should respect human rights."³ Our Office's research on mega-infrastructure projects in the transport, energy and water sectors reveals human rights risk factors at the macro- level, including fiscal impacts and financialization risks, in addition to more classical (physical) safeguard issues within the project area of influence.⁴

Given: (a) the diverse human rights risks affecting infrastructure investment at multiple levels; (b) deteriorating governance and human rights indicators in the region; (c) the widening gaps in many countries between international and national laws governing social and environmental issues within the scope of the ESF, and (e) the dramatically increased threats due to the COVID-19 pandemic, we'd recommend that the ESF incorporate a clear and robust

² See e.g. Press release, "Asia: Bachelet alarmed by clampdown on freedom of expression during COVID-19" (June 3, 2020), [https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920#:~:text=GENEVA%20\(3%20June%202020\)%20%2D,false%20information%20must%20be%20proportionate.](https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25920#:~:text=GENEVA%20(3%20June%202020)%20%2D,false%20information%20must%20be%20proportionate.)

³ G20 Principles for Quality Infrastructure Investment 2019, available at https://www.mof.go.jp/english/international_policy/convention/g20/annex6_1.pdf, principle 5.2.

⁴ OHCHR and Heinrich Boell Foundation, *The Other Infrastructure Gap: Sustainability* (2018), available at https://www.ohchr.org/Documents/Publications/TheOtherInfrastructureGap_FullLength.pdf. See also Benjamin Hunter & Susan Murray, "Deconstructing the Financialization of Health Care," 50(5) *Development & Change* 1263-1287 (2019).

policy commitment to respect human rights, back by detailed implementation guidelines and robust implementation capacities. The Inter-American Development Bank's (IDB's) Environmental and Social Policy Framework (ESPF) and European Bank for Reconstruction and Development's (EBRD's) Environmental and Social Framework (ESF) provide good examples.⁵ Clear timelines for public disclosure of project information are also all the more critical in the current context, in our view, in line with international good practice among MDBs and our Office's 2018 submission in connection with the AIIB's Policy on Public Information.⁶

In development practice generally to date, human rights issues and risk factors are often treated as marginal to social and environmental risk management, and are often thought of as extreme, or exceptional, rather than routine.⁷ In order to promote more consistent engagement with human rights risk factors, and more systematic access to available human rights risk information (see Annex I), OHCHR recommends that human rights due diligence should be an explicit requirement in the ESF (ESS 1, paras. 5.6-5.10) and should not be limited to special or high risk circumstances. The benefits, compared with costs, of integrating human rights information in investment project due diligence are discussed in Annex II.

Moreover, we recommend that specific human rights due diligence procedures be developed in line with the UN Guiding Principles on Business and Human Rights (UNGPs).⁸ The UNGPs reflect existing human rights law pertaining to State regulation of corporate activity, and are reflected in the IFC's Sustainability Framework (Guidance Note to Performance Standard 1), the IDB's ESPF (ESPS 1, fn 52), IDB's Social Impact Assessment Guidelines (2018), the OECD's Guidelines for MNEs and Responsible Business Conduct Due Diligence Guidance (2018),⁹ and sustainability frameworks of a growing number of bilateral DFIs and other financial institutions. The UN Guiding Principles provide authoritative and practical guidance that could be further integrated into the ESF on such matters as: (a) risk assessment, prioritizing severity (including *irremediability*) over likelihood (UNGP 24), which may usefully be integrated within draft ESF paras. 5.1-5.3 (risk classification); (b) differentiating the scope of due diligence and contribution to remedy by reference to responsibility for impacts (UNGPs 17 and 22); (c) unpacking the concept of *leverage* (UNGP 19), requiring the client to build and use all

⁵ See IDB ESPF, para. 1.3: "The IDB is committed to respecting internationally recognized human rights standards. To that end, in accordance with Environmental and Social Performance Standard (ESPS) 1 of this Policy Framework, the IDB requires its Borrowers to respect human rights, avoid infringement on the human rights of others, and address risks to and impacts on human rights in the projects it supports."

⁶ OHCHR, Recommendations for AIIB Policy on Public Information (Mar. 16, 2018), available at <https://www.ohchr.org/Documents/Issues/Development/DFI/RecommendationsAIIBPolicy.pdf>.

⁷ For a discussion see Rachel Davis, "Exploring the relationship between human rights due diligence and broader environmental and social due diligence" (2018) at <https://norad.no/en/front/evaluation/news/2018/exploring-the-relationship-between-human-rights-due-diligence-and-broader-environmental-and-social-due-diligence/>.

⁸ The UNGPs are available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf. For an illustrative analysis of DFI due diligence policies benchmarked against the UNGPs see OHCHR, Benchmarking Study of DFI Safeguards and Due Diligence Frameworks against the UN Guiding Principles on Business and Human Rights (draft, Sept. 2019), at https://www.ohchr.org/Documents/Issues/Development/DFI/OHCHR_Benchmarking%20Study_HRDD.pdf.

⁹ IDB, Social Impact Assessment: Integrating Social Issues in Development Projects (2018), fn 63, 69, 146 and 149 and accompanying text (focusing on the "cause, contribute, direct linkage" concept in particular), and OECD Due Diligence Guidance for Responsible Business Conduct (May 2018).

potential leverage through the value chain, including but not limited to primary suppliers; and (d) criteria for establishing and assessing the effectiveness of project Grievance Redress Mechanisms (GRMs, UNGP 31, cf: draft ESP para. 7.8, ESS 1, para. 2.20; ESS 2, para. 2.18; ESS 3, para. 2.12).

The need for human rights due diligence – case study in Myanmar

Myanmar provides a sobering but compelling illustration of the importance of integrating information from the UN human rights system within investment project due diligence and risk assessment, as well as more macro-assessment tools such as contextual risk assessments, strategic environmental and social assessments, and sectoral environmental and social assessments, relevant to the AIIB ESF's objectives of improving development outcomes and minimising reputation risk (ESF, para. 1.7, and ESP, para. 1.3).

MDBs have been active in Myanmar since the reopening of the economy in 2012, although gross human rights violations in northern Rakhine State from 2017 to the present are cause for heightened due diligence. The September 2020 [report](#) of the UN human rights office documents continuing impunity, discrimination against ethnic groups including the Rohingya, razing of particular villages in northern Rakhine State, obstruction of evidence relevant to the proceedings against Myanmar in the International Court of Justice under the Genocide Convention 1948 (*Gambia v. Myanmar*), and fresh evidence of what may constitute war crimes and crimes against humanity by the Tatmadaw in Chin and Rakhine States.

Moreover, the September 2019 [report](#) of the UN Independent International Fact-Finding Mission on Myanmar (FFM) on “the economic interests of the Myanmar military” identified 133 businesses and affiliates across diverse sectors of the economy – from construction and gem extraction to manufacturing, insurance, tourism and banking – owned by two Tatmadaw conglomerates, Myanmar Economic Holdings Limited (MEHL) and Myanmar Economic Corporation (MEC), which in turn are owned and influenced by senior Tatmadaw leaders allegedly responsible for gross violations of international human rights law and serious violations of international humanitarian law. The FFM underscored the importance of ensuring that external financing supports alternative SMEs unaffiliated with the two conglomerates and the Tatmadaw. The FFM's reporting also exposed how infrastructure investment could be associated with serious human rights violations and the obstruction of evidence pertaining to the investigation of genocide and other alleged international crimes.

The human rights violations documented in this case have already had significant (macro-critical) impacts on investor behaviour, third country sanctions policies, and development financing and procurement decisions, and appear likely to continue to do so.

OHCHR recommends that:

- *Timeframes for information disclosure should be clear and binding and aligned more closely with international best practice including, for Category A projects, disclosure of draft documentation 60 days (for non-sovereign operations) and 120 days (for sovereign operations) prior to Board approval.*
- *The requirements for disclosure of Financial Intermediary information (ESS 1, para. 2.17) should be strengthened in line with best practice in other MDBs, including more detailed description of the required content of ESMSs,¹⁰ disclosure of ESA's and other project documentation for higher-risk projects,¹¹ and the use of exclusion or referral lists.¹²*
- *Assessments of the clients' track record and capacity (Vision, para. 2.5) to implement the ESF, and gap-filling measures, should be publicly disclosed prior to Board approval.*
- *A policy commitment should be included within the ESF along the following lines: "The AIIB is committed to respecting internationally recognized human rights standards. To that end, in accordance with the ESP and ESSs, the AIIB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports."*
- *Human rights due diligence should be an explicit requirement in the ESF, and should not be limited to special or high risk circumstances. Specific due diligence procedures should be elaborated in line with the UN Guiding Principles on Business and Human Rights (UNGPs).*
- *In line with the UNGPs: (i) Draft ESS 1, paras. 5.2-5.3 (risk classification) should be amended to prioritise the severity (scale, scope and irremediability) of impacts; (ii) draft ESS 1, para. 5.6 should specify that the extent of the AIIB's due diligence varies in accordance with the severity (scale, scope and irremediability) and its own involvement in adverse impacts; (iii) ESS 1, para. 6.7, should clarify that the client should explore and use all potential sources of leverage in the project's area of influence, and ESS 1 should specify that the risk and impacts identification process should include risks and impacts associated with suppliers over which the client may reasonably exercise leverage; and (iv) the UNGPs' effectiveness criteria for GRMs should be integrated within draft ESP, para. 7.8.*

¹⁰ See e.g. EBRD Access to Information Directive (2019), para. 1.4.6.v.

¹¹ World Bank ESS 10, para. 27.

¹² E.g. EBRD ESP, PR 9, Annex 2.

B. Leveling up: Applying the strongest applicable legal standards to social risk management

We note that the draft ESF (para. 1.7.11) includes the objective of supporting clients in implementing their obligations under “*national environmental and social legislation (including under international agreements adopted by the Member)*” [emphasis added]. The core 10 UN human rights treaties have been widely ratified in the Asian region,¹³ however their implementation in any country is a work-in-progress, and there may be wide gaps between national and international standards governing resettlement, indigenous peoples, women’s rights and other issues pertinent to the ESF. Information from the UN human rights system (Annex I) can provide the basis for an informed judgement on gaps in the form of the law and, critically, its implementation in practice.

However the italicized text in ESF para. 1.7.11, quoted above, would appear to subordinate international law to (often, lower) national legal standards, to the detriment of social risk management objectives. ESF para. 1.7.11, as presently worded, also seems to overlook the fact that international law has independent and direct effect in numerous countries in the Asian region, without the need for implementing legislation. A similar problem is evident in draft ESS 1, para. 2.4.6 and in connection with labor issues (Vision, para. 2.11, governed by “national law (including international agreements adopted by the Member)”, and ESS 1, para. 2.47(f)). In similar vein, ESP, para. 3.3, permits more stringent member or client requirements to be taken into account, but (impliedly) not more stringent international legal requirements.

In other parts of the draft ESF national and international law are mentioned in parallel as equally applicable sources of law, namely: Environmental and Social Policy (ESP, para. 6.3.1, elements of the environmental and social assessment), ESP para. 6.29.1 (on client risk management systems), and ESS 3 (para. 1.2) on indigenous peoples, permitting “national legislation, customary law and any international conventions” to be taken into account in the definition of indigenous peoples. It would be useful to have a clear and consistent approach across the ESF insofar as the relevance of international law is concerned, in our view.

It should not be the AIIB’s role to determine when a human rights violation has actually occurred (which can be difficult even for specialized human rights tribunals) or to resolve conflicts between various sources of human rights law applicable to the subject matter of the ESF and a given project. Risk management on social issues, as any other issue, simply requires best professional judgement, taking into account all relevant information sources including those listed in Annex I. A consistent approach is needed across the ESF, ESP and ESSs. OHCHR recommends that social and environmental risk assessment and management, due diligence, and assessments of country/corporate systems should be informed by *all applicable bodies of law, whichever sets the highest standard*.

¹³ See UN human rights treaty dashboard at <https://indicators.ohchr.org/>.

OHCHR recommends that:

- *International human rights law and information from UN human rights bodies (Annex I) should guide: AIB's risk classification, assessments of the robustness of client risk management systems (equivalence assessments), the extent to which municipal laws and regulations are in line with corresponding international laws in force in the country, and assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.*
- *Social and environmental assessments, due diligence, and assessments of borrower frameworks/country systems should be informed by all applicable bodies of law, whichever sets the highest standard.*
- *The criterion of "track record" should be included along with the criteria of "capacity" and "commitment" within the draft ESP para. 5.7.3, 5.92 (review of client information), ESP para. 5.12.1(a) (financial intermediaries), ESP para. 6.16 (content of ESMP). These changes would promote consistency in approach with ESP para. 6.23.2 (use of frameworks) and ESP 6.24.2 (phased approach) where "track record" is included, and other provisions where implementation experience is referred to. Information from the UN human rights system (Annex I) should inform assessments of all three criteria: capacity, commitment and track record.*

C. Using versus strengthening client's environmental and social management systems

OHCHR strongly supports the objective of progressively strengthening country and client social and environmental systems to the extent possible, and to using the latter systems where to do so would not undermine human rights or social and environmental risk management objectives in relation to a given project. A commitment to strengthening, rather than necessarily using, country and client systems seems appropriate in view of the deteriorating indicators on many of the social issues reflected in the ESF, which are often caused by discrimination or lack of political will rather than capacity constraints.

However, under paras. 6.26.1 and 6.31.1 of the draft ESF, we note that the adequacy of client system's is determined only by their material consistency with the (broadly worded) *objectives* of the ESP and ESSs, rather than a more substantive "material consistency" test (such as that in ESP, para. 6.32, for development partner frameworks). We would recommend a more rigorous "functional equivalence" test, taking into account MDB best practice,¹⁴ to strengthen risk management and promote sustainability.

¹⁴ For example IDB ESPF, para. 5.1 provides: "The IDB may consider the use of the Borrower's Environmental and Social Framework relevant to the project, provided this is likely to address the risks and impacts of the project and will enable the project to achieve objectives and outcomes equivalent to those achieved with the application of the ESPF (functional equivalence)."

OHCHR recommends that:

- *Country and client systems may be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system's requirements are at least as strong as those of the ESP and ESSs.*
- *International human rights law and information from UN human rights bodies (Annex I) should guide AIIB's assessments of the functional equivalence of country and client social and environmental management systems.*

D. Up-front compliance v. downstream risk management.

OHCHR recognizes the need for strengthened, adaptable risk management throughout the project cycle, and that due diligence is not a one-time event. By the same token, we note the positive evidence in other MDBs of rigorous up-front risk and compliance assessments particularly for high-risk projects.¹⁵ Project-level case studies carried out by OHCHR in recent years illustrate the challenges of open-ended compliance, or the flexibility of DFIs to assess, determine, and disclose relevant information about or enforce safeguard compliance over the period of project implementation. Yet, we note the recent tendency among MDBs (public and private sector financing institutions) to shift from *ex ante* compliance to more flexible and aspirational environmental and social action plans, framework approaches, and “adaptive risk management” (including AIIB draft ESP, para. 10.5).

However we note that adaptive risk management and the implementation of (aspirational) environmental and social action plans place a heavy premium on supervision and reporting, and can raise potentially difficult questions about how a Bank's leverage and incentives to encourage safeguard policy compliance change throughout project implementation, particularly where the client's traditions of transparency and accountability are relatively weak, or where political will or capacities are lacking.

Unlike the IFC Sustainability Framework, the draft ESF requires only that the client meet the ESSs “within a time frame deemed appropriate by the Bank” (ESP, para. 4.2(f)), rather a more objective, rigorous and auditable standard, such as “reasonable manner and timeframe.” Moreover, while deferral of compliance through a “phased approach” and emergencies (ESP, paras. 6.24 and 6.25) is expressed to be exceptional, the kinds of circumstances in which a phased approach may be appropriate are not clear, and experience elsewhere (e.g. ADB, in the COVID-19 financing context and more generally) illustrates that safeguard policies may – and arguably should – apply without restriction.

¹⁵ World Bank, Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World* (2011), Chapter 4, pp.65-82, available at <http://documents.worldbank.org/curated/en/742801468177840668/pdf/638960PUB0Safe00Box0361531B0PUBLIC0.pdf>.

OHCHR recommends that:

- *AllIB ensure that (necessary) investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the ESSs', particularly for higher risk projects;*
- *Deferral of compliance, including phased compliance under ESP para. 6.24, be ruled out for Category A projects;*
- *The phrase "within a time frame deemed appropriate by the Bank" (ESP, para. 4.2(f)) be replaced by "reasonable manner and time frame;"*
- *Any deferral of compliance of lower risk projects under an Environmental and Social Management Planning Framework should be subject to independent third party monitoring (ESP, para. 10.2.6).*

E. Stakeholder engagement and reprisals

OHCHR's work with project-affected communities and in-country monitoring in the Asian region reveals and reflects the increasing risks faced by indigenous populations, women and girls, environmental and human rights defender and others, including threats and risks of reprisals against individuals who express critical views or bring their concerns to MDBs. While too few Banks and accountability mechanisms publish data on this issue, we note that one third of complaints brought last year to the IFC's Compliance Advisor Ombudsman were associated with allegations of intimidation or reprisals.

We warmly welcome the inclusion by the AIIB of requirements concerning stakeholder engagement and addressing retaliation (Vision, para. 2.8, ESP, S.E, ESS1, para. 2.1, ESS 2, para. 2.1.7 and elsewhere) and the more detailed requirements in the Project-Affected Peoples' Mechanism (PPM) Rules of Procedure (June 2019, para. 6.4.3, S.9 and Attachment 4). However we note that the profile and guidance on these issues in the draft ESF itself is relatively limited, and may not adequately reflect the barriers to inclusive and effective stakeholder engagement in the region, nor the severity and extent of threats and reprisals against project-affected people. Moreover, the guidance in the PPM Rules of Procedure appears to be predicated upon the assumption that the AIIB does not have any potential leverage to exercise on retaliation issues, and (implicitly) the only conceivable form of leverage is "enforcement."¹⁶ And while the PPM procedures include important detail on retaliation due diligence desk review, mitigating and monitoring, this appears to be confined to the relatively few cases where retaliation is associated with an admissible complaint to the

¹⁶ PPM Rules of Procedure (June 2019), para. 9.2.2: "Neither AIIB nor the PPM is an enforcement mechanism. Consequently, the PPM is unable to physically protect or safeguard people from possible consequences of engaging in a PPM process or cooperating with PPM personnel. The PPM advises Requestors and any in-country Authorized Representative about its inability to assist with physical protection measures. The PPM also communicates this inability through its outreach, the PPM website and publicity."

PPM, and there is only a discretion (not a requirement) to collect incident data for institutional learning and accountability purposes (PPM Rules of Procedure, Attachment 4, S.6).

Consistent with emerging practice in other MDBs and DFIs, including the World Bank Group, IDB Group and EBRD, we would strongly encourage AIIB include within the ESF or separately publish a “zero tolerance” statement against reprisals, along with more detailed operational procedures to clarify its own responsibilities and those of their clients to prevent and respond to threats and reprisals, and how the AIIB’s leverage may be exercised to minimize and respond to reprisals risks, alone and with other partners and actors. The IAMs Reprisals Toolkit (2019)¹⁷ may offer a useful resource in this regard.

OHCHR recommends that:

- *AIIB adopt an explicit ESS on stakeholder engagement modelled on that of the EBRD and IDB ESS 10.*
- *AIIB integrate within the ESF clear requirements on assessing reprisals risks and preventing and responding to reprisals against project-affected people, and publish detailed procedures on these issues, taking into account experiences in the World Bank Group, IDB Group, EBRD and the IAMs network.*
- *AIIB and the PPM systematically collect and publish data on reprisals in connection with AIIB-supported projects, including the nature and impact of response measures.*

F. A more proactive and consistent approach to remedy

In OHCHR’s view, the ESF revision presents the AIIB with a unique opportunity to set a new benchmark among MDBs on how to approach the question of “remedy” for adverse impacts. The increased vulnerabilities, inequalities, fragility and human rights violations accompanying the COVID-19 pandemic bring the question of remedy to center stage. The World Bank Group’s FCV Strategy 2020-2025 recognizes that unaddressed grievances can fuel social conflict, undermine development outcomes, and deepen state fragility.¹⁸ A recent IDB study analysing 40 years of infrastructure projects in Latin America concluded that despite a range of warning signs, and despite decades of experience, there has been inadequate attention to the question of remedy with significant costs for communities, clients and DFIs.¹⁹ Communities and workers may perceive risks around a project to be even higher than they might otherwise be if they feel they have no control over how their labour or resources will

¹⁷ See MICI, Guide for IAMs on Measures to Address the Risk of Reprisals in Complaints Management (2019), [http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/\\$file/guide_for_iams_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf](http://independentaccountabilitymechanism.net/ocrp002p.nsf/0/ce43d67170fcd8f3482583a20026ab13/$file/guide_for_iams_on_measures_to_address_the_risk_of_reprisals_in_complaints_management_february_2019.pdf).

¹⁸ World Bank Group, FCV Strategy 2020-2025 (Feb. 2020), paras. 2,6, 12-13, 53, 87, 97, 99, 126, 128, 148, 164, 172, Annex 2, at <http://documents1.worldbank.org/curated/en/844591582815510521/pdf/World-Bank-Group-Strategy-for-Fragility-Conflict-and-Violence-2020-2025.pdf>.

¹⁹ Graham Watkins et al, Lessons from Four Decades of Infrastructure Project-related Conflicts in Latin America and the Caribbean (Sept 2017), available at <https://publications.iadb.org/en/lessons-four-decades-infrastructure-project-related-conflicts-latin-america-and-caribbean>.

be used and have no credible access to remedy.²⁰ From this perspective, the mere fact of signaling a serious approach to remedy can reduce risks for a project. Yet, these lessons are not consistently applied in practice, and the *preventive* function of remedial mechanisms often appears to be under-appreciated.

Consistent with general practice across MDBs, we note that the requirements in the draft ESF on grievance redress and remediation are clearer and more detailed in the context of resettlement than for other kinds of adverse impacts (ESS 2). Yet under MDB mitigation hierarchies, even in the case of forced resettlement, violations are permissible where redress is not considered to be “technically or financially feasible” (draft ESP, para. 6.4.2, and ESS 1, para. 2.4.5). Under international law, there is no such thing as a “human rights off-set.”²¹ However no DFI safeguard policy yet recognizes, explicitly, that there should be an effective remedy for all adverse human rights impacts associated with a project, irrespective of whether it is covered by safeguard policies. In our view, explicit recognition of this principle within the ESF could set an important marker for DFI sustainability frameworks globally.

We welcome the additional detail in the draft ESF in relation to Grievance Redress Mechanisms (GRMs) (ESP, para. 7.8). However available evaluations of project-level GRMs are mixed at best,²² and they are not necessarily designed or required to address and remedy human rights harms including GBV and SEA. Very few DFI safeguard policies (even the most recent) specifically reflect the UNGPs’ “effectiveness criteria” for grievance mechanisms in their safeguard requirements, including the criterion of involving stakeholders in the design of the mechanism which is fundamental to building trust.²³

Remediating harms associated with a DFI-funded project may require a range of different mechanisms and avenues – within the project and within the country (via judicial and non-judicial mechanisms) – but this also seems to remain underexplored in DFI guidance to clients. In OHCHR’s view, it is important for the rights-holders (affected people) themselves to be able to exercise free and informed choice on accountability mechanisms. We would recommend that AIIB pay more attention to the remedy “ecosystem”²⁴ that clients are required to

²⁰ Kemp, D, Warden, S., Owen, J., “Differentiated social risk: Rebound dynamics and sustainability performance in mining,” Resources Policy 50 (2016) 19-26.

²¹ This is explicitly recognized in the EIB Environmental and Social Standards (2019), Glossary, “Mitigation Hierachy (Human Rights),” https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=2ahUKEwiSiJjq3NjoAhVS26QKHHTWDH0QFjAEegQIBBAB&url=https%3A%2F%2Fwww.eib.org%2Fattachments%2Fstrategies%2Fenvironmental_and_social_practices_handbook_en.pdf&usq=AOvVaw3AG-h0zS5yvMNUt5VP_3eX.

²² See e.g. World Bank, Global Review of Grievance Redress Mechanisms in World Bank Projects, Guidance Note 90388 (2013), pp.15-16, available at <https://openknowledge.worldbank.org/bitstream/handle/10986/20117/903880WP0Box380edressMechanismsinWB.pdf?sequence=1&isAllowed=y>.

²³ The “effectiveness criteria” set out in UNGP 31 identify characteristics of such a mechanism that help make it effective; each is accompanied by a longer description: (i) legitimate; (ii) accessible; (iii) predictable; (iv) equitable; (v) transparent; (vi) rights-compatible; (vii) a source of continuous learning; and (viii) based on engagement and dialogue. To these could also be added a specific criterion on ensuring no retaliation.

²⁴ David Kovick, Rethinking remedy and responsibility in the financial sector (May 2019), at <https://shiftproject.org/rethinking-remedy-and-responsibility-in-the-financial-sector/>.

address, that this should be part of the bank's due diligence within projects and when country support and technical assistance is provided, and that support to judicial and non-judicial mechanisms to address grievances of the kinds associated with AIIB financed projects should be strengthened.

The recent External Review of ES Accountability of the IFC and MIGA ("External Review"), framed by the UNGPs, noted (Section 7.8, para. 325) that where IFC or MIGA contribute to harm they should also contribute to remedy. The External Review and the example of the Dutch Banking Sector Agreement's recent paper on enabling remediation²⁵ could guide the AIIB's reflections on when and how it may contribute to remedy, or use its leverage to enable remedy, in particular contexts. Given MDBs' explicit sustainable development mandates, they have wider responsibilities but also wider opportunities and tools than those of commercial banks to address these issues. Remedial mechanisms could include the establishment of a fund through which the AIIB could, in appropriate circumstances and proportionate measure, contribute to remedy where projects its funds have caused or contributed to harms. In OHCHR's view, a more proactive and consistent approach to the question of remedy, integrated within the ESF, contractual conditions and policy dialogues, can strengthen legitimacy, build trust with communities, and strengthen norms and expectations for the provision of remedy by the client, State and other responsible actors within and beyond the scope of a given project.

Finally, with respect to the PPM, the requirement for complainants to exhaust GRMs prior to accessing the PPM (ESP, para. 7.9) seems unduly restricting and contrary to best practice (see e.g. IDB ESPF, para. 7.3, fn 29). Limitations on accessing the PPM in co-financing arrangements (ESP, para. 7.10) may also be problematic, contrary to the principles of user choice and accountability.

OHCHR recommends that:

- *The mitigation hierarchy should be changed to provide for remediation as a last step across all ESSs.*
- *AIIB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*
- *AIIB should remove the requirement in ESP, para. 7.9 that accessing the PPM be dependent upon the exhaustion of remedies through GRMs, and relieve restrictions in ESP, para. 7.10 on the eligibility of complaints in co-financing arrangements.*

²⁵ See <https://www.imvoconvenanten.nl/en/banking/news/recommendations-remediation>.

- *Para. 4.2 of the draft ESP specify the Bank’s right not only to exercise its contractual remedies in the event of the client’s non-compliance, but to (i) provide for or enable remedy to project-affected communities in connection with adverse impacts, taking into account severity (scale, scope, irremediability) and the Bank’s own involvement in impacts, (ii) provide technical advice to clients and affected communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.*
- *Consistent with Section 7.8 of the report for the External Review of the ES Accountability of the IFC and MIGA (paras. 329-339), the AIIB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by AIIB contributions to the extent of the bank’s own involvement in any adverse impacts.*
- *Any decisions by the Bank to exercise its contractual remedies under para. 4.2 of the draft ESP should take into account the potential human rights impacts of divestment on project-affected communities.*

G. Comments on specific issues

Capital market investments

We note the proposal that the ESP should not apply to capital market operations (Vision, para. 2.6, ESP, para. 3.6), but that instead a framework for social and environmental risk management would be established in each case “consistent with the spirit and vision of the ESF”, subject to Board approval but without the possibility for review by the PPM. We’d suggest that these provisions be clarified and tightened in line with IFC requirements governing investments in market instruments and publically traded equity investments (IFC ESRPM, paras. 2.16) whereby alternative means of monitoring should be consistent with IFC PSS’ themselves, and should not be excluded from independent compliance review. The EBRD ESF is to similar effect, benchmarking ES risk management against the Bank’s Performance Requirements (PRs) themselves, with the following additional requirements: (a) after subscription, the Bank will require clients to comply with the PRs; and (b) high risk projects or projects categorised “A” will not be financed through capital market instruments.

OHCHR recommends that:

- *The requirements for capital market operations (Vision, para. 2.6, ESP, para. 3.6) be clarified and tightened in line with MDB best practice (e.g. IFC ESRPM, para. 2.16, and EBRD ESP, para. 4.11), and be subject to PPM review.²⁶*

²⁶ IFC-CAO practice is instructive, e.g. http://www.cao-ombudsman.org/cases/case_detail.aspx?id=235.

Indigenous peoples

OHCHR notes that the majority of the world's indigenous peoples live in the Asian region, and are often the most marginalized and vulnerable populations in connection with development projects. We welcome the fact that the objectives of ESS 3 include fostering full respect for indigenous peoples' human rights, and the recognition in ESS 3, para. 1.2, of the relevance of customary law and international conventions in the definition of characteristics of indigenous peoples. We'd recommend that the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) also be explicitly mentioned in this context.

The issue of Free, Prior and Informed Consent (FPIC) in ESS 3 may require further clarification, in OHCHR's view, guided by UNDRIP and the authoritative interpretation of the UN Expert Mechanism on Indigenous Peoples (EMRIP).²⁷ We note that the concept of "Free, Prior and Informed Consultation" (FPICon, ESS 3, para. 2.14) is not recognized in international law, and that the circumstances giving rise to FPICon (ESS 3, para. 2.13) overlap to a considerable extent with those giving rise to FPIC. Moreover, while all but two countries in the Asian region voted for UNDRIP (Bangladesh and Bhutan abstained), almost none have codified FPIC²⁸ which makes ESS 3, para. 7.7 all but moot. To avoid confusion, align with stronger standards of international law, and more effectively promote the human rights of indigenous peoples (ESS 3, para. 1.2), we'd recommend deleting all references to FPICon and replacing it with FPIC as the term is understood under international law.

OHCHR recommends that:

- *ESS 3 should clarify that the ESPS should be interpreted consistently with Borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration the Rights of Indigenous Peoples. Where ESS 3 and national law set different standards, the Borrower should observe the higher standard.*
- *References to FPICon in ESS 3, paras. 2.13-2.14, should be replaced by FPIC, as the term is understood in international law (see further below), and ESS 2.15 should be deleted.*
- *ESS 3, para. 2.14 be amended to reflect an authoritative definition of FPIC along the following lines: "Free, Prior and Informed Consent is a process of dialogue and negotiation, that goes beyond mere consultation, where seeking the consent of indigenous peoples is always the objective and in a number of cases actual consent is actually required. The pursuit of FPIC denotes a right of indigenous peoples to influence the outcome of decision-making processes. Each element of FPIC should be present, ie the process should be "free" (without intimidation or harassment), "prior" (commence at the earliest possible stage), and "informed" (objective, clear, accurate).*
- *The reference in ESS 3, para. 2.14.4 to the lack of a unanimity requirement should be deleted, given its potential divisive impacts upon indigenous peoples. Instead, AIIB is*

²⁷ EMRIP report, UN Doc. A/HRC/39/62.

²⁸ The Philippines is an exception, Indigenous Peoples' Rights Act – IPRA (Republic Act No. 8371), although implementation is another question.

invited to consider including a requirement that “the pursuit of FPIC should be undertaken in accordance with indigenous peoples’ own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself.”

- *ESS 3, para. 2.14 should specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples’ lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples’ territory, and (d) in other instances where a measure or project is likely to have a substantial negative impact on indigenous peoples’ lives, lands, territories or resources.²⁹*

Gender equality

OHCHR warmly welcomes the strengthening of the draft ESF from a gender equality perspective, including its requirements concerning GBV, SEA and SH. Gender equality is intrinsically important and a powerful development multiplier. For the most unequal countries, according to the IMF, closing the gender gap could increase GDP by an average of 35 percent.³⁰

Conversely, the discrimination experienced by women in the private and public spheres drives vulnerability and undercuts women’s participation and equal access to the benefits of development projects. This is even more pertinent in the context of recovery from the COVID-19 pandemic, where we witness significant setbacks in gender equality.³¹ Women and girls are often absent in designing, implementing and monitoring development projects, and when they are present, their voices do not always have same weight as those of men. Women are often first in line defending their homes from forced evictions and last in line for compensation. Women in rural areas or belonging to ethnic groups face multiple forms and layers of discrimination and marginalization, which are often exacerbated in the contexts of negative impacts of development or business projects. GBV (including from worker influx) remains a stubbornly common feature of development projects, and personal security risks limit the access by many women to transport, sanitation and other infrastructure and services. Displacement and dispossession may dramatically alter women’s social and economic roles and expose women and girls to higher risks of human trafficking or other exploitative practices as well as gender-based violence.

²⁹Human Rights Committee, *Länsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006).

³⁰ Kristalina Georgieva, *A New Bretton Woods Moment*, Oct. 15, 2020, at https://www.imf.org/en/News/Articles/2020/10/15/sp101520-a-new-bretton-woods-moment?utm_medium=email&utm_source=govdelivery.

³¹ UN Women, *The First 100 Days of COVID-19 in Asia and the Pacific: A Gender Lens*, at https://asiapacific.unwomen.org/en/digital-library/publications/2020/04/the-first-100-days-of-the-covid-19-outbreak-in-asia-and-the-pacific_.

These realities are implicitly acknowledged in the recent G20 Principles on Quality Infrastructure Investment (QII) which recommend that “the design, delivery and management of infrastructure should respect human rights”, including women’s rights.³² In view of the above factors, we would recommend that AIIB consider including a self-standing ESS on gender equality in the ESF, drawing from best practice in the IDB ESPF (ESPS 9), while ensuring that any conflicts between applicable international and national legal standards governing women’s rights and gender equality are resolved in favour of the more stringent standard.

OHCHR recommends that:

- *AIIB consider including a self-standing ESS on gender equality in the ESF, drawing from best practice in the IDB ESPF (ESPS 9), while ensuring that any conflicts between applicable international and national legal standards governing women’s rights and gender equality issues are resolved in favour of the more stringent standard.*

Labour rights

As indicated earlier, we welcome the explicit linkages to International Labor Organization standards (ESS 1, para. 2.46, ESEL para. 1.1) and clear minimum age prohibition, ESS 1, para. 2.46), clear prohibitions on forced evictions, forced labor and other contraventions of international law in the ESEL, and the inclusion of international agreements within the definition of the client’s social and environmental management system (ESS 1, para. 6.29.2). The minimum age requirements, in particular, appear to constitute best practice among MDB safeguard policies, which we consider appropriate given the increasing risks to labour rights in the Asian region and the increasing risk profile of AIIB-supported projects. We also welcome the clear recognition of labour rights in para. 2.11 of the Vision statement, including non-discrimination, the freedom of association and the right to collective bargaining.

However we note that community health and safety issues are discussed together with labour and working conditions (ESS 1, Section D), notwithstanding the distinctive issues raised in each, and suggest that these be addressed separately, in dedicated ESS’s, in line with practice in other MDBs. Examples of potential confusion are ESS 1, para. 2.44, which seems to conflate rights in the workplace with community health and safety issues, and para. 2.45 on labour influx which is best characterised as a community health and safety issue. We would also suggest that AIIB delete the reference in para. 2.44 that the application of legally binding requirements under ILO treaties should only be optional. In OHCHR’s view, from a legal standpoint and to promote maximum rigour in social risk management, the highest applicable legal standard (national or international) should be applied. We’d specifically suggest upwards harmonization in connection with provisions pertaining to workers’ organisations and freedom of association and collective bargaining (draft ESS 1, para. 2.47),³³ and with OHS

³² G20 QII Principle 5.2 (June 2019).

³³ We note that the reference to international agreements in para. 2.11 of the Vision statement is not reflected in draft ESS 1, para. 2.47, which limits protections for workers’ organisations and collective bargaining only to the (often, weak)

standards in connection with the provision of no-cost personal protective equipment (see e.g. World Bank ESS 2, para. 26), and the right of workers to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to their life or health (World Bank ESS 2, para. 27), all of which have gained increased urgency and importance in the COVID-19 context. Finally, we note that the workers' rights requirements in ESS 1, para. 2.47, including non-discrimination and the freedom of association and collective bargaining, are limited to private sector projects as defined in fn 17. We'd suggest that labour rights protections in these areas should apply to all AIIB-supported operations.

OHCHR recommends that:

- *AIIB adopt separate ESS's for community health and safety, and labour and working conditions, in line with other MDBs' policies;*
- *AIIB delete the reference in ESS 1, para. 2.44 to the effect that the application of legally binding requirements under ILO treaties should be considered optional;*
- *The substantive requirements of ESS 1, para. 2.47 should be harmonized upwards in line with international law and MDB best practice, including with respect to freedom of association, collective bargaining and workers' organizations (e.g. IFC PS 2, paras. 13-14, World Bank ESS 2, para.16, IDB ESS 2, paras. 14-15) and OHS standards regarding no-cost personal protective equipment and the right of workers to remove themselves from dangerous situations (e.g. World Bank, ESS 2, paras. 26-27);*
- *The subject matter of ESS 1, para. 2.47 should apply to all AIIB-supported operations.*

Digital technology

We note with interest AIIB's Digital Infrastructure Sector Analysis (January 2020) and the increasing support and investments of other MDBs in digital technology, and the mainstreaming of digital technology in health, education, and other infrastructure projects. We note that risk management for digital technology projects under existing MDB safeguard policies frequently includes privacy and data security considerations, but not (yet) other human rights risk factors associated with the various phases of the data cycle (collection, storage, use/reuse) including:

- a) abridgement of freedom of information due to internet shutdown (as recently seen in Myanmar and Kashmir);
- b) collective privacy (in addition to individual privacy) such as when sensor data is collated and used in ways that communities are not aware or would not approve of;
- c) exclusion by sensors of particular population groups (such as fingerprint sensors failing to register manual laborers, or facial recognition biases according to skin colour),

requirements of national law. We recommend upwards harmonization with IFC PS 2, paras. 13-14; World Bank ESS 2, para. 16; and IDB ESS 2, paras. 14-15, among others.

- which may result in those groups being excluded by social protection and other public administration systems that rely on such censor data for identification purposes;
- d) environmental harms and abridgements of the right to water due to excessive consumption by data centres;
 - e) displacement and forced/child labour impacts in data center construction projects;
 - f) exclusion bias in data standards or formats (for example, data collection through binary “male/female” gender classifications);
 - g) gender gaps in data collection, and conversely, discriminatory impacts caused by over-representation of marginalized groups in certain data systems;
 - h) discriminatory biases in algorithms;
 - i) distortion of free speech through social media or speech-based platforms,
 - j) human rights risks from abuses of facial recognition and biometric technology;
 - k) problems of inaccuracy, discrimination and lack of agency arising from data sharing and combination for individual rating or assessment systems (e.g. credit checks, student grade systems, or health assessments); and
 - l) discrimination, exposure to harm, and function creep from digital ID systems.³⁴

OHCHR recommends that:

- *Digital tech projects and the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which digital tech projects are designed and implemented.*

³⁴ OHCHR is grateful to the NYU Law School’s International Organizations clinic for research supporting these recommendations.

Summary of recommendations:

OHCHR respectfully recommends that:

1. *Timeframes for information disclosure should be clear and binding and aligned more closely with international best practice including, for Category A projects, disclosure of draft documentation 60 days (for non-sovereign operations) and 120 days (for sovereign operations) prior to Board approval.*
2. *The requirements for disclosure of Financial Intermediary information (ESS 1, para. 2.17) should be strengthened in line with best practice in other MDBs, including more detailed description of the required content of ESMSs, disclosure of ESA's and other project documentation for higher-risk projects, and the use of exclusion or referral lists.*
3. *Assessments of the clients' track record and capacity (Vision, para. 2.5) to implement the ESF, and gap-filling measures, should be publicly disclosed prior to Board approval.*
4. *A policy commitment should be included within the ESF along the following lines: "The AIIB is committed to respecting internationally recognized human rights standards. To that end, in accordance with the ESP and ESSs, the AIIB requires clients to respect human rights, avoid infringement of the human rights of others, and address risks to and impacts on human rights in the projects it supports."*
5. *In line with the UNGPs: (i) Draft ESS 1, paras. 5.2-5.3 (risk classification) should be amended to prioritise the severity (scale, scope and irremediability) of impacts; (ii) draft ESS 1, para. 5.6 should specify that the extent of the AIIB's due diligence varies in accordance with the severity (scale, scope and irremediability) and its own involvement in adverse impacts; (iii) ESS 1, para. 6.7, should clarify that the client should explore and use all potential sources of leverage in the project's area of influence, and ESS 1 should specify that the risk and impacts identification process should include risks and impacts associated with suppliers over which the client may reasonably exercise leverage; and (iv) the UNGPs' effectiveness criteria for GRMs should be integrated within draft ESP, para. 7.8.*
6. *International human rights law and information from UN human rights bodies (Annex I) should guide: AIIB's risk classification, assessments of the robustness of client risk management systems (equivalence assessments), the extent to which municipal laws and regulations are in line with corresponding international laws in force in the country, and assessments of country/implementing authorities' implementation practice, track record, capacities and commitment.*
7. *Social and environmental assessments, due diligence, and assessments of borrower frameworks/country systems should be informed by all applicable bodies of law, whichever sets the highest standard.*
8. *The criterion of "track record" should be included along with the criteria of "capacity" and "commitment" within the draft ESP para. 5.7.3, 5.92 (review of client information), ESP para. 5.12.1(a) (financial intermediaries), ESP para. 6.16 (content of ESMP). These changes would promote consistency in approach with ESP para. 6.23.2 (use of*

frameworks) and ESP 6.24.2 (phased approach) where “track record” is included, and other provisions where implementation experience is referred to. Information from the UN human rights system (Annex I) should inform assessments of all three criteria: capacity, commitment and track record.

9. *Country and client systems be used in whole or part provided that this is likely to address the risks and impacts of the project and the client system’s requirements are at least as strong as those of the ESP and ESSs.*
10. *International human rights law and information from UN human rights bodies (Annex I) should guide AIIB’s assessments of the functional equivalence of country and client social and environmental management systems.*
11. *AIIB should ensure that (necessary) investments in adaptive risk management do not displace priority for ensuring ex ante compliance with the ESSs’, particularly for higher risk projects.*
12. *The phrase “within a time frame deemed appropriate by the Bank” (ESP, para. 4.2(f)) should be replaced by “reasonable manner and time frame.”*
13. *Any deferral of compliance of lower risk projects under an Environmental and Social Management Planning Framework should be subject to independent third party monitoring (ESP, para. 10.2.6).*
14. *AIIB should adopt an explicit ESS on stakeholder engagement modelled on that of the EBRD and IDB ESS 10.*
15. *AIIB should integrate within the ESF clear requirements on assessing reprisals risks and preventing and responding to reprisals against project-affected people, and publish detailed procedures on these issues, taking into account experiences in the World Bank Group, IDB Group, EBRD and the IAMs network.*
16. *AIIB and the PPM should systematically collect and publish data on reprisals in connection with AIIB-supported projects, including the nature and impact of their response measures.*
17. *The mitigation hierarchy should be changed to provide for remediation as a last step across all ESSs.*
18. *AIIB should undertake an analysis of the remedy eco-system in-country, including judicial and non-judicial mechanisms, as part of its due diligence for higher risk projects, and integrate this within project risk classifications, risk mitigation plans, and technical guidance to project stakeholders on accessing remedy. Where there is weak capacity within the government or the client, this should be a specific focus of capacity building.*
19. *AIIB should remove the requirement in ESP, para. 7.9 that accessing the PPM be dependent upon the exhaustion of remedies through GRMs, and relieve restrictions in ESP, para. 7.10 on the eligibility of complaints in co-financing arrangements.*
20. *Para. 4.2 of the draft ESP should specify the Bank’s right not only to exercise its contractual remedies in the event of the client’s non-compliance, but to (i) provide for or enable remedy to project-affected communities in connection with adverse impacts,*

taking into account severity (scale, scope, irremediability) and the Bank's own involvement in impacts, (ii) provide technical advice to clients and affected communities on remedy, and (iii) recognize and address un-met grievances as sustainable development opportunities.

21. Consistent with Section 7.8 of the report for the External Review of the ES Accountability of the IFC and MIGA (paras. 329-339), the AIIB should require the establishment of contingent liability funding to remedy harms in all higher-risk projects, complemented by AIIB contributions to the extent of the bank's own involvement in any adverse impacts.
22. Any decisions by the Bank to exercise its contractual remedies under para. 4.2 of the draft ESP should take into account the potential human rights impacts of divestment on project-affected communities.
23. The requirements for capital market operations (Vision, para. 2.6, ESP, para. 3.6) should be clarified and tightened in line with MDB best practice (e.g. IFC ESRPM, para. 2.16, and EBRD ESP, para. 4.11), and should be subject to PPM review.
24. ESS 3 should clarify that the ESPs should be interpreted consistently with Borrowers' international legal obligations under relevant human rights instruments, and in light of the 2007 UN Declaration the Rights of Indigenous Peoples. Where ESS 3 and national law set different standards, the Borrower should observe the higher standard.
25. References to FPICon in ESS 3, paras. 2.13-2.14, should be replaced by FPIC, as the term is understood in international law (see further below), and ESS 2.15 should be deleted.
26. ESS 3, para. 2.14 should be amended to reflect an authoritative definition of FPIC along the following lines: "Free, Prior and Informed Consent is a process of dialogue and negotiation, that goes beyond mere consultation, where seeking the consent of indigenous peoples is always the objective and in a number of cases actual consent is actually required. The pursuit of FPIC denotes a right of indigenous peoples to influence the outcome of decision-making processes. Each element of FPIC should be present, ie the process should be "free" (without intimidation or harassment), "prior" (commence at the earliest possible stage), and "informed" (objective, clear, accurate).
27. The reference in ESS 3, para. 2.14.4 to the lack of a unanimity requirement should be deleted, given its potential divisive impacts upon indigenous peoples. Instead, AIIB is invited to consider including a requirement that "the pursuit of FPIC should be undertaken in accordance with indigenous peoples' own customary norms and traditional methods of decision-making, with their legitimate representatives, and should be culturally appropriate. Any conflict should be resolved within the community membership itself."
28. ESS 3, para. 2.14 should specify that FPIC is required in the following situations: (a) relocation of indigenous peoples (art. 10 of the UNDRIP), (b) storage of hazardous wastes on indigenous peoples' lands (art. 29 of UNDRIP), (c) where extractives projects are undertaken within indigenous peoples' territory, and (d) in other instances where

a measure or project is likely to have a substantial negative impact on indigenous peoples' lives, lands, territories or resources.

29. *AIIB should consider including a self-standing ESS on gender equality in the ESF, drawing from best practice in the IDB ESPF (ESPS 9), while ensuring that any conflicts between applicable international and national legal standards governing women's rights and gender equality issues are resolved in favour of the more stringent standard.*
30. *AIIB should adopt separate ESS's for community health and safety, and labour and working conditions, in line with other MDBs' policies.*
31. *AIIB should delete the reference in ESS 1, para. 2.44 to the effect that the application of legally binding requirements under ILO treaties should be considered optional.*
32. *The substantive requirements of ESS 1, para. 2.47 should be harmonized upwards in line with international law and MDB best practice, including with respect to freedom of association, collective bargaining and workers' organizations (e.g. IFC PS 2, paras. 13-14, World Bank ESS 2, para.16, IDB ESS 2, paras. 14-15) and OHS standards regarding no-cost personal protective equipment and the right of workers to remove themselves from dangerous situations (e.g. World Bank, ESS 2, paras. 26-27).*
33. *The subject matter of ESS 1, para. 2.47 should apply to all AIIB-supported operations.*
34. *Digital tech projects and the collection, processing and use of data should be guided by specific safeguards addressing not only privacy and data security considerations, but other relevant human rights risk factors associated with environmental harms and climate change, non-discrimination and equality, freedoms of information, association and expression, economic and social rights, access to justice and due process rights, and the political and social context in which digital tech projects are designed and implemented.*

Annex I

Social risk information from UN human rights bodies

Relevant sources of risk information for investment projects include the following international (UN) human rights mechanisms:

- 1. Universal Periodic Review (UPR):** The UPR is a peer review process voluntarily undertaken by all countries on a 4-5 year cycle in the UN Human Rights Council, a subsidiary inter-governmental body of the UN General Assembly. Official information, UN data and reports, and information from NGOs and other stakeholders are submitted as part of the data base for the review.³⁵ Moreover a UN “compilation report” is published for each country’s review, containing a summary of recommendations issued by all UN human rights bodies for the country concerned, on issues relevant to contextual risk assessments as well as specific MDB safeguard policy requirements. Reports submitted to the UN for UPR reviews may contain analysis and recommendation of direct relevance to investment project risk management.³⁶
- 2. Treaty bodies:** Human rights treaty bodies are 18-24 member expert committees which review countries’ implementation of their legal obligations under the international human rights treaties they have ratified. They deal with issues such as the rights of women children, migrant workers, persons with disabilities, racial discrimination (including against indigenous peoples and minorities), civil and political rights (including personal security, freedom of expressions and association and related participation rights), economic and social rights (including forced evictions and resettlement, labour rights, health, water and sanitation), among others.³⁷
- 3. Special Procedures** are independent individuals and/or working groups, appointed by member States in the UN Human Rights Council, mandated to analyse and report on human rights situations in particular countries and/or thematic issues (like the right to food, health, housing, the environment, rights of indigenous peoples, violence against women, freedom of expression, human rights defenders, toxic waste, arbitrary

³⁵ All documentation regarding the UPR is publicly available and searchable by country at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>.

³⁶ For example, a significant body of information and analyses on hydropower development was submitted to the UN in advance of the third Universal Periodic Review of Lao PDR by the UN Human Rights Council in January 2020. See UN Doc. A/HRC/WG.6/35/LAO.3 (Nov. 5, 2019) available at <https://undocs.org/A/HRC/WG.6/35/LAO/3>, and in particular Manushya Foundation & Asian Indigenous Peoples’ Pact, Joint Submission to the UN Universal Periodic Review of Lao PDR (July 21, 2019), available at https://a9e7bfc1-cab8-4cb9-9c9e-dc0cee58a9bd.filesusr.com/ugd/a0db76_e031040b4a0f4c439b483637fc43c43a.pdf

³⁷ See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

detention, and many others).³⁸ Special Procedures are increasingly focusing on human rights implications of large investment projects, such as recently in Lao PDR (Special Rapporteur on extreme poverty and human rights, in relation to hydro-dam development), and provide information and recommendations on contextual risks and constraints to public participation and stakeholder engagement (for example, Cambodia,³⁹ Lao PDR,⁴⁰ Philippines⁴¹ and Myanmar).⁴²

- 4. OHCHR, UN field presences and other UN bodies.** As part of annual reporting to UN bodies, or at the direct request of those bodies, OHCHR and other UN entities with presence in the field routinely produce reports on country situations. Such reports are also increasingly prepared by *ad hoc* independent expert bodies commissioned by the UN, such as commissions of inquiry. For example, recent reporting of the Independent Fact-Finding Mission for Myanmar, operating under the authority of the U.N. Human Rights Council, contains extensive analysis and recommendations of direct relevance to investment project due diligence and social and environmental risk assessment.⁴³ Protection measures ordered by the International Court of Justice in the claim brought by The Gambia against Myanmar under the Genocide Convention include an order not to disturb evidence relevant to criminal prosecutions, which has direct relevance to any person or organization supporting infrastructure development in Northern Rakhine State.⁴⁴

The UPR and Special Procedures can produce information and recommendations relevant to social and environmental risk assessment even where the country concerned is not party to the relevant treaty. For example, the Special Rapporteur on the right to water and sanitation may visit a country and make recommendations relevant to investment project risk assessment even where the country has not ratified the ICESCR. More generally, the UPR reviews of the UN Human Rights Council are based, in part, on the Universal Declaration of Human Rights, which covers all rights: civil, social, cultural, economic and political.

³⁸ See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

³⁹ See <https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/KH/Pages/SRCambodia.aspx>.

⁴⁰ See "UN expert calls for reform of poverty-driving policies in Lao PDR", at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24710&LangID=E>. The Special Rapporteur's report is available at UN Doc. A/HRC/41/39/Add.2 (June 20, 2019).

⁴¹ See <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24538&LangID=E>.

⁴² See <https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx>.

⁴³ See the Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2 (Sept. 17, 2018), paras. 98, 110-11, 407, 413, 429, 476, 1181-12, 1216-19, 1224-29 and 1618, (on the risks of infrastructure development intentionally obstructing evidence of international crimes) 1239-44, 1295, 1425, 1565 and 1668 (calling for human rights due diligence by all development actors); *and* Independent International Fact-Finding Mission on Myanmar, Report on Economic Interests of the Tatmadaw (Aug. 2019) at <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>. See also the case study at p.5 above.

⁴⁴ The ICJ's decision is available at <https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>. The Court's decision drew extensively from the UN Fact-Finding Mission's reporting. In its September 2018 report to the UN Human Rights Council, the Fact Finding Mission had documented how infrastructure projects and associated land clearances in Northern Rakhine State were (intentionally, as alleged) eliminating evidence relevant to future international criminal prosecutions.

Information relevant to social and environmental risk assessment may also come from individual complaint procedures under the various UN human rights mechanisms.

Other relevant sources of risk information include the ILO supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations, responsible for monitoring the ILO core conventions and other international labour standards.⁴⁵ Regional human rights systems, in particular those in the African,⁴⁶ American⁴⁷ and European regions,⁴⁸ may also generate project-relevant social and environmental risk information, although the Asean Intergovernmental Commission on Human Rights is relatively new and lacks robust country reporting procedures.

Beyond the UN and ILO systems, human rights risk information is available from many other sources including the media, subscription databases, research institutes, analytics consultancy firms, national and international NGOs and other civil society organisations, and communities themselves. NGOs frequently perform a vital role in bringing to light potential human rights risks associated with investment projects and often help affected communities to access grievance redress mechanisms (including project level mechanisms, national grievance redress systems, and MDBs' mechanisms).⁴⁹ National Human Rights Institutions may also make important contributions to monitoring the human rights situations in a given country or region, and could provide expertise to independent advisory panels or otherwise be valuable partners in social and environmental risk assessment and mitigation.

⁴⁵ See <http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm>.

⁴⁶ See <http://www.au.int/en/organs/cj>.

⁴⁷ See http://www.oas.org/en/topics/human_rights.asp.

⁴⁸ See <http://www.echr.coe.int/Pages/home.aspx?p=home&c=>.

⁴⁹ Beyond the NGO sources referred to in these case studies, an extensive list of international NGOs working in the field of human rights is *available at* <https://www1.umn.edu/humanrts/links/ngolinks.html>.

Annex II

Benefits and costs of integrating human rights risk information

While the evidence is not definitive, available evaluations support the proposition that the benefits of effective safeguard implementation outweigh the costs. ADB's Independent Evaluation Department (IED), for example, has concluded that "safeguards implementation creates a positive net value, which tends to be higher for ADB's standards."⁵⁰ As put by the former Director General of the IED, "for an individual project, the cost may seem unnecessarily high if safeguards prompt excessive scrutiny. But damages avoided (i.e. the benefits of having the system) across projects can more than offset the cost of having safeguards in place."⁵¹ However, the balance of benefits and costs from well-designed and managed resettlement frequently go unmonitored, and are therefore largely unknown.⁵²

The value of rigorous and comprehensive up-front risk assessment, relative to cost, has been confirmed in safeguard evaluations in other MDBs. The World Bank's IEG has assessed that the benefits of safeguard policies, including up-front requirements for higher risk projects, outweigh the costs,⁵³ and a 2015 IDB study found that safeguard compliance (an estimated 1 percent of project costs on average) did not have an independent impact on the length of the project cycle.⁵⁴ Moreover, the likely effectiveness of earlier corrective measures is higher as they precede and therefore have greater impact on implementation, backed by the leverage of having been built into the project agreement's disbursement structure and non-compliance covenants at the outset.

The benefits of incorporating human rights risk information, specifically, relative to the cost of accessing it, are difficult to model and quantify in the abstract. However the costs of accessing human rights risk information are negligible. Much of this information is freely available on-line (see Annex I). Doing so may trigger additional mechanisms (such as the creation of an independent advisory panel, or incorporation of human rights expertise within third party monitoring arrangements) or qualitatively different processes (such as enhanced

⁵⁰ ADB Independent Evaluation Department (IED) Real-Time Evaluation of ADB's Safeguard Implementation Experience Based on Selected Case Studies, 2016, pgs. xv-xvi.

⁵¹ Vinod Thomas, "Top 5 surprising independent evaluation results," Asian Development Blog (Jan. 4, 2016), at <http://blogs.adb.org/blog/top-5-surprising-independent-evaluation-results>. See also World Bank Independent Evaluation Group Safeguards and Sustainability Policies in a Changing World (2010), p.78; Watkins, Graham, et al (2017) Lessons from four decades of infrastructure project related conflicts in Latin America and the Caribbean. Inter-American Development Bank.

⁵² World Bank Press Release: "World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems" (Mar. 4, 2015) at <http://www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems>.

⁵³ World Bank, Independent Evaluation Group, Safeguards and Sustainability Policies in a Changing World (2010).

⁵⁴ Boston University, Greening Development Finance in the Americas (2015), p.29 at <https://pdfs.semanticscholar.org/aa00/56e1d5f0edae6485ccbe5b4f62042a7c4cb2.pdf>.

social analysis or consultation requirements) which involve additional costs at the outset. However these kinds of costs may turn out to be negligible compared with the costs of not doing so.

A more tangible sense of potential costs and benefits can be gleaned from analyses of the costs of poor stakeholder engagement, grievance redress and social conflict in the infrastructure and extractives sectors. If stakeholder engagement is to be effective, it must be free and without coercion or reprisals, it must be inclusive (that is to say, reflecting inputs and preferences of those most vulnerable or marginalized, including those experiencing discrimination on the grounds of race, sex, ethnicity, political or other opinion, or national or social origin, or other status), and it must provide the basis for informed decision-making.⁵⁵ Effective grievance redress, similarly, requires an environment in which complaints can be raised freely and without fear of reprisals. Grievance mechanisms should, among other things, be independent, accessible, equitable and rights-respecting.⁵⁶ In other words, by necessary implication, effective stakeholder engagement and grievance redress require the observance of a wide range of internationally recognized human rights, including civil, political, economic, social and cultural rights. Cost-benefit analyses of stakeholder engagement and grievance redress may therefore, indirectly and imperfectly, help to model potential costs and benefits of integrating a number of important human rights variables in project design and due diligence relevant to most if not all development projects (particularly large development projects).

Recent evaluations by the IDB and other organizations have found that lack of community consultation and lack of transparency have caused social conflict and have been major factors in the failure of infrastructure projects in the Latin American region.⁵⁷ An IDB evaluation, *Lessons from 4 Decades of Infrastructure Project Related Conflicts*, found that infrastructure investments that suffered from “deficient planning, reduced access to resources, lack of community benefits, and lack of adequate consultation were the most prominent conflict drivers. In many cases, conflicts escalated because grievances and community concerns accumulated, going unresolved for many years.”⁵⁸ These costs cannot be equated merely with lost revenue or sunk investment due to higher risk of delay, cost overruns or cancellation, which are often passed on to the public. The more enduring costs relate to the lost livelihoods, physical and mental health, dignity, security and quality of life which may undermine the social contract and fuel conflict, poverty and exclusion.

⁵⁵ See e.g. World Bank ESS 10, and EBRD ESS 10.

⁵⁶ UN Guiding Principles on Business and Human Rights (2011), principles 29-31.

⁵⁷ Watkins et al (2017), *supra*; Boston University, Global Development Policy Center (2018), Standardizing Sustainable Development? Development Banks in the Amazon, available at <https://www.bu.edu/gdp/files/2018/04/Development-Banks-in-the-Andean-Amazon.pdf>.

⁵⁸ Watkins, et al (2017), *Ibid*.

The IDB study found that project delays (81% of cases) and cost overruns (58% of cases) were the most common consequences of social conflict at the project level. The average delay from all projects listed in the available literature was approximately 5 years. Similarly, the average publicly reported cost overrun from sampled projects was US\$1,170 million, or 69.2% of average original budget.⁵⁹ These kinds of losses are consistent with findings about the costs of failed stakeholder engagement in the extractives sector and, recently, in connection with the Dakota Access Pipeline in the USA,⁶⁰ as well as more general findings of the World Bank and UN on how unaddressed grievances may fuel violence and state fragility.⁶¹

The IDB study noted that costs of failed stakeholder engagement may transcend individual projects and may impose a reputation cost surcharge for future (similar) investments for years to come. The IDB study finds that “communities strongly oppose projects that they believe might cause damage similar to the damage of comparable projects elsewhere, even in other countries or continents... that 28% of projects faced historically motivated community opposition.”⁶² With these factors in mind, it seems clear that the potential benefits of integrating and acting upon available human rights risk information at the project design stage will generally outweighs the costs of not doing so.

⁵⁹ Op cit, p. 15.

⁶⁰ First Peoples Worldwide/University of Colorado, Social Cost and Material Loss: the Dakota Access Pipeline (2018), available at https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf, noting that investors lost \$7.5B and banks financing the pipeline incurred an additional \$4.4B in costs in the form of account closures, not including costs related to reputational damage; and Rachel Davis & Daniel Franks, Cost of Company-Community Conflict in the Extractive Sector (2014), available at <https://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/>, noting lost production costs of up to \$20M for major mining projects between \$3-5B capital valuation.

⁶¹ World Bank and United Nations, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict (2018), especially at pp.125-130.

⁶² Op cit, p. 11.