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Consultation on the
Asian Infrastructure Investment Bank (AIIB)
Draft Environmental and Social Framework
(3 August 2015)

**Comments of the Office of the
United Nations High Commissioner for Human Rights
(OHCHR)**

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Introduction

1. The Office of the UN High Commissioner for Human Rights (OHCHR) welcomes the opportunity to contribute to the public consultation convened by the Multilateral Interim Secretariat (hereinafter “the Secretariat”) of the Asian Infrastructure Investment Bank (hereinafter “AIIB” or the “Bank”) on its Consultation Draft Environmental and Social Framework dated 3 August 2015 (hereinafter “the draft ESF,” “the draft framework” or “the draft safeguards”). This document sets out OHCHR’s preliminary analysis and recommendations in response to the Secretariat’s request for written comments and is intended to serve as the basis for future engagement between OHCHR and the AIIB.

1. Mandate

2. As part of the UN Secretariat, OHCHR supports the work of the High Commissioner for Human Rights in fulfilling his mandate of promoting and protection the full enjoyment by all of all human rights (GA res 48/141 [1993]). Consistent with this mandate, OHCHR’s comments focus on the content and potential impacts of the draft safeguards from the perspective of international human rights law, particularly in relation to social risk management. These comments build on OHCHR’s engagement over the years with other Multilateral Development Banks (MDBs) in relation to safeguards and other relevant policies.

2. The need for robust environmental and social safeguards

3. OHCHR welcomes the establishment of the AIIB and notes the Bank’s stated objectives, as affirmed in its Articles of Agreement, of promoting economic growth, regional cooperation, and social development for the people in Asia, as a complement to the existing MDBs. The AIIB will no doubt play an important role in scaling up finance and infrastructure development, which will be crucial for attaining the Sustainable Development Goals recently adopted by the UN Sustainable Development Summit.

4. In order for AIIB to effectively meet its objectives, robust environmental and social safeguards are essential. The up-front and recurrent costs of a strong safeguard system may be significant, but are more than offset by the benefits.¹ Conversely, a weak framework may trigger significant liabilities.² Rigorous and well-defined procedures can allow costs to be anticipated and minimized, benefits to be maximized, and irremediable harms successfully avoided, including potential reputational harms for the AIIB.

3. Overview of OHCHR’s comments

5. The AIIB’s draft ESF puts forward a simple framework applicable to all AIIB Operations, with a clear division of responsibilities between the Bank and its Clients. OHCHR welcomes the draft ESF’s strong commitment to inclusion and equal opportunity, including special attention to gender equity

¹ Independent Evaluation Group (IEG), *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of the World Bank Group Experience*. Washington, The World Bank, 2010, pp 65-80.

² See e.g. Rachel Davis and Daniel Franks, *Costs of Company-Community Conflict in the Extractive Sector* (2014).

and to the situation of vulnerable and disadvantaged groups. OHCHR also welcomes the relatively clear requirements for Independent Advisory Panels and Experts as part of the Bank's due diligence, and the routine nature of third party monitoring for Operations with significant risks. The incorporation of specific standards on involuntary resettlement (ESS2) and on indigenous peoples (ESS3) is also a positive feature of the proposed framework, given the relevance of these two issue areas to major infrastructure lending.

6. OHCHR warmly welcomes the explicit reference to relevant international standards (including those relating to human rights) in the draft ESF's Vision statement (para 7) and in the provisions dealing with Country and Corporate Systems (Environmental and Social Policy, ESP para 43), the Client's responsibility for environmental and social assessment (ESP para 54) and indigenous peoples (ESS3, paras 1-2). However, OHCHR would strongly recommend that all ESS's be more explicitly and consistently aligned with international human rights standards and principles.

7. While acknowledging AIIB's intention to simplify due diligence and risk management requirements, OHCHR considers that there are a number of areas in which AIIB's responsibilities need further clarification, as outlined further below. In order to prevent negative human rights impacts, due diligence responsibilities should be defined as clearly and precisely as possible in the safeguards policy text. In addition, AIIB's due diligence should be anchored in a commitment by the Bank to respect human rights, including client countries' international legal obligations relevant to a given Operation.

8. In OHCHR's view, the draft ESF also requires further clarification and strengthening in relation to its provisions regarding Co-financing, Financial Intermediaries, and the use of Country and Corporate Systems. Similarly, the draft should more clearly define the timeframe for the Client's compliance with the safeguards, in order that the AIIB Board may take informed decisions regarding Operations submitted for approval and affected communities and other relevant stakeholders may effectively participate in all facets of project approval and implementation.

4. The consultation process

9. OHCHR is concerned at the limited reach and time frame of the ongoing ESF consultation, and the inherent limitations of videoconferencing for this purpose. In line with best practice in the financial sector, and in order to build a corporate culture of effective stakeholder engagement, OHCHR would recommend opening up a second phase of public consultations with dedicated outreach and face-to-face dialogue with all relevant stakeholders.³

10. OHCHR recommends that all draft documentation be made available in local languages well in advance of the further consultations, and would strongly encourage the AIIB to consult publicly in due course in relation to its draft information policy, proposed grievance mechanism, and draft implementation plan for the ESF (addressing safeguard staff resources, incentives, capacity building, and accountability structures, with proposed costings).

³ Relevant stakeholders include governments, civil society organisations and representatives of groups of people whose rights may be most affected by AIIB-supported infrastructure projects, such as indigenous peoples, women, persons with disabilities, migrants, the rural and urban poor, and the labour movement.

A. Vision

1. Equality and non-discrimination

11. OHCHR welcomes the draft safeguards' specific attention to "vulnerable groups" (Vision, para 7; ESS1, "Social coverage") and to prejudice and discrimination (ESS1, "Social coverage"), although would recommend that the need to identify and address discrimination also be included in the Vision. Non-discrimination and equality are fundamental components of the legal obligations of States under international human rights law and essential to the exercise and enjoyment of civil, cultural, economic, political and social rights which are crucial for the achievement of the objectives of the ESF (p.2, para 4). Prohibited grounds of discrimination under international human rights law, as specified in the Universal Declaration of Human Rights, international human rights treaties and recommendations by UN human rights mechanisms, include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation, gender identity, health status, and economic and social situation.

- *The Vision statement, para 7, should include discussion of the need to identify and address discrimination. ESS 1 should, in addition to the existing section on vulnerable groups, stipulate that projects should not result in direct or indirect discrimination on grounds prohibited under international human rights law, and should take measures to avoid and mitigate the risk of such discrimination.*

2. Human rights

12. OHCHR welcomes AIIB's statement of support for human rights, though the current wording in paragraph 7 of the Vision statement (AIIB operations "seek to be supportive of these human rights and encourage respect for them") fails to acknowledge the legally binding nature of human rights obligations under international law. The language is also not clear as to whether the Bank commits to respect human rights independently of its Clients. In OHCHR's view, it is important that the ESF should explicitly affirm, at a minimum, the Bank's responsibility to respect human rights independently of the more comprehensive obligations of its Clients under international law. The scope of the Bank's responsibility could be clarified by referencing a core set of international human rights instruments to which it would pay particular regard, namely the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the eight ILO core conventions, as other MDBs have done (see IFC, PESS, fn 4; EBRD, ESP, fn 7).

13. In OHCHR's view, the reference in paragraph 7 to the AIIB's Articles of Agreement seems both redundant and anachronistic and should be deleted. Article 31.2 of the AIIB's Articles of Agreement (prohibiting interference in members' political affairs), and comparable provisions in other MDB Articles, cannot be taken to limit the scope of a Client country's international legal obligations or prevent the lender from respecting the latter obligations in connection with the investment projects it supports. All the AIIB's members are party to UN and ILO treaties governing some, or all, of the environmental and social issues embraced by the draft ESF. These treaties have specific implications for social and environmental risk management.

14. Moreover, the subject matter of internationally recognised human rights (whether economic, social, cultural, civil or political in nature) cannot categorically be considered "political" within the meaning of Article 31.2. The intention of MDB "political" prohibitions, on which art. 31.2

of the AIIB Articles was based, was to ensure that lending decisions are based on economic considerations and are not influenced arbitrarily by the political character of the borrower. Human rights and economic development are closely linked in both theory and practice. The experience of other investment lending institutions shows that excluding people on the grounds of their social origin, economic status, political opinion or other grounds of discrimination prohibited by human rights treaties can have very significant economic impacts.

- *Paragraph 7 of the Vision statement should contain a commitment that the Bank will respect (as well as encourage respect for) borrowing countries' obligations under international agreements relevant to the ESSs.*
- *The reference to the Articles of Agreement in paragraph 7 of the Vision statement should be deleted.*
- *The core UN human rights instruments, as well as relevant ILO conventions, should be explicitly referenced in the ESF.*

B. Framework and definition of roles and responsibilities

1. "Do no harm" commitment and the AIIB's due diligence

15. The draft ESF affirms that Clients have a responsibility to "comply with their legal obligations (under international law) relating to environmental and social sustainability" and that the AIIB is "prepared to assist Clients in meeting these obligations" (ESF, para 6; ESP, para, 51). The exclusion list (ESP, Appendix 1) includes activities deemed illegal under international conventions or agreements. OHCHR very much welcomes AIIB's commitment to support the effective implementation of Clients' international legal obligations. However, in OHCHR's view, a clearer commitment is needed in the draft ESF that the AIIB will take all reasonable measures to ensure that it does not finance project activities that may put a Client country in breach of its obligations under international law, including human rights law.

16. Moreover, AIIB's stated objective to assist Clients in meeting their international obligations does not appear to be translated into the ESF's operational provisions. Notably, when defining the content of the Client's obligation to carry out the environmental and social assessment of the Operation (ESF, para 24; ESP, para 54), the draft ESF does not require the Client to take account of relevant obligations of the borrower under international human rights law.

17. The Client's international obligations, including human rights obligations, should also be an integral element of the AIIB's due diligence (ESF, para 14; ESP, para 52). This includes ensuring that the relevant international obligations are part of the Bank's analysis of the Client's willingness and/or capacity to "address environmental and social issues in the planning and implementation of the Operation" and, ultimately, in the decision whether or not to finance the Operation (ESF, para, 14).

18. Finally, OHCHR welcomes the requirements concerning Independent Advisory Panels and Experts in paragraphs 21 and 49 of the ESP, as part the AIIB's due diligence. OHCHR would encourage the AIIB to flesh out these requirements further in the ESF and/or Environmental and Social Procedure, together with more specific requirements relating to third party monitoring and AIIB supervision visits.

- *The ESP should contain an explicit commitment that the AIIB will take all necessary measures to avoid financing projects that may violate Clients' human rights obligations as defined by national law and international law.*
- *The ESF should require Clients to incorporate relevant legal obligations, including those stemming from international law, into its social and environmental assessment.*
- *AIIB should undertake an assessment of its Clients' international legal obligations within the scope of own due diligence.*

2. Assessment instruments

19. OHCHR takes note of the variety of environmental and social instruments included in the draft framework (ESP para 30) and the provisions governing Environmental and Social Managements Plans and Frameworks (ESMP/ESMF) (ESP paras 31-40; ES Proc paras 3-9). OHCHR also notes that for Category A Operations, the client may use an Environmental and Social Assessments (ESIA) report "or other environmental and social assessment report." The lack of definition of the ESIA's elements and the generic meaning normally attributed to this term (see eg the definition of Environmental Impact Assessment in WB OP 4.01 Annex A, para 3), and the inter-changeability of the terms "assessment," "assessment process" and "assessment report" (eg ESP paras 24, 29-30), may give rise to confusion and inconsistent practice. Similarly, the list of project instruments required in relation to Category B projects (ESP para 29) does not seem sufficiently clear, at least by comparison with the more detailed lists in other MDB policies (see eg ADB, ES1 para 9; WB OP 4.01, para 8.b).

- *OHCHR recommends that the section on assessment instruments in the ESP be reviewed in order to further clarify which instruments should be required in relation to different risk categories.*
- *A description of the elements of the ESIA should be incorporated within the Environmental and Social Procedure.*

3. Use and strengthening of Country and Corporate Systems

20. The draft ESF gives importance to using and providing "adequate support" in order to strengthen Country and Corporate environmental and social systems (ESP, para 11). OHCHR strongly supports these objectives, providing that the goal of using Clients' systems is not permitted to displace the higher order goal of ensuring effective risk management for particular projects.

21. Under the draft ESF, the Client's system should be deemed "adequate to address the environmental and social risks and impacts in the Operation *in a manner broadly consistent with the ESSs*" (ESP, para 41). While understanding the need for flexibility in AIIB's assessment of Clients' systems, in OHCHR's view the open-ended "broad consistency" equivalence test requires further elaboration. Existing MDB safeguards may provide guidance in this regard. For instance, the ADB's equivalence assessment of "Country Safeguard Systems" (CSS) requires that the CSS be "designed to achieve the objectives and adhere to the policy scope, triggers, and applicable principles set out" in ADB's Safeguard Policy Statement (para 68.ii, pp. 16-18). The ADB safeguards also include explicit transparency and consultation requirements (ADB SPS, para 68.viii; WB OP 4.00, para 7) and exclude "highly complex and sensitive projects" from the scope of its CSS policy (para 68.v).

- *The "broadly consistent" equivalence test should be complemented by more specific criteria such as those contained in the ADB safeguards.*

- *ESP para 44 should include clearer requirements regarding disclosure of equivalence and capacity assessments, and should require stakeholder engagement. Third party monitoring should be required for projects that use Client systems.*
- *The use of Country and Corporate Systems should be ruled out for Category A Operations or Operations that are highly complex or sensitive, or that involve serious multidimensional environmental or social risks or impacts.*

4. Deferred compliance and the “phased approach”

22. OHCHR welcomes the clear statement that ESA’s, resettlement plans and other relevant instruments should be submitted in draft prior to AIIB appraisal, and that the final documents should be submitted prior to Board approval (ESP, para 56). However this is qualified by the assertion that the Client shall meet “the requirements of the applicable *ESSs in a manner and a reasonable time frame acceptable to AIIB*” (ESP, para 22).

23. OHCHR understands the need for the AIIB to strike an effective balance between up-front compliance and downstream risk management. However, to defer compliance to a future time undermines the incentives for both the Bank and the Client to make feasible and necessary investments to ensure that risks are adequately identified at the outset. The full appraisal of risks prior to Board approval should remain the rule, in OHCHR’s view, subject only to very clear and compelling exceptions.

24. OHCHR would also recommend that the AIIB more clearly define the terms “phased approach” and “selected activities” (ESP para 58), which – on their face – seem to broaden the scope for risk assessment and appraisal after Board approval. The link between para 58 and frameworks (ESP paras 37-40) might also usefully be explained, in OHCHR’s view.

- *ESP para 22 should clarify that deferred compliance should be the exception to the rule, allowed only clearly defined circumstances. Category A Operations should be excluded from this possibility.*
- *The terms “phased approach” and “selected activities,” and their relationship with risk management frameworks, should be further explained.*
- *The ESP should make clear that the Client should not carry out any action in relation to the Operation that may pose significant adverse risks or impacts until the required risk assessment and management measures are in place.*

5. Co-financing

25. OHCHR notes the importance of co-operation and partnership in bridging development finance gaps (ESF, Vision, para 4). However, co-financing may also bring additional risks if the AIIB enters into co-operation arrangements with institutions that have less stringent environmental and social policies and procedures or weaker implementation capacity.

26. The draft ESF calls for the adoption of a “*common approach* to appraisal, environmental and social management requirements, monitoring and reporting” (ESF, para 20). However, the specific requirements for common approaches are not spelled out. The draft states only that the possibility of using a co-financer’s system is subject to the AIIB’s determination that the partner’s system is “broadly consistent” with the AIIB’s framework (ESP, para 9). In OHCHR’s view, this open-ended

equivalence test requires further clarification, in line with the comments made above in connection with the AIIB's proposed criteria for using Country and Corporate Systems (*supra*, §A.2).

- *The ESP should clearly spell out the requirements for adopting a common approach with co-financiers. These requirements, along with those applicable in case of use of co-financier's systems, should be guided by the objectives, scope, triggers and policy principles stemming from the ESSs.*

6. Financial Intermediaries (FI's)

27. The AIIB will be required to conduct due diligence in order to assess the FI's policies and procedures, implementation capacity, and project portfolio (ESP, para 20). OHCHR notes with concern the very high degree of unassessed risk exposure involved with this kind of lending in practice.⁴ OHCHR recommends that the AIIB take full account of the IFC's ongoing investigation into FI lending⁵ prior to finalising its proposed approach to this model of financing.

28. Subject to the above, at a minimum, OHCHR would suggest that the AIIB align itself with the safeguard policies of other MDBs, which require FIs to fully comply with national law (ADB ESPS, para 65; WB draft ESS9, para 7) as well as the MDBs' environmental and social standards (ADB ESPS, para 66; WB draft ESS9, para 7) including their respective exclusion lists (ADB ESPS, para 65; WB draft ESS9, para 7). The policies of the latter MDBs also place considerable importance on building the capacities of FIs' own environmental and social systems (ADB ESPS, para 65; WB draft ESS9, paras 11-16). OHCHR would recommend further that that AIIB commit itself to full due diligence, monitoring and supervision of all high risk FI Operations.

- *ESF should require FIs to fully comply with national laws and regulations. FIs should also be required to abide by AIIB's exclusion list.*
- *High risk Category FI Operations should be required to comply with the ESS's and should be subject to AIIB due diligence, monitoring and supervision.*
- *If an FI's current or future Operations may pose significant adverse risks or impacts, the FI should be required to put in place and maintain an environmental and social system proportionate to the nature of the FI and to the level of potential risks and impacts associated to the Operations.*

7. Supply chain risk

29. OHCHR notes that supply chain risk does not seem to be adequately covered by the ESF. Contemporary social and environmental systems, including those of MDBs and businesses, regularly address supply chain risks (see eg IFC, PS2, paras 27-29; PS6, para 30; ESS WB draft, ESS2 37-39). According to the UN Guiding Principles on Business and Human Rights (UNGPR) and other relevant standards, an initial assessment should be conducted throughout the supply chain in order to identify potential environmental and social risks. Where significant risks are present, suppliers should be required to mitigate and prevent such risks (UNGPR, Principle 17.b).

⁴ See eg Compliance Advisor Ombudsman (CAO), *Audit of a Sample of IFC Investments in Third Party Financial Intermediaries* (February 2013).

⁵ IFC, management response to the CAO Audit of a Sample of IFC Investments in Third Party Financial Intermediaries: "E&S Risk Management of Financial Institutions." (4 September 2013).

30. The Guiding Principles also acknowledge the difficulties in carrying out effective due diligence where value chains comprise a large number of entities. In such cases, it is recommended to prioritise those areas where risk may be “most significant,” taking into account the operating context, the particular operations, products or services involved, and other relevant factors (UNGP, Principle 17, Commentary).

- *Clients should be required to comply with the relevant ESSs in relation to primary suppliers as well as with other supply chain entities that may pose significant adverse risks or impacts.*

8. Environmental and Social Exclusion List

31. Appendix 1 to the ESP reproduces an Environmental and Social Exclusion List which, similar to that of other MDBs and finance providers, enumerates the Operations that the AIIB will not “knowingly finance.” In keeping with international best practice, and in order to reinforce ESS1’s labour requirements, OHCHR recommends that the exclusion list include a prohibition concerning activities involving forced or child labour (see eg ADB, Prohibited Investment Activities List, AfDB, PS, p 18; EBRD, Environmental Exclusion and Referral List), as well as activities involving forced evictions (as set forth in ESS1 para 60).

32. The Environmental and Social Exclusion List could also take into consideration the EBRD’s Environmental Exclusion and Referral List as it relates to FIs. Under this model, FIs’ financing of “environmentally or socially sensitive business activities”, as specified in the exclusion list, is subject to referral to EBRD.

- *The exclusion list should include the prohibition that AIIB knowingly finance products or activities involving forced evictions, forced or compulsory labour, hazardous forms of child labour, or labour under the minimum employment age.*
- *OHCHR recommends that the exclusion list enumerates FI Operations which would be subject to a referral to AIIB.*

C. Environmental and Social Standard 1: Environmental and Social Assessment

1. Meaningful consultation

33. OHCHR welcomes the importance given in ESS1 to consultation with affected people and stakeholders in order to “facilitate their informed participation” in the design and implementation of the Operation.

34. Under draft ESS1, “meaningful consultation” processes should aim at ensuring that stakeholders’ views and concerns “are made known to and understood by decision-makers *and taken into account*” and should allow for the “incorporation of all relevant views...into decision making.” However, ESS1 does not set out on the specific steps that Clients should take in order to demonstrate that stakeholders’ views have been taken into account. The relationship between the consultation requirements in ESS 1 and those of other ESS’s is likewise not clear.

- *Clients should be required to document efforts to integrate stakeholders’ views and concerns into the design and implementation of the Operation, and, if not, to provide the substantive reasons why it was not possible to integrate them.*

- *Consultation requirements in ESS1 should be cross-referenced in ESS2 and ESS3. The consultation requirements in the latter standards should be made consistent with those in ESS1.*

2. Information disclosure

35. OHCHR notes the general requirements in ESS1 concerning the disclosure of environmental and social information and welcomes that fact that draft assessments, reports and action plans will need to be made available to the bank prior to appraisal, and final documents must be presented prior to Board approval (ESP, para 56).

36. Nevertheless, OHCHR recommends that ESS1 be made consistent with the disclosure requirements in the ESP, which clearly detail the list of documents that the AIIB commits to disclose (environmental and social assessment report, ESMP, ESMPF, monitoring reports and, when applicable, Resettlement Plan, RFP, Indigenous Peoples Plan and IPPF) (ESP, para 52). OHCHR recommends that the draft and final versions of the latter documents be made publicly available on AIIB's website (ibid, and see eg ADB, ESPS, 53).

37. In addition to Operations' preparatory documents, and in line with the safeguard policies of other MDBs, in OHCHR's view, ESS1 should include the requirement to disclose information regarding: (i) the purpose, nature and scale of the Operation; (ii) the duration of the proposed activities; (iii) potential adverse risks and impacts; (iv) the proposed consultation process, and time and venue of proposed public consultation meetings; and (v) grievance mechanisms (EBRD, PR10, para 71; IFC, PS1, para 29; WB, draft ESS10, para 19). Information regarding material changes in the Operation should also be disclosed in a timely manner (EBRD, PR10, para 71), in OHCHR's view.

38. OHCHR notes that other MDB systems generally include additional disclosure requirements for Category A Operations. This includes the disclosure of full social and environmental impact assessments and other relevant documentation at least 120 days prior to the Board's consideration of the project (see eg ADB, SPS, 53; EBRD, PR10, para 71). OHCHR would recommend that the 120-day rule be included in relation to AIIB's Category A Operations.

- *ESS1 should further elaborate the minimum information disclosure requirements expected from Clients, which should be made consistent with the ESP and the minimum disclosure requirements of other MDBs.*
- *Disclosed information should be regularly updated, along with information on any material changes in the Operation.*
- *In the case of Category A Operations, ESS1 should require Clients to disclose all relevant information 120 days prior to consideration of the project by AIIB's Board.*

3. Working conditions and community health and safety

39. OHCHR welcomes the inclusion of basic safeguards regarding conditions of employment or occupation, reflecting an emerging trend among MDBs. Given the importance and potential complexity of the issues involved, OHCHR would encourage AIIB to consider the possibility of adopting a separate ESS on this subject.

40. **International labour standards.** In line with the policies of other banks, ESS1 should reference, and be informed by, the International Labour Organisation (ILO) fundamental labour

conventions or, as a minimum, the ILO Declaration on Fundamental Rights and Principles Freedoms at Work (see eg AfDB, OES5, p. 49; EBRD, PS2, fn2; IFC, PS2, fn 2). The Declaration sets forth the minimum universal rights pertaining to all workers in all countries, and is binding upon all States that are members of the ILO whether or not they have ratified the relevant Conventions (it should be noted that *all* Prospective Founding Members of the AIIB are also members of the ILO. The International Covenant on Economic, Social and Cultural Rights, and other UN human rights treaties also contain relevant standards in this regard.

41. **Scope of application.** ESS1 applies to “workers (whether full-time, part-time, temporary, seasonal or migrant) engaged directly by the Client, the Operation proponent, and any Operation implementing entity, to work specifically on the operation,” to the exclusion of other workers employed by the Client (fn 3). This definition may unnecessarily restrict the scope of application of ESS1. It should therefore be clarified that the standard also applies to sub-contracted and third party workers, in line with other MDB safeguard policies (EBRD, PS2, para 4; IFC, PS2, para 4; WB, draft ESS2, para 3), as well as community labour (ibid, para 3.d). In a similar vein, the limitation of the requirements regarding labour management systems to private sector Operations only (§3) seems arbitrary, particularly in light of the requirement to comply with national law and/or collective agreements.

42. **Forced labour.** ESS1 prevent Clients from resorting to any form of “*involuntary or compulsory labour,*” understood as “any work or service not voluntarily performed that is exacted from an individual under threat of force or penalty,” irrespective of the specific contractual arrangement. OHCHR would recommend that the language in ESS1 be aligned with international labour and human rights standards by specifically referring to “*forced or compulsory labour*” (ILO Conventions Nos. 29 & 105).

43. **Child labour.** ESS1 allows for the employment of children under the age of 18 provided certain safeguard requirements are met, and further calls upon the Client to avoid the employment of children “in a manner that is likely to be hazardous or interfere with the child’s education or be harmful to the child’s health.” (§2). As in the case of forced labour, OHCHR recommends that ESS1 more clearly adhere to international labour and human rights standards, which extend the prohibition of child labour to activities that may be harmful to the child’s safety, dangerous to life, or likely to hamper the child’s “normal development” (ILO Convention No. 138, art 3.1; see also ICESCR art 10.3; CRC, art. 32.1). The language of ESS 1 (“avoid”) should be strengthened to reflect the unconditional character of this prohibition under international law. Furthermore, in addition to prohibiting hazardous forms of child labour, OHCHR recommends that ESS1 also explicitly prohibit the employment of children under the minimum legal age (ibid).

44. **Non-discrimination and equal opportunity.** OHCHR notes that ESS1 lacks any reference to the principle of non-discrimination. The commitment to “employment on the basis of the principle of equal opportunity and fair treatment,” restricted to private sector operations and subject to national law (§3), does not seem to be an adequate proxy in this regard. It should be noted that 50 out of the 53 AIIB Prospective Founding Members have ratified at least one of the two fundamental ILO conventions on non-discrimination in employment and occupation (ILO Conventions Nos. 100 & 111). Forty-nine of the prospective members are also a party to at least one of the two international human rights Covenants, both of which include non-discrimination commitments (ICCPR, arts 2 and 26; ICESCR, art 2.2). Specific non-discrimination requirements are also included in the more recent MDB safeguard policies (AfDB, OS5, p. 50; EBRD, PR2, para 12; IFC, PS2, paras 15-17; WB, draft ESS2, paras 13-15).

45. **Freedom of association and collective bargaining.** In OHCHR’s view, the requirement in ESS 1 (§3) that clients comply with “national law relating to workers’ organizations and collective

bargaining” in relation to private sector operations falls well short of international legal standards on freedom of association and collective bargaining (ICCPR, art 22; ICESCR, art 8; ILO Conventions Nos. 87 & 98). At a minimum, OHCHR recommends that ESS1 be aligned with other MDB safeguard policy standards which require compliance with national law, in situations where freedom of association and collective bargaining are legally recognised. If the latter rights are not formally recognised in domestic legislation, the Client should be required to provide “alternative mechanisms” allowing workers to express their grievances and protect their rights in relation to working conditions and employment, without undue interference (AfDB, OS5, p 50; EBRD, ES3, para 12; IFC, PR2, paras 13-14; WB, draft ESS2, para 17).

46. **Disability.** ESS 1 recognises that persons with disabilities may be “more affected than others by Operation-related risks and impacts.” OHCHR recommends that specific operational requirements be spelled out under the heading of working conditions, community health and safety. This is particularly relevant in light of the commitments set forth in the UN Convention on the Rights of Persons with Disabilities, which calls upon all concerned parties to ensure that international development programmes are “inclusive of and accessible to persons with disabilities” (CRPD, art 32.1.a). The World Bank Group’s Environmental, Health and Safety Guidelines (EGHS), which are reflected in ESS1, do not adequately address disability issues (see eg pp 78, 80). In OHCHR’s view, ESS1 should require, as a minimum, the application of the principles of accessibility and universal design in relation to the design and construction of new buildings and structures, in accordance with the UN Convention (CRPD, arts 2, 4.f, 9).

- *OHCHR recommends that requirements regarding working conditions and community health and safety in ESS1 be integrated within a separate social and environmental standard.*
- *ESS1 should explicitly reference relevant ILO and UN instruments.*
- *The scope of application of ESS1 should be expanded to include sub-contracted, third party, and community labour workers. The requirements for labour management systems should apply to both public and private sector Operations.*
- *OHCHR recommends that the terminology utilised in ESS1 be aligned with international labour and human rights standards regarding forced or compulsory labour and child labour. Hazardous forms of child labour should unequivocally be prohibited, along with the employment of children under minimum legal age.*
- *Clients should be required to guarantee the principle of non-discrimination in employment and occupation, including the principle of equal pay for male and female workers.*
- *ESS1 should require Clients to comply with national laws recognising workers’ rights to form and to join workers’ organizations of their choosing and to bargain collectively without interference. Clients should put in place alternative mechanisms when national laws do not recognise those rights.*
- *ESS1 should require the application of the principles of accessibility and universal design in relation to the design and construction of new buildings and structures, in accordance with the CRPD.*

D. Environmental and Social Standard 2: Involuntary resettlement

1. Avoidance of involuntary resettlement

47. In OHCHR's view, ESS2 should give unequivocal priority to the objective of avoiding involuntary resettlement. Existing MDB policies provide a useful reference point in this regard. For instance, the World Bank's draft involuntary resettlement standard requires the Client to "consider feasible alternative project designs to avoid or minimize land acquisition or restrictions on land use." According to the World Bank's draft standard, the Client also needs to demonstrate that involuntary land acquisition or land use restrictions "are limited to direct project requirements for clearly specified project purposes within a clearly specified period of time" (WB, draft ESS5, para 11).

- *ESS3 should clearly spell out that involuntary resettlement should be considered an exceptional measure and require the Client to demonstrate that involuntary resettlement is fully justified by reference to criteria such as those outlined in the World Bank's draft ESS 5.*

2. Resettlement as a development opportunity

48. The draft ESS2 incorporates the objective of "enhanc[ing], or at least restor[ing] the livelihoods of all displaced persons in real terms." However, in OHCHR's view, ESS2 should explicitly recognise the principle that resettlement activities "should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits"(see e.g. World Bank OP 4.12, para 2b). OHCHR recommends that the Client be required to identify development opportunities for displaced communities and persons beyond mere compensation and rehabilitation of pre-existing livelihoods (see World Bank OP 4.12, para 6.c.ii; draft World Bank ESS 5, paras 26-28; IFC, PS5, para. 9).

49. Moreover, special attention should be given to "vulnerable groups" (within the meaning of ESS1) in order to ensure that these groups are not disproportionately affected by the Operation and that they are not disadvantaged in accessing development benefits (ADB, SR2, para 16). This requirement could be specified in the context of social support to resettlement (para 3 §7).

- *ESS2 should explicitly state that resettlement activities are to be considered and executed as sustainable development programs.*
- *The Client should be required to identify, development opportunities to displaced communities and persons, including development benefits from the project, as part of the Resettlement Plan. Special attention should be given to vulnerable groups in this context.*

3. Forced eviction

50. OHCHR notes that the draft safeguards explicitly exclude the possibility of financing Operations involving forced eviction (ESP 60). OHCHR would recommend that the prohibition of force eviction also be included as a specific objective of the ESSs, and be included in the Social and Environmental Exclusion List (supra, C §4).

51. In addition, in OHCHR's view, the definition of forced eviction in the ESP could be further clarified in light of applicable international human rights standards.⁶ The due process requirements

⁶ Relevant sources of international law and guidance include the International Covenant on Economic, Social and Cultural Rights (Art. 11(1)); the Basic Principles and Guidelines on Development-based Evictions and Displacement, reproduced in

listed in footnote 13 should be broadened to include the following procedural criteria recognized in international human rights law including: informed consultation with affected persons; presence of government officials; provision of legal aid; and prohibition of evictions in case of bad weather or at night.⁷ As in the case of involuntary resettlement generally (*supra*, §1), evictions can be justified only in exceptional circumstances based on clear public interest grounds, when no other alternative is available.

- *ESS2 should incorporate an explicit prohibition against forced evictions and clearly define the specific criteria under which, exceptionally and as a last resort, the Client may resort to such evictions. These criteria should be informed by applicable international human rights standards and principles.*

4. Scope of application

52. ESS2, paragraph 2, states that the standard applies if “the Operation involves past, present or future IR [involuntary resettlement] risk and impacts.” This phrasing may imply that ESS2 will also apply to resettlement activities that are not part of the AIB-financed project, such as resettlement carried out by the Client in anticipation of the project, but this point is not clear. OHCHR recommends that more specific language be introduced, in line with other MDB safeguard policies, to clarify that the standard also applies to resettlement activities that are not part of the Operation but are directly connected or necessary to achieve the Operations’ objectives (see ADB, SR2, para. 4; WB, OP 4.12, para 4; draft ESS5, para 4.g). In OHCHR’s view, it should also be clearly stated that ESS2 applies to cases of economic displacement resulting from involuntary restrictions or loss of access to land and natural resources, irrespective of physical relocation, other than restrictions arising from the establishment of legally designated parks or protected areas.

53. The acquisition of land rights derived from “negotiated settlements” should be also be included within the scope of ESS, in OHCHR’s view. The involuntary character of the acquisition of land may be inferred not only from expropriation or the exercise of eminent domain, but also from “lands acquired through negotiated settlements, if the expropriation process would have resulted upon the failure of negotiation.” (ADB, SR2, para 4). The draft ESS2 currently includes a paragraph requiring that negotiated settlements should be carried out in a “transparent, consistent and equitable manner” (para 3 §12). OHCHR would recommend that additional procedural safeguards be incorporated in relation to such acquisitions, such as payment of fair and equitable price; independent third-party validation and documentation; and the existence of transparent mechanisms for price calculation (see e.g. ADB, SR2, para 16).

- *The scope of ESS2 should be broadened to cover resettlement activities that are not part of the Operation but that are directly connected or necessary to achieve the Operation’s activities. ESS2 should also apply to economic displacement arising from the loss of access to land and natural resources other than restrictions arising from the establishment of legally designated parks or protected areas.*

Report of the Special Rapporteur on adequate housing UN Doc. A/HRC/4/18 (2007); *UN Guiding Principles on Internal Displacement*, reproduced in Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum, UN Doc E/CN.4/1998/53/Add.2 (1998); General Comment No. 4: *The right to adequate housing* (art. 11 (1) of the Covenant), Committee on Economic, Social and Cultural Rights, U.N. Doc. E/1992/23 (1991) Annex III, paras 114ff; and General Comment No. 7: *Forced evictions, and the right to adequate housing* (art. 11 (1) of the Covenant), Committee on Economic, Social and Cultural Rights, UN Doc. E/1998/22 (1997), Annex IV, paras 13ff.

⁷ General Comment No. 7: *Forced evictions, and the right to adequate housing* (art. 11 (1) of the Covenant), Committee on Economic, Social and Cultural Rights, UN Doc. E/1998/22 (1997), Annex IV, para 15..

- *ESS2 should also apply to land acquired through negotiations, in situations where the failure of those negotiations would trigger expropriation. The criteria for assessing the validity of such acquisitions should be specified.*

5. Eligibility for compensation

54. In line with established practice, draft ESS2 correctly recognises the entitlement of persons without title or any other recognizable rights to land to receive resettlement assistance and compensation for loss of non-assets (para 3 §11). However, as the practice of international financial institutions has shown in recent decades, the determination of land rights in cases of resettlement and other projects involving land acquisition or restriction is frequently very challenging.

55. In this context, OHCHR would strongly recommend that paragraph 3 §11 be amended to explicitly affirm the eligibility for full compensation and other resettlement benefits of persons who may not have formal legal rights to land or assets, but who nonetheless have recognised or recognisable legal claim to such lands or assets (see eg ADB, SR2, para 7; WB, OP 4.12, paras 15-16). Moreover, it should be clarified that the title over land and natural resources may derive from customary and traditional rights, and is thus not necessarily restricted to owners in possession of a formal title deed (ibid, para 15.a). In OHCHR's view, the terminology "Persons without title or legal rights" should be amended to reflect the frequent gap between national law and international law insofar as the legal recognition of legitimate tenure rights is concerned.

- *ESS2 should affirm the eligibility for resettlement compensation of persons who have a recognised or recognisable legal claim to lands or assets even in the absence of a formal legal title.*
- *The expression "Persons without title or legal rights" should be changed to "Persons without recognized title under national law."*

6. Livelihoods restoration

56. ESS2 provides for livelihood restoration in the form of land compensation "where possible." The general preference for land-based resettlement could be strengthened by requiring the Client to document the lack of adequate land at a reasonable price (WB, OP 4.12, para 11). Moreover, it should be clarified that the land provided should be of quality and legal status at least equal to those attaching to the lands previously owned.

57. Particular consideration should be given to collective or communal forms of land tenure, which are recognised and protected by international standards.⁸ In such cases, priority should be given to land-based resettlement, and preference should be given to compensation in the form of collective title unless otherwise decided by the affected community.

- *The preference for land-based resettlement should be strengthened by requiring the Client to document the lack of adequate land at a reasonable price. Such strategies should be also prioritised where ownership of land and resources is collective in nature.*
- *It should be clarified that land provided as a form of compensation should be of quality, size, value and legal status at least equal to that of the lands previously owned. In cases of*

⁸ See eg Food and Agriculture Organization (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, (2012), paras 8.3; 9.2; 17.2.

collective ownership of land and resources, compensation should take the form of collective title.

7. Meaningful consultation

58. As set forth in ESS1, consultation with stakeholders is a process that begins at the earliest stages of an Operation and is carried out through the Operation's life cycle. However, draft ESS2 only considers consultations with affected persons, host communities and other stakeholders in relation to the design and implementation of the Resettlement Plan. OHCHR recommends that consultations with potentially affected communities and other stakeholders should take place as early as possible in the project preparation process, thus allowing them the opportunity to influence discussions over project design and alternatives.

- *ESS2 should require the Client to carry out consultations with potentially affected persons and other stakeholder from the earliest stages of the preparation of the Operation.*

8. Resettlement Plan

59. In OHCHR's view, given the ESP's lack of guidance on the content of Resettlement Plans, the requirements stipulated in ESS2, paragraph 3 §2 do not seem to be adequate. OHCHR recommends that the latter paragraph be expanded to include additional elements of key practical importance such as land surveys, censuses, compensation schemes, eligibility criteria and cut-off dates. As part of the elements to be included in the Resettlement Plan, the Client should also be expected to identify the full costs of resettlement activities, and to ensure that such costs are integrated within the total costs of the Operation. The World Bank's safeguard policies (OP. 4.12, para 20; draft ESS5, para 22) provide a useful model in this regard.

- *The list of elements for Resettlement Plans should be expanded. These plans should identify the total costs of resettlement activities and fully integrate them in the total costs of the Operation.*

E. Environmental and Social Standard 3: Indigenous peoples

1. International standards

60. OHCHR notes with interest that draft ESS3 aims at fostering indigenous peoples' "identity, dignity, *human rights*, livelihood systems and cultural uniqueness" (para 1). Impacts on indigenous peoples' human rights further trigger the application of ESS3 (para 2). In order to effectively operationalise the reference to indigenous peoples' human rights, and in line with the policies of the ADB and other financial institutions, it would be advisable to reference specific international instruments regarding the rights of those peoples⁹ (see eg ADB, PR3, paras 1, 7).

- *ESS3 should reference relevant international legal instruments regarding the rights of indigenous peoples.*

⁹ International standards specifically relating to indigenous peoples include the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), as well as ILO Conventions Nos. 107 and 169, which have been ratified by a number of Asian States.

2. Participation, consultation and consent

61. While ESS3 endorses the principle of indigenous peoples' participation (para 1.c), the operative paragraphs seem to impose unnecessary limitations, for example, in allowing Indigenous Peoples' participation in project design and mitigation measures only "*where applicable*" (para 3 §3). Similarly, ESS3 calls for the adoption of a "participatory monitoring approach, *wherever possible*" (§13). Similarly, the draft ESS3 does not appear to envisage the participation of indigenous peoples in the Client's initial social assessments (para 3).

62. OHCHR welcomes the strengthened consultation requirements as well as the explicit recognition of the principle of Free, Prior and Informed Consent (FPIC), in line with international human rights standards. OHCHR notes, however, that international standards do not regard consultation and FPIC as separate processes, but rather as parts of a continuum. In this regard, ESS3 should clarify that securing indigenous peoples' consent or agreement should be the objective of *all* consultation processes, including when FPIC is not necessarily a formal requirement (UNDRIP, arts 19, 32.2; ILO Convention 169, art 6). Moreover, the Client should be required to document efforts to accommodate indigenous peoples' views in all circumstances, and not only when FPIC is required.

63. Draft ESS3 specifies the circumstances in which the Client would be required to obtain the FPIC of the indigenous peoples adversely affected by the Operation. If FPIC is not obtained, the client must ensure that "the Operation will not have adverse impacts" on the specific indigenous people concerned (para 3 §6). However, the latter provision would seem to contradict the FPIC requirement. OHCHR therefore recommends that the AIIB state clearly that it will not finance the Operation or specific components within the Operation under such circumstances, in line with the safeguard policies of other MDBs (see ADB, PR3, para 55; WP, OP.4.12, para 11; draft ESS7, para 19).

- *ESS3 should unequivocally affirm indigenous peoples' entitlement to participate in social assessments as well as in the design of operation activities, mitigation measures and monitoring mechanisms.*
- *It should be clarified that all consultations with indigenous peoples should aim at obtaining their agreement or consent, and the Borrower's efforts to accommodate the results of this consultation in the design and implementation of the Operation should be documented and made publicly available prior to Board approval.*
- *The AIIB should commit not to finance an Operation or specific components of an Operation when FPIC has not been obtained, where it cannot be ascertained that the Operation will not have adverse impacts on the specific indigenous people concerned.*

3. Prohibition of relocation

64. ESS3 requires Clients to obtain indigenous peoples' FPIC in relation to any Operation implying the relocation of indigenous peoples (para 3 §5). This requirement, which is consistent with international human rights standards, is of utmost importance (UNDRIP, art. 10; ILO Convention 169, art 16). Relocation of indigenous peoples as a result of development projects in Asia and elsewhere has often had disastrous consequences for indigenous peoples' identities, cultures and livelihoods. However, this requirement seems to be diluted by the requirement, in a different section of the policy, to "[a]void, to the maximum extent possible, any...physical displacement from...protected areas and natural resources" (para 3 §7).

- *The prohibition of relocation of indigenous peoples without their consent should be clearly stated and prioritised in ESS3.*

4. Participation in benefits

65. Finally, ESS3 incorporates the explicit objective that “indigenous peoples receive culturally appropriate social and economic benefits” (para 1). However the only other reference to benefit-sharing agreements is found in the section on “Avoidance of Impacts” (para 3 §7) which requires only that Clients ensure that indigenous peoples have access to equitable benefits in relation to the management of protected areas and natural resources. While this reference is welcome, it falls short of international standards which affirm indigenous peoples’ entitlement to participate in the benefits from the exploitation of natural resources in their traditional territories.¹⁰ The same holds true in relation to the commercial exploitation of indigenous peoples’ biodiversity-related traditional knowledge.¹¹

- *ESS3 should clearly spell out the Client’s obligations to establish equitable benefit-sharing arrangements with regard to the commercial development of indigenous peoples’ lands, natural resources, and cultural heritage. This requirement should be a part of the Indigenous Peoples Plan.*

* * *

¹⁰ ILO Convention 169 (1989), art 15.2; Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Series C, No. 172 (2007), paras 129-137; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: *Extractive industries and indigenous peoples*, A/HRC/24/41 (2013), paras 75-77.

¹¹ See e.g. UN Convention on Biological Diversity (1992), art 8.j.