

ANALYSIS OF THE BRICS NEW DEVELOPMENT BANK

ENVIRONMENT AND SOCIAL FRAMEWORK¹

April 2017

As the New Development Bank (NDB) prepares for the one-year review of the Environment and Social Framework ('ESF'), the below endorsing organizations wish to provide the following analysis and recommendations to strengthen the ESF, and in so doing, the NDB's development outcomes. Robust environmental and social standards and consultative processes are critical for ensuring responsible and sustainable development. The NDB has an opportunity to enhance its operations and ultimately its investment outcomes by further integrating best practices for social and environmental management. To do so, it is critical that the NDB open a transparent and inclusive process for engagement and consultation with civil society around this and future policy and strategy documents.

The NDB sets out within the ESF laudable principles for social and environmental performance, including sustainability, inclusion, and climate change. At the same time, in order to actually operationalize these principles, the ESF will need to be bolstered in the following ways:

- Include clear sustainability criteria and due diligence requirements for project selection, supervision, and implementation.
- Clarify and strengthen within the ESF, the role of NDB staff in assessing projects and supervising and monitoring implementation and compliance.
- Put in place clear benchmarks and systems for assessing and supporting country and client capacity, especially where country or client systems are utilized, in order to ensure a minimum level of protection for people and the environment.
- Set out time-bound requirements for disclosure and consultation to ensure that affected communities and civil society groups have access to information and are able to participate in NDB-financed activities.

ANALYSIS

Sustainability Principles. The ESF includes laudable core principles, including "Inclusive and Sustainable Development", "Gender Equality", "Precautionary Approach", "Conservation of Natural Resources" etc. In many cases, however, these terms are undefined or limited in their definitions. Most importantly, they are not integrated into the policy itself, but rather left as aspirations. While the ESF provides that the NDB 'integrates the principles of environment and social sustainability into its policies and operations', it does not define what the NDB

¹ New Development Bank, *Environment and Social Framework* ('ES Framework'). Version: 2016V4. March 2016. Available: <http://ndb.int/pdf/ndb-environment-social-framework-20160330.pdf>

understands to constitute ‘sustainability’ nor does it indicate the manner in which such sustainability will be integrated into project selection or implementation. The ESF does not set forward sustainability criteria for project screening. While the “Exclusion List” prohibits the NDB from “knowingly” (a lower standard than other banks) financing activities such as trade in tobacco, commercial logging in old growth forests, or activities prohibited by international biodiversity agreements, the list of excluded activities does not include some activities commonly excluded by other banks, such as activities involving child or forced labor. It also does not reflect NDB’s sustainability mandate, allowing financing of activities contrary to that mission, such as unsustainable extractive industries, nuclear energy, coal, large-scale hydroelectric, etc.

A commitment to sustainable development will require the NDB to go beyond a focus on market-orientated growth and merely a “do-no-harm” approach, towards an emphasis on developing projects that explicitly aim to generate positive social and environmental impacts. The activities of the Bank should be geared toward supporting sustainable patterns of consumption and production, and inclusive, transformative strategies of growth.

Recommendation: Clearly define sustainable development, including clear benchmarks for the sustainable development outcomes that the NDB seeks to achieve. For example, such benchmarks might include support for low-carbon development and national contributions to emissions reductions in line with the Paris climate agreement, and securing improvements in income and asset base for poor or marginalized communities, etc. Ensure that the definition of sustainability is reflected in explicit criteria for project selection, as well as in the Exclusion list.

Country and Corporate Systems. The strengthening and use of country systems is an important strategy to ensure social and environmental sustainability and promote greater country ownership. To be successful, however, the NDB will need to ensure that where alternative systems are utilized they are able to effectively manage social and environmental impacts. The ESF privileges the use of host country social and environmental management systems (laws and regulations), but also corporate systems (policies), above the requirements of the Environmental and Social Standards (ESS), without ensuring a minimum level of social and environmental protection. While the ESF notes that these systems should be “strong”, it does not set forth the criteria or processes by which these systems will be evaluated as to their adequacy to assess and manage social and environmental risk and prevent harm. The ESF rather states that “NDB conducts environmental and social due diligence review, as an integral element of its appraisal to ensure the consistency of use of country and corporate system with the core principles and key requirements of this Framework” and that “NDB will apply, on a project by project basis, an appropriate risk-based framework grounded on NDB experience with BRICS and other international good practices,” however it is not completely clear what this risk-based framework is and how it will be applied.

Most critically, where country systems are utilized, the ESF only requires *consistency* with the *key requirements* of the ESSs, rather than *compliance* with the *requirements* of the ESSs. Given that the ESSs have already been streamlined for a country systems model, to then only require consistency with *key requirements* of those streamlined ESSs leaves very little in the way of standards and requirements. Additionally, though the ESF states that the NDB will work with clients to strengthen country capacity and systems, it is unclear how and when this would occur. Gap-filling measures, for instance, are described in terms of extra measures to be taken by the client rather than capacity building facilitated by the Bank.

Recommendation: Change the benchmark for use of country or client systems to ensure compliance with the requirements of the ESSs. Develop a clear and transparent policy for assessing country and client systems, and identify a funded technical cooperation arrangement for country capacity building around core sustainable development priorities (e.g. sustainable agriculture, water, housing, education, health, green energy, pro-poor financial services etc.) Require corporate clients to align their policies and practices to the highest standards of responsible business conduct and respect for human rights, notably the UN Guiding Principles on Business and Human Rights.

International Standards. While we acknowledge the inclusion in the ESF of references to international standards and good practices, these references could be clearer and stronger. The ESF “encourage[s] the international good environmental and social practices” and “recognizes the importance of maintaining policy and operating standards which...(ii) are aligned with international good practices.” ESS1 on Environmental and Social Assessment notably states “This sections [sic] with respect to the environmental and social coverage shall be in accordance with country specific international agreements, signatories to international conventions / agreements and related national laws.” This is followed by a series of environmental and social issues to be addressed in social and environmental assessment. It is laudable that the ESS situates these issues within an international legal framework. Treatment of these environmental and social issues solely within an ESS on assessment, however, is somewhat unclear, as it does not clearly set forth a commitment to mitigate adverse impacts so as to not infringe upon countries’ international obligations, or to carry out project implementation in-line with countries’ international commitments. The requirements on environmental and social issues additionally are extremely general and in many cases fail to incorporate international standards which could provide much needed guidance for performance. The policy states that projects are required to comply with relevant International Labor Organization (ILO) conventions “as applicable to the country.” However, a minimum level of protection to workers would require that the NDB and borrowers comply with the core ILO conventions as set out in the Declaration on Fundamental Principles and Rights at Work. Where there is a difference in standards, the NDB does not set forth the rule, as some other financiers have, that the stronger standard applies. Instead the NDB leaves choice of law up to discretion. The ESF states that if national law is more stringent, NDB “can” decide to apply national law. Similarly, NDB “may apply additional requirements” of co-financiers.

Recommendation: Include a commitment to not infringe upon countries' international obligations. Clarify that environmental and social standards are to be met not just in impact assessment, but throughout implementation. Reference and ensure consistency with international standards, and where there is a difference in standards, require that the standard which offers more protection to people and the environment will apply.

Public participation, consultation and disclosure. Meaningful participation, transparency, and access to information are notably absent from the NDB's core principles. The ESF "requires the Client to conduct a meaningful consultation process" that begins "early", provides "timely" disclosure of "relevant and adequate" information, is gender inclusive and responsive, and "tailored to the needs of vulnerable groups", is "free of intimidation or coercion", and enables the incorporation of all relevant views of affected people. While this requirement has several useful elements, the failure to provide more detail on terms such as "meaningful", "timely" and "relevant" leaves the requirement less useful. While the ESF requires disclosure of social assessment documents before project appraisal, it does not include more detailed time bound requirements on disclosure, or clarity on how disclosure and consultation will ensure meaningful participation.

Recommendation: Open procedures and decision-making processes to direct participation of individuals, communities and civil society organizations potentially affected by NDB-financed activities. Require disclosure of key project documents, including assessments and planning instruments, 120 days prior to project approval.² Elaborate on the requirements for meaningful consultation, drawing on international good practice, including that these draft documents and other information are provided in local languages and in a format understandable by the affected communities, and that processes and timelines for consultation are transparent and mutually agreed with affected communities, transcripts of consultation proceedings and comments received are disclosed, etc.

Project Categorization. The Environmental and Social Policy lays out definitions for four categories of risk (A, B, C, and FI for financial intermediaries). The definition of Category A projects is overly narrow - "likely to be irreversible, diverse or unprecedented" impacts. Other financiers assign a high risk categorization to *potential* significant adverse environmental or social *risks and/or* impacts that are diverse, irreversible, *sensitive* or unprecedented. Under the

² The Asian Development Bank requires disclosure of draft environmental impact assessment reports for category A projects at least 120 days before Board consideration; draft environmental assessment and review frameworks, draft resettlement frameworks and/or plans, and draft Indigenous Peoples planning frameworks and/or plans before project appraisal (which tends to be around 120 days before approval); final or updated environmental impact assessments and/or initial environmental examinations, resettlement plans, and Indigenous Peoples plans upon receipt; and environmental, involuntary resettlement, and Indigenous Peoples monitoring reports submitted by borrowers/clients during project implementation upon receipt. Asian Development Bank, Safeguard Policy Statement, June 2009, <https://www.adb.org/documents/safeguard-policy-statement?ref=site/safeguards/main>.

ESF, only Category A projects require full environmental and social impact assessment. Such a system tends to create a dynamic in which high risk projects are under categorized. Similarly for FI projects, the ESF states that the “client shall provide environmental and social impact assessment and environment and social management plans for sub-projects where such impacts are *significant*.” There, however, is no guidance on how significance is determined and by whom. To ensure proper project assessment and planning, due care should be given to the categorization of risk.

Recommendation: Revise categorization to reflect the significance of social and environmental impacts as determined based on the scale of the impact (how many people could be affected), the remediability of the impact (how easy or difficult is it to remediate impacts) and the vulnerability of the groups which stand to be impacted (how exposed to the impact are they and how resilient are they). Require that risk and impact assessments are conducted through participatory processes so that the potentially affected communities play an active role in identifying impacts and their significance.

Environmental and Social Assessment and Management. Section D - “Coverage of Environmental and Social Assessment” of ESS1 includes a broad list of social and environmental issues, including land use, gender, vulnerable groups, climate change, etc. to be addressed in environmental assessment. While the scope of issues is appreciated, each one is incorporated superficially – in only one or two sentences – and with only a limited treatment of social (versus environmental) risks/impacts. Moreover, ESS1 only applies “if the project is likely to have potential adverse environmental and/or social risks and impacts.” This means that adverse impacts may go unassessed because they were not anticipated to be likely. Most importantly, there is a lack of clarity in the duty to actually avoid adverse impacts once they are assessed. Lack of clarity in the mitigation hierarchy could lead to offsetting of adverse impacts rather than avoidance and minimization. Similarly, the alternatives analysis does not require avoiding or mitigating adverse impacts. Finally, in the scope for assessment, the area of influence is unclear and the definition of “associated facility” is unduly limited.

Recommendation: Ensure that ESS1 applies to all projects. The scope of assessment may vary in accordance with the significance of potential impacts, but all projects should have some level of social and environmental assessment and management. The mitigation hierarchy should ensure that adverse social and environmental impacts are avoided. It is equally important to include clear guidelines to ensure that significant positive social and environmental impacts are achieved, consistent with the NDB’s vision to be a leader in advancing inclusive, sustainable development. The ESF should identify the staffing and resources necessary for social and environmentally sustainable operations, including dedicated environmental and social specialists and environmental and social compliance officers.

Natural habitats. While the ESF includes a prohibition on project activities in areas of critical habitats, it provides for wide exceptions. The framework explicitly allows activities within protected areas. While it states that clients should ensure there is no significant conversion or degradation of natural habitats, it provides big loopholes where “(a) alternatives are not available; (b) the overall benefits from the project substantially outweigh the environmental costs; and (c) any conversion or degradation is appropriately mitigated.”

Recommendation: Prohibit financing for activities in critical habitats or protected areas and clarify what mitigation is required for any significant degradation of natural habitats.

Climate Change. We commend the inclusion of climate change as a core principle of the ESF, as well as the requirements for assessing potential climate impacts and development of mitigation and adaptation measures. Clients are to “[c]onsider alternatives and implement technically and financially feasible and cost-effective options, as appropriate, to reduce project-related greenhouse gas emissions during design and operation. For projects with significant greenhouse implication, where technically and financially feasible, quantify direct and indirect emissions in line with national protocols.” The ESF states that the Bank “encourages climate proofing of its infrastructure financing and investments to build resilience to climate change”. However, these requirements are generally discretionary “as appropriate” or where “financially feasible.” The ESF could provide clearer and stronger climate-related requirements for project selection and implementation.

Recommendation: The ESF should, as the Asian Infrastructure Investment Bank’s policy framework³ does, require: that project design and selection minimize emissions, in accordance with the 2015 Paris Agreement; that the bank prioritize mitigation or adaptation measures to reduce risk of climate change; and that the bank commit to assisting clients in achieving host countries’ nationally determined contributions. The ESF should also provide clearer and stronger climate-related requirements for project selection and implementation, including prioritizing greenhouse gas neutral and climate resilient infrastructure, developing an annual cap on greenhouse gas emissions from Bank-financed activities, and supporting greenhouse gas quantification and reporting. NDB’s Exclusions List should include projects that are particularly exacerbating of climate change, including coal-related activities, as well as other carbon intensive projects.

Inclusion and non-discrimination. The ESF lists inclusive development as a core principle and it is laudable that the policy requires assessment of “social risks and impacts that fall disproportionately on vulnerable groups, and any prejudice or discrimination toward individuals or groups in providing access to development resources and project benefits, particularly in the

³ The Asia Infrastructure Development Bank Environmental and Social Framework Policy, February 2016, ESS1 <https://www.aiib.org/en/policies-strategies/download/environment-framework/20160226043633542.pdf>

case of vulnerable groups.” The policy however does not clearly require that discrimination be avoided and that disparate impacts be mitigated through differentiated measures.

Recommendation: Add an explicit commitment to non-discrimination and require that social risks and impacts that fall disproportionately on vulnerable groups and any prejudice or discrimination in providing access to benefits must be avoided and mitigated through differentiated measures. Support clients in collection of disaggregated data.

Gender. We acknowledge that gender equality is listed as one of the NDB’s core principles. However, the ESF does not include requirements to prevent non-discrimination and ensure women’s access to project benefits. The ESF requires projects to “[i]dentify any potential gender-specific adverse impacts” but merely to “undertake to develop mitigation measures to reduce these.” It also instructs that “[w]here relevant, consider enhancing the design of the project to promote equality of opportunity and women’s socio-economic empowerment, particularly with respect to access to finance, services and employment.”

Recommendation: Encourage as the AIIB⁴ does, that potential gender-specific opportunities are identified as well as adverse gender-specific impacts, and require that such adverse impacts are avoided or reduced. Enhance the design of projects in an inclusive and gender-responsive manner to promote equality of opportunity and women’s socioeconomic empowerment, particularly with respect to access to finance, services and employment and property/resource ownership and control. Reference international standards on women’s rights and develop measures to ensure women’s meaningful and effective participation, consultation, and access to information.

Due Diligence. The ESF states that while project implementation is the responsibility of the client, “NDB seeks to play a proactive role by way of (i) ensuring stricter compliance with applicable national standards; (ii) working with the client to strengthen the country capacity and systems; and (iii) knowledge sharing with clients on international good practices. NDB may provide support to clients during project processing, and monitoring and supervision, where necessary.” The policy does not state that NDB will conduct the due diligence necessary to ensure compliance with the requirements of the policy, but rather that the NDB will “engage its clients to take adequate action to ensure the full achievement of the *objectives*.” Under the ESF, the NDB’s role is one of reviewing documents provided by the client rather than undertaking active due diligence. Similarly, the framework does not provide for participatory monitoring. Moreover, the compliance bar is unclear — NDB is to “ensure compliance” with country and corporate systems and with the legal agreement, but only “*consistency with key requirements*” of NDB’s ESSs.

⁴ The Asia Infrastructure Development Bank Environmental and Social Framework Policy, February 2016, p. 34 <https://www.aiib.org/en/policies-strategies/download/environment-framework/20160226043633542.pdf>

Recommendation: Require compliance with the requirements of the ESSs not merely their objectives. State that NDB will conduct necessary due diligence to assess and ensure compliance throughout project design and implementation. Identify these due diligence measures and processes, including site visits, conducting consultations or independent research, use of third party experts and use of participatory monitoring.

Accountability. The NDB requires the client to establish and maintain a grievance mechanism, but additionally states that “existing national mechanisms for grievance redressal” may be “deemed appropriate” in complying with this requirement. Such national mechanisms often lack adequate independence and capacity such that they are unable to provide effective redress. The framework does not set forward clear criteria for a valid, functional grievance mechanism, such as accessibility, legitimacy, and other effectiveness criteria for non-judicial mechanisms as found in the UN Guiding Principles on Business and Human Rights (‘UNGPs’). Moreover, the lack of clarity around compliance requirements and the absence of clear requirements and timelines within the ESF present a major challenge for accountability. The ESF furthermore makes no provisions for an independent accountability mechanism for the NDB, an established practice within development finance institutions. Lastly, the ESF does not include provisions for a remedy fund to ensure that harmed communities and individuals have access to redress.

Recommendation: Require the establishment of project level grievance mechanisms that meet the UN Guiding Principles on Business and Human Rights’ effectiveness criteria for non-judicial grievance mechanisms. In addition, establish an independent accountability mechanism for the NDB, based on best international practices and which meets UNGP effectiveness criteria, with powers to make binding decisions related to complaints on matters of social and environmental impacts arising out of the projects and allegations of non-compliance with the ESF and relevant policies. Take measures to protect complainants from retaliation for raising concerns and complaints, including allowing for complainants to remain anonymous. Require that clients contribute to an NDB or third-party administered contingency arrangement, such as a fund, insurance plan, or bond, to provide financial or other remedy in case negative impacts occur.

ESS2: Involuntary Resettlement. The inclusion of an Involuntary Resettlement Standard is standard practice and welcome. However the current proposal is overly general, lacking the detail necessary to ensure sustainable resettlement activities. Critically, it does not include a prohibition on forced evictions. In addition, the scope of the policy is very narrow. Economic displacement is described as “(loss of land, assets, access to assets, income sources, or means of livelihoods) as a result of (i) involuntary acquisition of land, or (ii) involuntary restrictions on land use or on access to legally designated parks and protected areas.” It is unclear whether this includes loss of natural resources or access to natural resources, and it seemingly does not include land administration projects. The policy lacks sufficient provisions to ensure that resettlement solutions are designed together with the people to be resettled. Notably, the policy does not provide for recognition of customary land rights or provide protections for those

without formal legal title. Instead *persons without title or legal rights* are only eligible for resettlement assistance and compensation for loss of non-land assets. Draft resettlement plans are to be disclosed “prior to appraisal”, however there is no timeline to ensure that affected people would have sufficient time to be consulted on the plan.

The policy should include an objective to strengthen, secure and prioritize the tenure rights of vulnerable and marginalized people and to promote more equitable use of, access to and control over land, housing and natural resources, with particular attention to the rights of women. Security of tenure is a crucial foundation for poverty reduction and sustainable development, as well as the enjoyment of a variety of rights.

Recommendation: Expressly prohibit financing for forced evictions. Establish significantly stronger and more detailed requirements to ensure avoidance of involuntary resettlement and effective livelihood restoration, harmonized with international human rights norms on resettlement and forced evictions. Expand the scope of the policy to cover all physical and economic displacement that occurs as a result of project activities. Establish clear provisions to ensure that resettlement activities are designed through meaningful consultation with affected people and that resettlement planning documents are produced and disclosed 120 days prior to project approval. Require a participatory tenure security assessment that captures all existing forms of tenure within the project’s area of influence and an action plan for the conferral of legal security for the range of existing forms of tenure. Tenure security measures should promote and secure women’s tenure rights regardless of marital, civil or social status, with the aim of achieving non-discrimination and gender equality in land tenure systems.⁵

ESS3: Indigenous Peoples. The Indigenous Peoples Policy has two inconsistent triggers for when it is to apply. ESS3 states that “[T]his Framework applies if the project would directly or indirectly affect the dignity, human rights, livelihood systems, or culture of indigenous peoples or affects the territories or natural or cultural resources that indigenous peoples own, use, occupy, or claim as an ancestral domain or asset.” This is a good trigger. The screening under ESS3, however, uses a test of “(i) whether indigenous peoples are present in, or have collective attachment to the project area; *and* (ii) whether project impacts on indigenous peoples are *likely*”, which is very narrow. Moreover, the Environmental and Social Assessment policy, lists an even narrower trigger of whether indigenous peoples “are present in the project area”.

Moreover, the consultation and participation requirements in the policy are inadequate and unclear. The policy does not require clients to obtain indigenous peoples’ free, prior and

⁵ For a fuller exploration of measures which could help to ensure stronger tenure security for affected populations, see: Inclusive Development International and Oxfam, A Proposal for New World Bank Safeguards on Tenure of Land, Housing and Natural Resources, April 2013, http://www.inclusivedevelopment.net/wp-content/uploads/2013/04/World-Bank-Tenure-SafeguardsSubmission_FINAL.pdf

informed consent⁶ through their decision making processes for projects that will affect their rights or lands or resources. While the policy calls for informed consultation of indigenous peoples, that consultation is limited to discussion of mitigation measures and benefits, while “where applicable” the project should “allow for Indigenous peoples’ effective participation in the design of project activities or mitigation measures that could potentially affect them either positively or negatively.” While the consultation process “involves Indigenous peoples’ representative bodies and organizations,” consultation with other community members is only required “where appropriate.” There is not a clear requirement for Indigenous Peoples Plans to be developed together with indigenous peoples, nor a clear timeline for disclosure.

Critically, the policy does not include protections for indigenous peoples’ collective or customary land rights. As indigenous peoples often lack formal legal title, their land and resource rights are often vulnerable to violation. The Indigenous Peoples Policy similarly does not require benefit sharing for use or development of indigenous peoples’ natural or cultural resources, though benefit sharing is mentioned in the Involuntary Resettlement Policy.

Recommendations: Require verification of indigenous peoples’ free, prior and informed consent, defined in accordance with established international law and by the respective people, for any projects that would affect their lands, territories, natural resources, cultural heritage, or involve resettlement. Ensure consistency with the broader trigger of “directly or indirectly affect the dignity...” for application of the Indigenous Peoples Policy. Require respect for indigenous peoples’ collective customary land rights and require that indigenous peoples share in the benefits of any commercialization or use of their natural resources. Require that Indigenous Peoples Plans and social and environmental assessments be developed in consultation with indigenous peoples and disclosed in draft form 120 days prior to project approval.

Endorsing organizations,

Coalition for Human Rights in Development, International
Economic Justice Network (EJN) of FOCCISA, South Africa
Asia Indigenous Peoples Pact, Regional
Oxfam, International
Conectas Human Rights, Brazil
International Rivers, International
International Accountability Project, International
Brazilian Network for the Integration of Peoples (REBRIP), Brazil
Institute for Socioeconomic Studies (INESC), Brazil
Centre for Applied Legal Studies (CALC), South Africa
Project 90 by 2030, South Africa

⁶ Free, prior, and informed consent (FPIC) is endorsed by different international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention No. 169 - Indigenous and Tribal Peoples Convention, 1989