August 6, 2021

Comments on the EIB's Draft Environmental and Social Sustainability Framework

Adapted from consultation questionnaire

Environmental and Social Policy

Thank you for the opportunity to provide feedback on the European Investment Bank's (EIB) draft Environmental and Social Sustainability Framework (ESSF). As an organization that supports local communities affected by internationally financed development projects, we know the importance of strong environmental and social safeguards for project-affected people.

Our experience supporting local communities impacted by EIB financing has revealed a number of shortcomings with the Bank's current environmental and social practice, shortcomings which the draft ESSF largely fails to address or in some cases even exacerbates. The EIB approved financing for the 220 kV Marsyangdi Corridor transmission line in 2014, as part of the Nepal Power System Expansion Project. The project is causing a range of environmental and social issues for communities we are supporting in the Lamjung and Manang districts of Nepal, including inadequate consultation, displacement, and violations of the rights of Indigenous Peoples. The EIB's own Complaints Mechanism (CM) recently published its Conclusions Report for the project that verified these harms.

These issues, which are further detailed throughout this submission, illuminate the need for bolder reform of the Bank's environmental and social framework.[1] For many of these issues, the failings of the promoter stemmed from failings of the Bank. The failure of the Bank to ensure timely completion of required environmental and social activities, provide the necessary technical support, and meaningfully monitor environmental and social practice demonstrates the need for a stronger Environmental and Social Policy ("the Policy").

Time-bound requirements: The discretionary instructions in the Policy (and throughout the ESSF) on when to conduct certain practices has led to counterintuitive results, with activities and documents being completed after they are needed. In the Nepal case, for instance, environmental and social impact assessments remain incomplete and resettlement action plans have not been finalized despite the land acquisition process and project construction activity being well underway.

The untimeliness of important environmental and social documentation directly implicates the Bank's ability to conduct an "informed decision-making process" on whether to finance a project

[1] We note that the online consultation process for this review has limited outreach and the ability of stakeholders, in particular, among vulnerable and marginalized groups and communities, to meaningfully participate. For example, the main languages of the consultation are in English, French, German, Spanish, and Protuguese, limiting the ability of many marginalized groups, especially outside Europe, to understand the draft ESSF and express their feedback.

(Draft Policy, paras. 4.2, 4.18) and refrain from financing projects that do not comply with its standards (*Id*., para 4.4). As the Nepal case illustrates, untimely environmental and social practice can undermine a project throughout implementation.

The Policy (and corresponding Standards in the ESSF) should establish clear timelines throughout the project lifecycle to promote environmental and social practice that is timely and effective. At a minimum, the Policy should specify what types of environmental and social documentation should already be completed and included in the submission to the Governing Bodies for approval (*Id*., para. 4.18).

Technical assistance: Many of the environmental and social problems associated with the Nepal project attribute, in part, to a lack of technical assistance provided by the EIB to the promoter. The CM found that the EIB "did not identify what resources and what technical support would be needed to close existing gaps between the national legislation and the EIB E&S standards, and ensure full compliance of the Project with the EIB requirements" (Conclusions Report, para. 5.6.7).

Unfortunately, the draft Policy does little to address this potential issue in future projects. The Policy contains only a single paragraph on technical support (Draft Policy, para. 4.17). The discretionary language in the Policy around technical assistance – "when feasible and appropriate" (*Id*.) – is insufficient to ensure that Bank management consistently identifies and addresses the need for technical assistance for the projects it finances.

The Policy should provide clearer guidance on how Bank management is to assess and address the need for technical assistance on each project. The Policy should specify that this should begin before the project is even approved. As the Nepal Conclusions Report notes, "[t]his question about the need for resources and support should be raised at appraisal stage" (para. 5.6.7). Commensurate with this, the Policy should include a commitment not to finance projects where the Bank is unable to provide the technical assistance necessary to ensure adequate promoter capacity to implement good environmental and social practice. Such technical assistance should be provided first, rather than simultaneous to project implementation.

Meaningful monitoring: Effective monitoring is crucial for the Bank's ability to continue promoting environmental and social sustainability as a project is being implemented. Without effective monitoring, and meaningful action when monitoring identifies gaps in environmental and social practice, issues can not only persist but worsen. In Nepal, the CM found that, despite insufficient or nonexistent environmental and social documentation that should have been completed before construction, the Bank nonetheless continued to make financial disbursements to continue construction (Conclusions Report, Table 6, p. 45). This was a contractual condition included in the finance contract with the promoter. Yet construction activities continue today demonstrating the Bank's failure to take immediate corrective action.

There is only a single paragraph in the draft Policy on the Bank's monitoring role (Draft Policy, para. 4.20). There is scant detail on how the Bank can meaningfully track the promoter's compliance with environmental and social requirements and contractual conditions, and take corrective action when compliance gaps are identified. The final Policy should include more concrete guidelines for how the Bank will monitor projects and ensure that contractual conditions are honored. The Policy should ensure monitoring is conducted routinely, at periodic intervals, including requiring the promoter to submit periodic monitoring reports on its environmental and social performance and specifying how often the Bank will conduct site visits. It should also detail how the Bank should use financial, contractual, and other forms of leverage to ensure promoters take corrective action when gaps are identified and the escalating steps to be taken if the promoter continues to fail to comply with its social and environmental commitments.

Standard 1: Environmental and/or Social Impacts and Risks

In the Nepal project, incomplete or non-existent environmental and social documentation provided the EIB and the promoter with an inadequate picture of the environmental and social risks associated with the project. The environmental and social blindspots this created exacerbated the project's information disclosure failings (see comments on Standard 2). To promote more consistent and effective practice around environmental and social impacts and risks, the new Standard 1 must provide more specific and practical guidance to promoters on conducting environmental and social, cumulative impacts, and strategic environmental assessments.

Environmental and/or Social Impact Assessments: The Environmental and/or Social Impact Assessment (ESIA) mandate in the draft Standard 1 is couched in highly discretionary language, noting that the ESIA process "*may* involve *some* or all" of the steps listed (Draft Standard 1, para. 16) (emphasis added). This is insufficient to ensure promoters consistently identify and address environmental and social impacts and risks adequately. For instance, the lack of time-bound requirements can – and has, in the case of the Nepal project – led to absurd situations where impact assessments remain incomplete and thus unfinalized years after a project has commenced (see Conclusions Report, para. 5.1.25).

Cumulative impacts: In the Nepal project, the CM found the quality of the assessment of potential cumulative impacts, a required part of the ESIA, to be poor (Conclusions Report, Table 3, p. 11). Like current policy, the draft Standard 1 instructs promoters to assess cumulative impacts but, apart from a general definition in footnote 16, provides no actionable detail on how to do this. Specific guidance should be provided through an annex, similar to Annex 2A in the draft standard containing a recommended table of contents for the ESIA report.

Strategic Environmental Assessments: Leaving use of a Strategic Environmental Assessment (SEA) to the promoter's discretion (Draft Standard 1, para. 15) is a missed

opportunity, identified by the EIB's own accountability mechanism, to ensure better environmental and social practice. For the Nepal case, the CM found that no SEA was carried out, despite Bank management itself noting "the importance of an SEA as an upstream tool used to identify the best available planning options early in the decision-making process" (Conclusions Report, para. 5.1.24). In light of the CM's finding that promoting the use of an SEA "could be conducive for the success of future investments" (*Id*., para. 5.1.28), Standard 1 should establish a firmer expectation for promoters to conduct SEAs.

Standard 2: Stakeholder Engagement

In the Nepal case, project authorities failed to provide meaningful information disclosure and consultation about the project's environmental, human rights, and economic livelihood impacts. There were major flaws in public consultation processes, with low participation levels, particularly of women. In one project area, the total number of people who attended public consultations was as low as one percent of the total population.

The new draft Standard 2 retains much of the same imprecise and discretionary language from the current Standard – information disclosed "in a timely manner" (Draft Standard 2, para. 11(a)); engaging throughout the project cycle "whenever necessary" (*Id*., para. 13); supplement engagement activities "whenever applicable" and "with any action deemed necessary" (*Id*., para. 14) – which the Nepal case has shown to be insufficient to ensure meaningful stakeholder engagement. To promote more consistent and effective stakeholder engagement, Standard 2 should be revised to provide more robust instructions on addressing reprisals, Stakeholder Engagement Plans, and means of communication.

Reprisals/intimidation: Communities in Nepal have consistently reported to the Bank and the CM the intimidation they have experienced from project authorities to accept compensation for land acquisition, but feel their concerns have not been adequately addressed (see Conclusions Report, para. 4.5). Standard 2 contains very little on the details for how the promoter is to deal with reprisals. While this is elaborated on in the Guidance Note on Stakeholder Engagement (see Guidance Note, p. 33-35) even that document provides insufficient detail on what is expected *of the Bank* if such cases are escalated to the EIB. The Guidance Note simply states, "EIB management will be informed of such cases, so it can consider possible action" (*Id*., p. 35). The EIB wrote a letter to the promoter in the Nepal case which was met with outright denial by the promoter. At the minimum, the Standard should require a credible investigation by the Bank into the issues raised by communities rather than taking promoters' claims at face value.

Stakeholder Engagement Plans: The discretionary language in the draft Standard 2 extends even to the decision to prepare a Stakeholder Engagement Plan (SEP). Promoters are told to determine whether to create a SEP based on "the nature and scale of the projects and their potential impacts and risks" (Draft Standard 2, para. 26), with little guidance on accurately making that determination. The Guidance Note on Stakeholder Engagement similarly prescribes

general criteria – "[i]n most projects where there are moderate or significant environmental and social risks" (Guidance Note, p. 13) – without instructions on how to apply them.

The Nepal project demonstrates how, even when "the development of a SEP should have been considered a must given the nature of the Project," promoters can opt not to create one (Conclusions Report, para. 5.2.12). Standard 2 must provide more concrete guidance on making this determination if it is to be made consistently and correctly.

Means of communication: Similarly, while the draft Standard 2 instructs that information be made "available to the public in the most accessible way and as soon as it can reasonably be provided" (Draft Standard 2, para. 35), this mandate is unaccompanied by any actionable guidance for achieving it. Such guidance is crucial. In the Nepal project, the promoter failed to ensure effective communication channels and was insufficiently responsive to the language needs of the communities. The CM found that better communication would "encourage meaningful and effective participation and the active involvement of different groups of PAP in decision-making" (Conclusions Report, para 5.2.14).

The disclosure of project information should be comprehensive, transparent, and readily available in the formats and languages that the affected stakeholders can fully understand. To facilitate this, Standard 2 should provide additional detail on how promoters can conduct effective communication with local communities.

Standard 6: Involuntary Resettlement

Communities affected by the Nepal project were provided little information about resettlement impacts and compensation, including both landowners who have or will be physically displaced by tower construction and those economically displaced under the line's right of way. The application of Nepalese policy, rather than a more holistic evaluation of resettlement compensation, proved inadequate and leaves communities without compensation sufficient to replace devaluation of their land and lost earning capacity that secures their livelihoods and community fabric.

Draft Standard 6 creates an imprecise mandate for promoters regarding Resettlement Action Plans (RAPs) and other planning documents. The Standard instructs that they be "commensurate with the extent and degree of the impacts, the scope of the physical and economic displacement and the vulnerability of the affected persons" (Draft Standard 6, para. 53) but provides little indication of how to make and apply these determinations, which can lead to very inconsistent results from project to project.

Standard 6 should include more concrete guidance on developing RAPs, including by when they must be completed and indications of how far in advance of the proposed resettlements these RAPs and other documentation should be disclosed to project-affected communities and

consulted on. Without these revisions, Standard 6 risks enabling a repeat of the problematic issues in the Nepal case, where the CM noted that RAPs were still not finalized years into the project and after the land acquisition process had begun (Conclusions Report, para. 5.4.40).

Lastly, Standard 6 should include more guidance and support on determining fair compensation for certain types of land acquisition, such as the imposition of easements and rights of way. Without further guidance, the Bank risks a repeat of the issues in the Nepal project. The CM found that the RAPs failed to deal with land use restrictions and called for a better and fairer accounting of the actual impacts of the restrictions (*Id*., para. 5.4.40-5.4.41). While draft Standard 6 makes clear that the imposition of such access rights constitutes land acquisition (Draft Standard 6, fn. 1), it provides no additional instructions for ensuring fair compensation is determined in such circumstances.

Standard 7: Vulnerable Groups and Indigenous Peoples

The Nepal project promoter failed to take steps to seek local peoples' free, prior, and informed consent (FPIC), even though community land rights of traditionally governed Indigenous communities are directly implicated by the 220 kV Marsyangdi Corridor, and Indigenous Gurung are the most populous group in Lamjung district. The lack of information disclosure and consultation is in sharp violation of international and domestic requirements to seek FPIC of Indigenous Peoples.

In light of these failings, it is unfortunate to see the draft Standard 6 seemingly take a step back in terms of safeguarding Indigenous rights. The draft standard now only makes one fleeting reference to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – a crucial resolution that is of particular significance in the countries where there is no legal recognition of Indigenous Peoples within the domestic legal framework – and weakens the definition of consent by, among other things, omitting the importance of meaningful and equitable participation, especially of Indigenous women, children, and youth.

Rather, Standard 7 should effectuate the Bank's professed commitment to Indigenous rights with strong protections for Indigenous Peoples. As a first step, Standard 7 should reestablish its commitment to UNDRIP and codify a firm expectation that FPIC be a collective process centered on equitable and meaningful participation, effective communication, and ensuring sufficient time for Indigenous communities to make informed decisions, and may culminate in a decision by communities not to proceed with a project. Standard 7 should also provide more guidance on identifying Indigenous Peoples, codify a sufficiently inclusive definition of Indigenous Peoples, and specify how the Bank will ensure accountability for infringements of Indigenous rights.

Identifying Indigenous Peoples: The safeguarding of Indigenous rights starts with properly identifying when Indigenous communities are affected by a project. The Nepal case showed

how a failure to identify and properly document Indigenous Peoples can render the remaining safeguards moot. The CM found that the required documents for the Nepal project "do not provide substantiated information about whether and to what extent the Project would affect indigenous peoples in terms of their traditional or customary rights and interests over lands and natural resources, physical relocation, and livelihoods (except for some broad statements)" (Conclusions Report, para. 5.3.22). Predictably, the rest of the process exhibited significant shortcomings. The CM found no evidence of an FPIC process and that other required documentation was either inadequate or non-existent (Conclusions Report, paras. 5.3.24, 5.3.31).

Unfortunately, it is not clear whether the draft Standard 7 provides any additional guidance to promoters for effectively conducting this crucial step, only instructing promoters to "seek the most reliable information" (Draft Standard 7, para. 33). While providing some additional guidance on conducting an FPIC process, the Guidance Note on Stakeholder Engagement is also vague on the threshold question of how to determine the presence of Indigenous communities (see Guidance Note, p. 25).

Inclusive definition of Indigenous Peoples: Exacerbating the lack of guidance on identifying Indigenous Peoples is an overly rigid definition of Indigenous Peoples that threatens to unduly exclude some communities. Paragraph 10 of the draft standard requires that Indigenous groups possess all prescribed characteristics – self-identification, collective attachment to ancestral land, customary cultural economic social and political institutions, and a distinct language or dialect – to qualify as Indigenous People under the ESSF. However, in reality, some groups that are socioculturally distinct may nonetheless not meet all prescribed characteristics and thus be denied access to Standard 7's protections and remedies. At a minimum, the standard should codify that these characteristics may be exhibited in "varying degrees" (see Guidance Note, p. 25) and provide for flexibility to promote an inclusive conception of Indigenous Peoples for each project.

Responsive action by the Bank: Finally, the current situation in the Nepal case demonstrates that Standard 7 needs to more clearly specify what measures the Bank will take if the promoter does not undertake an FPIC process. At present, the draft standard states that "when an FPIC process is required, the Bank shall not be able to proceed with the financing of these activities" (Draft Standard 7, para. 45). It should go further to state that the project activity should be suspended and, if the promoter remains in noncompliance, for instance by continuing construction activities without conducting FPIC, the Bank must exercise various forms of leverage, escalating to possible exit.