

SUBMISSION II

Office of the United Nations High Commissioner for Human Rights

Comments on the draft AIIB Project-affected Peoples' Mechanism Phase II Public Consultation

16 March 2018

Introduction

1. The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to provide comments on the consultation document for the proposed AIIB Project-affected People's Mechanism (PPM) (the "document" or "proposed mechanism"). OHCHR's comments and recommendations elaborate on the Office's submission during the first phase of the public consultation.¹
2. OHCHR notes that an independent and effective PPM will be crucial to ensure the effective fulfilment of the AIIB's mandate to foster sustainable economic development,² by guaranteeing the environmental and social soundness and sustainability of the projects it finances.³ In this regard, in OHCHR's view, it is critical that the PPM terms of reference and procedures reflect international best practice and the lessons that have been learned by other Independent Accountability Mechanisms (IAMs).
3. OHCHR's submission first underlines the applicable international human rights framework (A). The submission then highlights the positive features identified in the document (B), and then analyses elements of the proposed mechanism that, in OHCHR's opinion, warrant further strengthening (C). The submission then provides specific comments and recommendations in relation to the operative parts of the document concerning the PPM's structure and procedures (D).

A. Accountability and the right to remedy

4. International organizations are subjects of international law and are bound by general rules of international law,⁴ including with respect to human rights. OHCHR welcomes the AIIB's explicit commitment to support international human rights through the projects it finances and to encourage

¹ OHCHR, Recommendations for the future AIIB Complaints Handling Mechanism (31 May 2017) [hereinafter "OHCHR Submission 2017"] available at:

<http://www.ohchr.org/Documents/Issues/Development/DFI/RecommendationsfortheFutureAIIBComplaintsHandlingMechanism.pdf>

² AIIB, Articles of Agreement, adopted on 29 June 2015, entered into force on 31 December 2016, art. 1.

³ AIIB, Environmental and Social Framework (ESF) (February 2016), p. 2.

⁴ Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20).

respect for them, and to support the implementation of Clients' national and international obligations relating to environmental and social risks (AIIB Environmental and Social Policy (ESF), para 4).

5. OHCHR strongly recommends that the AIIB's commitment to human rights be reflected more explicitly and consistently in the design of the PPM. The principle of accountability is a cornerstone of the human rights framework. Article 2 of the Universal Declaration of Human Rights and article 2 of the International Covenant on Civil and Political Rights jointly affirm the right to "an effective remedy" by the competent authorities for human rights violations (art 8). Other international human rights treaties ratified by AIIB members also support this right.⁵ More broadly, the concept of accountability refers to the relationship between State actors and other duty bearers and rights holders affected by their decisions and actions.⁶ In the context of the development process, the principle of accountability promotes the responsiveness of all relevant actors—including not only States but also intergovernmental institutions and the private sector—to the communities and individuals affected by their policies, actions and omissions. Accountability has a corrective function, making it possible to address individual or collective grievances and sanction wrongdoing by the individuals and institutions responsible. However, accountability also has a preventive function, helping to determine which aspects of a policy or project are working well, so that these strengths can be built upon, and which aspects are not working and need to be removed or improved.

6. The concept of accountability has become an integral component of the framework for engagement between Development Finance Institutions (DFIs) and the communities and individuals affected by the projects that they support. While IAMs generally seek to promote compliance by the various institutions with their own operational policies, they can also have a role in advancing accountability in the broader sense embodied in the international human rights framework, by increasing the overall responsiveness and answerability of DFIs with respect to their impacts on development and human rights. Many internal safeguard standards are explicitly aligned with human rights norms and principles, procedurally or substantively, and certain IAMs have (appropriately) considered relevant international human rights standards when interpreting the application of safeguard policies in practice.⁷ In order to advance human rights accountability in the work of the AIIB, the future PPM should be equipped with a progressive and explicit mandate, robust procedures and adequate resources. OHCHR's submission to the first phase of the consultation on the AIIB complaints mechanism discusses the criteria that should guide the design of the PPM, on the basis of the list of effectiveness criteria for non-judicial grievance mechanisms set forth in the UN Guiding Principles on Business and Human Rights (UNGPs).⁸

⁵ Cf. article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD).

⁶ OHCHR and Center for Economic and Social Rights (CESRs), *Who will be accountable? Human Rights and the Post-2015 Development Agenda* (2013), p. ix, available at: www.ohchr.org.

⁷ See, e.g., Inspection Panel, Investigation Report: Chad-Cameroon Petroleum and Pipeline Project (Loan No. 4558-CD); Petroleum Sector Management Capacity Building Project (Credit No. 3373-CD), and Management and the Petroleum Economy (Credit No. 3316-CD) (2000), para 215; Investigation Report: Honduras: Land Administration Project (IDA Credit 3858-HO), Report No. 39933-HN (June 12, 2007), para 256; CAO Audit of IFC Investment in Corporación Dinant S.A. de C.V., Honduras, CAO Ref: C-I-R9-Y12-F161 (December 20, 2013), paras 38, 46-52.

⁸ OHCHR Recommendations for the future AIIB Complaints Handling Mechanism, *supra*, pp. 2ff.

B. Positive features

7. OHCHR welcomes the intention of the proposed PPM to “provide an independent, impartial and effective way to address” potential or actual adverse impacts derived from AIIB-financed Projects (para 1.1), based upon a definition of “project area of influence” which includes induced impacts. OHCHR notes the PPM’s proposed focus on prevention on harms (e.g. paras 22-24, 66) and the inclusion of a “continuous learning” function, which, in line with the UN Guiding Principles on Business and Human Rights, should “identify and influence policies, procedures or practices that should be altered to prevent future harm.”⁹ OHCHR notes that the PPM intends to provide Project-affected people with several entry points to file submissions during the project-cycle including formal compliance review and dispute resolution procedures, although as will be specified shortly, the eligibility criteria seem unduly restrictive in several important respects (para 30). OHCHR welcomes the inclusion of a section dealing with the identification and management of retaliation risks faced by complainants to the PPM, in line with the best practice of other IAMs and OHCHR’s previous recommendations.

C. Recommended areas for further strengthening

8. Despite a number of potentially positive features, however, in OHCHR’s view there appear to be several weaknesses or ambiguities in the document which could severely limit the accessibility and effectiveness of the PPM. The main areas of concern from OHCHR’s perspective are the following:

- **Limited scope.** The scope of the PPM is proposed to be limited to ESP-related concerns (4.3.1), subject to paragraphs 15 and 19, alone, rather than a wider range of operational policies and procedures as is the case with other IAMs. In OHCHR’s view, in line with best practice of other IAMs, the scope of the PPM should be defined by reference to the potential or actual adverse impact or harm resulting from projects financed in whole or in part by the Bank. The PPM should also be mandated to assess the adequacy of AIIB policies and procedures to prevent and redress harms.
- **Unduly rigid sequencing.** The scheme of relief under the PPM is divided into “concerns”, requests for dispute resolution, and complaints. However, complaints are only admissible in the project implementation phase. This appears to be an unduly rigid scheme and seems to overlook the fact that early resolution (“pre-emptory review” and/or dispute resolution) may not be the most feasible, suitable, safe or desirable option for complainants to pursue in a given situation, and that mitigation actions are more likely to be effective early in the project cycle. If accountability and access to justice are the dominant objectives, all options should be open to complainants as early as possible in the project cycle. To foreclose the possibility of compliance review prior to project approval may result in delay or denial of justice to many complainants. While aiming for flexibility, this scheme of review seems to be unduly rigid and out of kilter with the political economy of major infrastructure projects.
- **Inconsistent eligibility criteria and unnecessary or arbitrary restrictions for filing submissions.** Eligibility criteria are set forth not only in a dedicated section (5.2), but also in other sections relating to the scope and accessibility of the mechanism (4.3), the complaint review procedure (4.3.3) and filing (5.1). The criteria defined in these various sections are not always internally

⁹ UN Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31/Annex (2011) [hereinafter UNGPs], Principle 31, Commentary, para (g).

consistent and seem to accumulate layers of eligibility tests, thus limiting the accessibility of the mechanism. Some of the eligibility criteria seem to impose unnecessary or arbitrary restrictions upon project-affected people wishing to file a complaint, particularly in relation to the proposed provisions concerning the eligibility to file (including the proposed requirement in paragraph 33 that those seeking compliance review must show the reasonable likelihood of “substantial” adverse impact); external support and representation; language requirements, and prior contact with project-level grievance mechanisms and AIIB management.

- **Insufficient institutional guarantees of independence and integrity.** The functional independence of the PPM is not fully assured, particularly vis-à-vis the CEIU Managing Director (CEIUD MD) who is expected to be closely involved in the complaint procedure. The document fails to establish pre and post-employment cooling-off periods for the CEIU MD and PPM staff, which could significantly compromise the independence and legitimacy of the mechanism. In OHCHR’s view, consistent with best practice, the PPM should be vested with the authority to autonomously initiate formal compliant procedures *ex officio* in the absence of a complaint, and without the Board’s approval.
- **Potential gaps in relation to the use of co-financer’s or Client’s systems.** The criteria set forth in Section 5.9 relating to the use of environmental and social systems of co-financing institutions or AIIB Clients seem to be inconsistent with the general principle that the PPM’s mandate extends to all projects “financed in all or in part by AIIB” (para 14) and seems to deviate with the provisions of the AIIB Environmental and Social Policy (ESP) at least in certain respects. Moreover, the exclusion from the scope of the PPM of AIIB decisions relating to the use of the environmental and social systems of financing institutions seems unwarranted, in OHCHR’s view, and contrary to the AIIB’s commitment “to stakeholder responsiveness and robust internal oversight to engender trust, confidence and constructive partnerships in Project design, processing and implementation” (para 11).
- **Limited transparency and accessibility.** The provisions regarding the disclosure of documents relating to PPM procedures appear to fall well short of the comparative provisions of other IAMs. The accessibility of the mechanism to project-affected people seems to be further limited by the complexity of the various procedures established under the various PPM functions, and unduly complex terminology. In OHCHR’s view the general structure of the document could be simplified in order to avoid unnecessary duplications and potential inconsistencies, particularly in relation to Section 4.3 (Scope and accessibility) and Section 4.4. (Functions), many of which could be dealt with in the sections relating to eligibility.

9. Finally, OHCHR welcomes the Bank’s efforts to engage with stakeholders in a two-phased public consultation process. Effective and inclusive stakeholder engagement is especially critical during these initial stages of the Bank’s operations, in order to establish relations of trust and confidence among the many stakeholders on whom the long-term success and reputation of the AIIB will depend. However, OHCHR notes the importance of consulting publicly on the implementation guidelines for the PPM, in addition to the policy, given their close inter-relationship in practice. Moreover, in line with international best practice of other financial institutions, OHCHR would recommend that all written submissions received, as well as summaries of the virtual or in-person consultation meetings, should be made publicly available. A comprehensive listing of the substantive points raised during the consultation and Management’s responses should be also published, in OHCHR’s view, in order to ensure that stakeholders’

viewpoints are fully taken into account. The short summary in paragraph 100 of the many points raised during Phase I of the consultation does not seem to be adequate, in OHCHR’s view.

D. Specific comments

[4.3] SCOPE AND ACCESIBILITY

[4.3.1] ALL PROJECTS

Para 14	...the scope of the proposed PPM covers any ESP-related concerns, requests and/or complaints (submissions) raised at any stage of the Project cycle .
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Scope

10. In OHCHR’s perspective, and in keeping with the best practice of other IAMs, the focus in the definition of the scope of the PPM should be on the potential or actual adverse impact or harm resulting from projects financed in whole or in part by the Bank, rather than the applicable policy itself (i.e. “ESP-related” submissions). This would be consistent with paragraph 34 of the document, which does not require complaints to indicate the specific ESP provisions that the AIIB has allegedly failed to comply with (only “to the extent possible,” according to paragraph 34). The actual policies that delimit the PPM’s material scope should be specified elsewhere.

11. OHCHR recommends that the scope of the PPM should be broadened to include all submissions relating to actual or potential harms resulting from non-compliance not only with the AIIB ESP but all operational policies except those which are specifically excluded (4.3.5), and arguably also the Environmental and Social Standards (ESSs), taking into account, for example, the IFC/CAO’s comparative procedures in this regard (CAO Operational Guidelines, Section 3.1) and Section 24 of the EBRD PCM Rules of Procedure (definition of “Relevant EBRD Policy”, including safeguard policies, public information policies, and other policies approved by the Board of Directors for the purposes of Section 24). The PPM’s scope should also extend to the Environmental and Social Procedures, which are an integral part of the Bank’s safeguard system (ESP, paras 2, 72). This includes the 2017 President’s Directive on Environmental and Social Policy (December, 2017). The same clarification applies to other references to the ESP in the document, including in paragraphs 34 (complaints review) and 56-57 (eligibility).

Terminology

12. OHCHR notes that the document proposes different terminology for the communications submitted by project-affected people under the three proposed procedures of the PPM (i.e. “concerns” for the “pre-emptory review”; “requests” for “dispute resolution”; and “complaints” for “complaint reviews”). In OHCHR’s view, this multiplicity of terms may add unnecessary complexity and generate confusion for the user. OHCHR recommends the use of a single term for all communications submitted to the PPM irrespective of the procedure under which these communications will be dealt with (for instance, “submissions” as proposed in paragraph 14).

13. Moreover, the author(s) of a submission should not necessarily be expected to indicate the procedure under which the communication should be handled (a technical matter which should fall within

the responsibility of the PPM secretariat), and therefore to characterize the submission as a “concern,” a “request” or a “complaint” (see below comments regarding Section 5.1 on registration). Neither is it reasonable to expect complainant to cite specific AIIB policies, in OHCHR’s view, consistent with the practice of other IAMs.

[4.3.2] ELIGIBILITY TO FILE

Para 15 [1]	<p><i>...The process to be followed in any of these situations is as follows:</i></p> <ul style="list-style-type: none"> • <i>Direct submission by any two or more persons from the Project area of influence who are potentially or actually adversely affected by the Project...</i>
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14. While practice varies across different IAMs, best practice is that *any person* affected by a potential or actual adverse harm or impact may be qualified to make a submission. This is the case, for instance, of the IFC/CAO, whose operational guidelines provide that “[a]ny individual or group of individuals that believes it is affected, or potentially affected, by the environmental and/or social impacts of an IFC/MIGA project may lodge a complaint with CAO.”¹⁰ As pointed out in OHCHR’s submission under Phase I of the consultation, flexibility in eligibility criteria is key for ensuring the accessibility, predictability and equity,¹¹ and experience has shown that the number of submitting parties has no necessary bearing on the cogency of a given communication nor of the seriousness of the alleged harm.

Para 15 [2]	<ul style="list-style-type: none"> • <i>Submission by any two or more affected persons in the Project area of influence with local assistance...</i> • <i>In exceptional cases, by two or more affected persons in the Project area of influence with nonlocal assistance that is adequately justified by the affected persons at the filing of their submission and the same is endorsed by the PPM.</i>
Para 16	<p><i>Ordinarily, Project-affected people will be expected to file any submission themselves. However, they may seek assistance locally to file a submission. In exceptional circumstances, where adequate local assistance for filing a request is not available, such assistance may be sought internationally. Project-affected people on whose behalf the submission is filed and provide evidence of the authority to file on behalf of such people. The filing party must have no conflict of interest and act with transparency and in good faith.</i></p>

External assistance

15. OHCHR notes that paras 15 and 16 of the document would allow for submissions to be made by representatives of project-affected people acting on their behalf or their consent. However, the current draft introduces an explicit preference (1) for communications filed by project-affected people without

¹⁰ International Financial Corporation (IFC) Compliant Advisory Ombudsman (CAO) Operational Guidelines (2013) [hereinafter “CAO Operational Guidelines”], para 2.1.2.

¹¹ OHCHR Submission 2017, para 25.

assistance, and (2) for local rather than international assistance. These provisions seem unduly restrictive, in OHCHR’s view.¹²

16. In OHCHR’s view, the directness or otherwise of a communication or complaint is at best a secondary issue. Applicants should not be prevented from seeking expert assistance in submitting a communication. As indicated in OHCHR’s previous submission, “[a]ggrieved parties should have access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms” (para 10). This is particularly important in the context of the power asymmetries that characterize disputes between financial institutions and local stakeholders.

17. In OHCHR’s view, an evident bias towards direct submissions may discourage project-affected peoples from seeking external assistance, thus undermining basic due process and equity considerations. OHCHR would therefore suggest that the first sentence of paragraph 16 be deleted, or otherwise redrafted to clearly indicate that seeking external assistance is a prerogative of the complainant(s).

18. OHCHR is concerned at the expressed preference for local assistance instead of international assistance. Again, while seeking local assistance could be a more straightforward alternative for local communities impacted by AIIB projects, this determination should not be vested with the PPM, but with the communities themselves. Nor should it be up to the PPM to determine whether available local support is “adequate” or otherwise, in OHCHR’s view. The closure of civil society space in many countries, as well as capacity constraints, may put local assistance out of reach of many potentially eligible complainants.

Representation

19. The possibility that Project-affected people seek local or international assistance is independent of the issue of representation in the context of submissions to IAM. In the latter connection, OHCHR notes that the document requires that a party filing a submission on behalf of Project-affected people should provide “evidence of the authority to file” on their behalf.

20. However, the additional requirements that the filing party must “have no conflict of interest” and “act with transparency and in good faith” are unclear and may be implemented in a way that undercuts the freedom of complainants to choose their representatives. OHCHR would therefore recommend deleting these additional requirements, which appear to be covered by the general exclusion of submissions that are “frivolous, malicious” or intended to gain undue competitive advantage (para 19).

[4.3.3] ATTRIBUTION TO AIIB

Para 17 [1]	<i>PPM submissions must make a credible case of potential or actual adverse impact or harm to Project-affected people concerned in the Project area of influence resulting from AIIB’s lack of compliance with applicable ESP provisions.</i>
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¹² While there is no necessary equivalence, for comparative purposes see e.g. African Development Bank, The Independent Redress Mechanisms: Rules and Procedures (January 2015), para 4; European Bank for Reconstruction and Development (EBRD), Project Complaint Mechanism (PCM) Rules of Procedure (May 2014), para 5; Inter-American Development Bank (IDB), Policy of the Independent Consultation and Investigation Mechanism (December 16, 2015), para 13(b); CAO Operational Guidelines, para 2.2.2.

Fn 17	<i>“Substantial” adverse impact or harm must be demonstrated, to the satisfaction of the PPM, for an eligible complaint.</i>
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21. The minimum threshold for the consideration of alleged adverse impact or harm by the PPM remains unclear. On the one hand, filing parties must make “a credible case” of potential or actual adverse impact. On the other, according to footnote 17, the allegations must demonstrate “substantial adverse impact or harm.” These requirements may place an excessive burden on potential complainants and severely limit the mechanism’s accessibility and effectiveness.

22. These requirements also seem unwarranted compared to the practice of other IAMs. For instance, the World Bank’s Inspection Panel requires submissions to describe “how the Requesters believe that their rights or interests may be adversely affected by a Bank-financed project, and the *material adverse effects* (harm) that they believe they are suffering, or are likely to suffer as a result.”¹³ The IFC/CAO is mandated to receive complaints from a person or group of persons “who believe they are affected, or potentially affected, by the environmental and/or social impacts” of a project.¹⁴

23. Moreover, OHCHR notes that the requirements to show a “credible case” and “substantial adverse impact or harm” are not consistent with the eligibility criteria set forth in Section 5.2 of the document. Under the latter criteria, submissions must “reasonably” show “a perceived misapplication or omission to apply any provision mandated under AIIB’s ESP” (para 56) that is “likely to cause a potential adverse impact or harm” (para 57).

24. OHCHR strongly recommends that the foregoing provisions be amended in order not to place unnecessary burden on complainants and restrict access to the PPM. As an alternative, OHCHR would propose that paragraph 17 be redrafted to make it consistent with the eligibility criteria under Section 5.2, to read as follows:

Suggested new para 17	<i>PPM submissions must arise from or relate to matters that are likely to cause potential or actual adverse impact or harm to Project-affected people concerned in the Project area of influence resulting from AIIB’s lack of compliance with its operational policies, subject to Subject Matter Exclusions in Section 4.3.5.</i>
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25. For the same reasons, OHCHR suggests the deletion of footnote 17 relating to the “substantial” impact or harm standard.

Para 17 [2]	<i>The proposed PPM will not have authority to review the actions or inactions of a Client parties. It is only authorised to review AIIB’s own actions or inactions regarding application of the ESP.</i>
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¹³ The World Bank Inspection Panel, Operating Procedures (April 2014) [hereinafter “Inspection Panel Operating Procedures”], para 12(a) (emphasis added).

¹⁴ CAO Operational Guidelines, para 2.1.1.

26. Most IAM mandates are limited to assessing compliance of the parent institution with the latter institution’s internal policies and procedures. However, it should be clear that the AIIB has due diligence responsibilities in monitoring and following-up on Clients’ actions or inaction in relation to the Projects supported to the Bank. In this regard, the AIIB ESP and associated ESSs set out the requirements for Client relating to the “identification and assessment of environmental and social risks and impacts” associated with Bank-financed Projects (ESP, para 4).

27. Paragraph 17 could be therefore amended to better reflect PPM’s mandate to review AIIB’s due diligence responsibilities vis-à-vis the Clients’ environmental and social risks prevention and management. A useful model could be that of the IFC CAO procedure, according to which “[t]he focus of CAO Compliance is on IFC and MIGA, not their client” (CAO Operational Guidelines, para 4.1). However, the procedure also clarifies that “in assessing the performance of the project and IFC’s/MIGA’s implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field” (ibid).

[4.3.4] LANGUAGE

Para 18	<i>...If the submitter is unable to make an English language submission to the PPM, the submission may be in a national language of the AIIB Member in whose territory the Project area of influence is located. The PPM will make its best efforts to respond to such submissions in the most practically informative, useful and inclusive ways for the Project-affected people concerned.</i>
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28. OHCHR notes that English is the official language of the AIIB (Articles of Agreement, art. 34.1), while also noting the flexibility in accepting communications in the national language of AIIB Members’ territories. It could be foreseen that the eligibility review of complaints in languages other than English could be delayed as a result of the need to translate these complaints.¹⁵

29. However, to the extent possible, and depending on the specific circumstances, the PPM could be expected to communicate in the language of the submission, particularly in those cases in which Project-affected people file submissions without external assistance and/or representation.¹⁶ The reference that the PPM will respond to submissions “in the most practically informative, useful and inclusive ways” does not seem to go far enough in this regard, in OHCHR’s view.

[4.3.5] SUBJECT MATTER EXCLUSIONS

Para 19 [1]	<i>The substance of all Project-related concerns, requests or complaints must have been taken up with AIIB Management in the first instance...</i>
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¹⁵ Inspection Panel Operating Procedures, para 15.

¹⁶ See e.g. the CAO Operational Guidelines, which, while noting that the working language of CAO is English, “CAO works to facilitate communications with its stakeholders in any language, including the submission of complaints and publication of CAO reports and materials” (para 6). The CAO’s language policy includes the translation into the local language of the relevant complainants of all reports and documents relating to a specific complaint.

30. OHCHR respectfully disagrees with this proposed exclusion. As we have suggested earlier, there may be very cogent reasons why accessing GRMs and/or AIIB Management may not be desirable or practicable for complainants in particular cases, for example, where there is fear or reprisals or retaliation, or where there are insurmountable access barriers, or where the GRM is not equipped to deal with the serious nature of the concerns at issue. Para 12c of the EBRD PCM Rules of Procedure, for example, avoids any strict exclusion of this kind where complainants’ efforts to resolve problems directly with the client may be “harmful to the complainant or futile.” Accordingly, OHCHR suggests that this proposed exclusion be deleted. Subject to this fundamental concern, OHCHR notes that there is a degree of confusion within the document as to whether a submission needs to be taken up with the GRM, where one is available, or with AIIB Management, or both.

Para 19 [2]	<i>The proposed PPM will not handle or take cognizance of any concerns, requests or complaints arising from or relating to the following...Issues or matters relating to the adequacy of the ESP, including any AIIB decision pursuant to paragraph 10 of the ESP to use the environmental and social procedures of an MDB or a bilateral development organization in place of the ESP.</i>
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31. In OHCHR’s view, the exclusion from the PPM’s mandate of AIIB decisions relating to the use of the co-financer’s environmental and social procedures is unwarranted and may severely curtail the effectiveness of the mechanism. Paragraph 10 of the ESP permits the use of co-financers’ ES frameworks “provided that the Bank is satisfied that (the latter frameworks) are consistent with the Bank’s Articles of Agreement and materially consistent with the ESP and ESSs, and that appropriate monitoring procedures are in place”. This is self-evidently a very wide discretion with potentially major social and environmental consequences in practice, and accordingly – in OHCHR’s view – should not categorically be excluded.

Para 19 [3]	<i>...Submissions that concern activities or parties or impacts outside the reasonable control of AIIB, including the actions or inactions of any Client or third party.</i>
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32. As presently worded, this paragraph seems to leave open the possibility that complaints will be excluded where they include information concerning the actions or omissions of parties other than Bank Management. Yet, the latter actions and omissions may be indispensable in helping the PPM reach a determination on the compliance by the Bank with its own policies and procedures. Redrafting is advised in order capture this nuance, and to clarify that the AIIB’s due diligence responsibilities extend to the monitoring and follow-up on the Client’s identification and management of environmental and social risks and impacts. Please see above comments in relation to paragraph 17.

Para 20	<i>...where appropriate, the PPM will direct the person(s) who made the submission to the appropriate reviewing authority that can deal with the matter...</i>
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33. The above seems to refer to the possibility that the PPM may direct the submission to an appropriate official or body *within the AIIB* with the specific mandate to deal with the matter object of a submission that falls outside the PPM’s ambit. However, the term “authority” in this context could be misconstrued as referring to “public authority,” thus conveying an inappropriate message that the PPM

may refer matters to national judicial or administrative bodies. Similar considerations may arise in relation to the use of this term in paragraphs 35 and 74 below.

34. Finally, in OHCHR's view, bullet point 3 ("Any matter relating to a policy other than the ESP") and bullet point 5 ("improper purposes" is too broad a ground for exclusion, and invites misuse, in OHCHR's view), of paragraph 19 should be deleted.

[4.4] FUNCTIONS

35. As indicated earlier, in OHCHR's view, the scheme of relief under the PPM appears to be unduly rigid, inasmuch as the possibility of compliance review (which may be the only option reasonably open to complainants in particular situations) is arbitrarily foreclosed prior to the project implementation phase. As desirable as early resolution ("pre-emptory review" and/or dispute resolution) undoubtedly are in theory, they may not be feasible or safe for complainants to pursue in many situations. Moreover, experience shows that mitigation actions are more likely to be effective early in the project cycle, before design decisions are locked in and disbursements are made. To foreclose the possibility of compliance review prior to project approval may result in delay or denial of justice to many complainants.

36. Accordingly, OHCHR recommends that the document clarify that complainants have potentially different needs and may face different constraints in practice, and that all three functions (pre-emptory review, dispute resolution and compliance review) are open to complainants at any point in the project cycle, and that complainants should not be required to specify which type of action they are pursuing. OHCHR recommends that paragraph 22 be amended accordingly.

37. Drawing inspiration from the IFC/CAO Operational Guidelines (3.2), OHCHR would also recommend that the PPM procedures set out the AIIB's definitions and approach to compliance reviews, and include an explicit reference to the relevance of the client's legal obligations under international agreements in this regard. For example, the CAO's Operational Guidelines provide: "Compliance investigation criteria may have their origin, or arise from, the environmental and social assessments or plans, host country legal and regulatory requirements (including international legal obligations), and the environmental, social, health, or safety provisions of the World Bank Group, IFC/MIGA, or other conditions for IFC/MIGA involvement in a project." This is particularly pertinent for the proposed PPM, given the AIIB/ESF's pledge to support and encourage respect for human rights through the projects it finances (ESF, para 8; and ESP, para 4), and the relevance of international human rights obligations in connection with social and environmental risk management and in assessing the adequacy of client and co-financier's social and environmental frameworks.

[4.4.1] PRE-EMPTORY REVIEW

38. The denomination of this specific function is problematic, in OHCHR's view. The term "pre-emption" is a term of art with specific legal connotations, referring either to a specific doctrine in conflicts of law (in public law) or to a preferential right (in contract law). The sense of proactiveness and prevention that this specific function of the PPM is called to fulfil could be more effectively conveyed by other terms, such as "preliminary review" or "precautionary review," which are commonly found in international law and practice.

Para 23	<i>Concerns are those issues raised by Project-affected people during [the] processing of Financing [sic] that are considered by the PPM to be sufficiently material that, if left unresolved, are likely to result in potential adverse impact in the Project area of influence.</i>
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39. In OHCHR’s view, the above provision seems to confuse the definition of a “concern” (i.e. a submission under the pre-emptory review procedure) with the assessment by the PPM of the materiality of the potential harm, and to this extent may require redrafting.

[4.4.2] DISPUTE RESOLUTION

40. OHCHR notes that the dispute resolution function (para 25) is limited to “disputes over AIIB compliance with the ESP.” OHCHR notes that the CAO’s dispute resolution function is defined more broadly, aiming at “resolv[ing] issues raised about the environmental and/or social impacts of IFC/MIGA projects and improv[ing] results on the ground.”¹⁷ In similar terms, the Accountability Mechanism of the Asian Development Bank (ADB) incorporates a problem solving function aiming at assisting people affected by ADB-funded projects “through informal, flexible, and consensus-based methods with the consent and participation of all parties concerned.”¹⁸

41. OHCHR would respectfully suggest a formulation similar to the above, and broader scope, for the AIIB’s dispute resolution function. We also recommend that paragraph 26 be amended to remove the requirement that Project-affected people demonstrate that they have attempted to resolve issues of concern with AIIB staff and GRM, for reasons outlined above.

[4.4.3] COMPLIANCE REVIEW

Para 34	<i>A complaint should (i) indicate the outcomes the complainant is seeking; (ii) provide copies of all relevant correspondence with AIIB Management, the Client or other concerned authorities, including with the GRM where one is available, and (iii) refer[,] to the extent possible, to the relevant ESP provisions which it is considered AIIB has not followed.</i>
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42. OHCHR’s principal concern with the scheme of relief under the proposed PPM procedures is the arbitrary exclusion of compliance review prior to project approval, irrespective of complainants’ potentially different needs, risks and constraints, as previously mentioned, along with the unwarranted requirement in paragraph 33 that the complainant(s) show reasonable likelihood of “substantial” adverse impact. OHCHR reiterates its view that the primary focus should be on the perceived (actual or potential) harm resulting from the lack of compliance with AIIB internal policies, and there should be no categorical requirement that complainants specify the relevant ESP (or other relevant policy or procedure) provisions that have allegedly been breached. The term “to the extent possible” (para 34) warrants clarification, in OHCHR’s view, to ensure that the citation of specific provisions of relevant policies will not operate as a fixed requirement.

¹⁷ CAO Operational Guidelines, p. 14.

¹⁸ ADB Accountability Mechanism Policy 2012, para 126, available at: <https://www.adb.org/sites/default/files/institutional-document/328211/accountability-mechanism-policy-2012.pdf>

43. As a subsidiary concern, the proposed content requirements for a submission under the complaint review procedure do not appear to be consistent with the registration requirements and eligibility criteria set forth in Sections 5.1 and 5.2, respectively. Moreover, the requirement for complainants to indicate “the outcomes” that they are seeking seems to be unduly strict, as distinct from an invitation to do so (as is the case with the CAO, for example).

44. It is also recommended, for the sake of consistency, that the term “complainant” be substituted by “Project-affected people,” as used in previous paragraphs, or otherwise by “complainant(s)” (noting OHCHR’s previous recommendation that individuals should be accorded standing; cf. para 15).

Para 35	<i>...Importantly, processing of a Financing and/or Project implementation, as the case may be, will continue notwithstanding any submission of a concern, request for resolution or complaint in the absence of any suspension mandated by the relevant authority.</i>
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45. The use of the term “authority” in this context could generate confusion, given that it could be interpreted in the sense of public authority. The term could be simply substituted by “the competent AIBB official or the Board.”

[4.5] ORGANIZATION AND STAFFING

46. As noted earlier, the document contains insufficient guarantees to ensure the independence and impartiality of the AIBB staff servicing the PPM, in OHCHR’s view. In this connection, there is no clear indication whether the CEIU-MD will have the capacity to select the PPM-specific staff. Neither the CEIU-MD nor the PPM-specific staff are subject to specific pre- or post-employment cooling-off periods, which the document currently seems to restrict to external experts (para 52). The direct involvement of the CEIU-MD as an ex-officio chair of all project-specific task forces (and not of the Head-PPM Secretariat) may also raise concerns relating to the independence of task force investigations.

[4.5.1] MULTITASKING AND FUNCTIONAL FIREWALLS

Para 45	<i>...The CEIU staff assigned to compliance reviews will support a complaint-specific task force, with MD-CEIU as Chair, to review and investigate any complaints.</i>
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47. Paragraph 45 seems confusing as it does not clarify whether the CEIU/PPM staff will actually be part of the task forces or whether their role will be limited to playing a secretariat role in support of the work of these task forces (the substantive work of which would be carried out by external experts). Paragraph 45 seems to suggest the former alternative, irrespective of the possibility to engage external experts on an ad hoc basis. If this interpretation is correct, then the term “support” could be substituted by “be integrated within.” Moreover, for the purposes of consistency, the paragraph could use the term “Project-specific task force” as used elsewhere in the document.

Para 46	<i>For matters requiring specialist expertise, MD-CEIU may engage external experts as necessary, in accordance with AIB consultant recruitment procedures, for carrying out PPM functions. MD-CEIU may create a Project-specific task force comprising one or more members as necessary. MD-CEIU will be the chair of this task force</i>
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48. External experts are dealt with in Part 4.5.4 which, for the sake of clarity, could be cross-referenced. Given the specific placement of this provision, it is not clear whether external experts will be engaged exclusively as members of project-specific task forces responsible for compliance reviews or whether external expertise will also be sought in relation to other PPM functions (including pre-emptive reviews and dispute resolutions) and other areas of work of the MD-CEIU (including integrity, effectiveness/evaluation, and learning and knowledge).

49. The final two sentences seem to repeat the content of the previous paragraph and could be therefore deleted, in OHCHR’s view.

[4.5.2] MANAGING DIRECTOR (MD)-CEIU

Para 47	<i>...PPM-related responsibilities of the MD-CEIU will include ... (iv) constituting and handling all complaint-specific reviews and investigations, as chair of each assigned task force...</i>
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50. The above text could be redrafted for the purposes of consistency, bearing in mind the use of the terminology “compliance reviews” and “project-specific task force” elsewhere in the document. The following rephrasing is suggested:

Suggested new para 47(iv)	<i>...PPM-related responsibilities of the MD-CEIU will include ... (iv) handling complaint reviews, including by constituting and handling project-specific task forces responsible for undertaking such reviews.”</i>
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[4.5.3] CEIU ASSIGNED STAFF; HEAD-PPM SECRETARIAT

51. The title of this part appears confusing and, in view of its contents, it could be simply be renamed “PPM Secretariat”, in OHCHR’s view.

[4.5.4] PROJECT-SPECIFIC TASK FORCE

52. The paragraphs under this part seem to refer exclusively to the possibility of engaging external specialists to serve as task force members, rather than other aspects of the proposed task forces’ operations. The section could be therefore renamed (e.g. “External specialists”).

Para 51	<i>Task force members should be well-respected experts with demonstrated integrity, professionalism, relevant qualifications and experience ...</i>
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53. This paragraph may appear confusing to many readers as it refers to “task force members,” when it seems to relate to the requirements for *external experts* engaged to serve as part of a task-force. Moreover human rights expertise could specifically be needed in relation to specific complaints in certain circumstances, and it could be thus mentioned as part of the relevant qualifications and experience of external experts. This is particularly relevant given the AIIB’s pledge to support and encourage respect for human rights through the projects it finances (ESF, para 8) as well as the relevance of international human rights standards in various areas covered by the Bank’s Environmental and Social Standards (ESSs). For example, ESS2 explicitly includes the objective of realising the human rights of indigenous peoples (para 1), and the Exclusion List includes activities which may be unlawful under international agreements. In addition, expertise relating to international labour standards could be specifically required in relation to allegations of forced labor or harmful or exploitative forms of child labour, which are explicitly prohibited by the AIIB policies.

[5.1] REGISTRATION

54. The differentiation between registration and eligibility does not seem to be clear, in OHCHR’s view. Some of the required elements for the registration of communications listed in paragraph 54 are in fact eligibility criteria (e.g. identification and contact information of the submitting party, prior referral to AIIB Management or GRM, subject to the need for flexibility in the latter respects, as we have argued) while others refer to the minimum content that a communication should include (e.g. name of the project, location). OHCHR would therefore recommended to streamline sections 5.1 and 5.2 in order to more clearly delineate the conditions for eligibility and the administrative and procedural steps under the eligibility phase.

Para 53	<i>Any submission filed by Project-affected people under PPM, [sic] (whether characterized as a concern, request for resolution or complaint)...</i>
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55. As we have suggested above, consistent with the procedures of other IAMs, it is neither reasonable nor realistic to expect complainants to identify the specific procedure under which they would like their submission to be handed. Rather, this assessment could fall under the responsibility of the PPM based on the objective elements of the complaint and on the circumstances and expressed wishes of the complainant.

Para 54	<i>Any submission should...Adequately identify the party making the submission and, if relevant, an entity assisting the party in filing.</i>
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56. The requirement above could be rephrased to better accommodate the modalities of external support to the project-affected people, as provided in paragraphs 15-16 of the document. This support may include not only assistance in filing, but could also extend to submission on behalf of the aggrieved party. In the latter case, the filing party should provide “evidence of the authority to file on behalf of such people” (para 16).

Para 54	<i>If considered necessary, expressly request confidentiality.</i>
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57. Please see below comment under section 5.6.

Para 54	<i>Briefly describe any efforts by the party to approach project-level authorities (including the GRM) and AIIB Management or project staff...</i>
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58. OHCHR reiterates that there may be good reasons in practice why it may not be feasible or possible for complainants to approach the GRM or AIIB Management or staff, in particular situations. Hence, if such a requirement is retained, there should be flexibility in its formulation and application, in OHCHR’s view.

59. Subject to the above, we note that this proposed registration requirement does not seem to be consistent with paragraph 19, excluding submissions that “have no first been taken up with the Project-level grievance mechanism (GRM)...or with AIIB Management or staff concerned.” In addition, the difference between “project-level authorities” and AIIB Management does not seem to be clear.

[5.2] ELIGIBILITY

60. OHCHR notes the internal inconsistencies between Sections 5.2 and 4.3 on eligibility criteria and recommends that there be one section (Section 5.2) covering all eligibility criteria, subject to the various specific recommendations we have made here on the need for greater flexibility and responsiveness to the differing circumstances, capacities and needs of complainants.

Para 56	<i>The eligibility assessment process for all three PPM responses requires that (i) the submission has been duly registered by the PPM Secretariat; (ii) the submission is not subject to any of the exclusions described in Part 4.3.5; (iii) the submitting party meets the standing requirement for Project-affected people in Part 4.3.2 above and (iv) the submission reasonably shows a perceived misapplication or omission to apply any provision mandated under AIIB’s ESP.</i>
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61. The reference to a “perceived misapplication or omission to apply” in relation to the ESP is not consistent with the language in Part 4.3.3 (para 17) (“Attribution to AIIB”). A cross-reference to the latter provision could be included.

Para 57	<p><i>The following are additional eligibility conditions for each specific response route:</i></p> <ul style="list-style-type: none"> • Concerns: <i>An eligible concern must be submitted prior to approval of a Sovereign-backed Financing or the signing of the legal agreements for a Non-sovereign-backed Financing and arise from or relate to matters that (i) occur following PSI disclosure, (ii) have not yet crystallized into, or become matters of, disagreement or dispute and (iii) are likely to cause potential adverse impact or harm in the Project area of influence due to AIIB noncompliance with ESP requirements.</i> • Requests for dispute resolution: <i>An eligible request may be filed following PSI disclosure or at the latest before Project completion (or Loan closing date in the case of a Loan). The request must relate to matters that (i) have become the subject of an identified disagreement or dispute and (ii) are likely to cause potential or actual adverse impact or harm in the Project area of influence due to perceived AIIB noncompliance with ESP requirements.</i>
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	<ul style="list-style-type: none"> • Complaints: <i>A complaint requesting compliance review must be filed after approval of a Sovereign-backed Financing or after signing of the legal agreements for a Non-sovereign-backed Financing and show the reasonable likelihood of substantial potential or actual adverse impact in the Project area of influence from perceived AIIB noncompliance with ESP provisions.</i>
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62. This paragraph refers mainly to temporal eligibility criteria. The inclusion of the additional criteria that matters “likely cause potential or actual adverse impact or harm in the Project area of influence due to perceived AIIB noncompliance with ESP requirements,” common to the three response routes, appears to be redundant and could be replaced by reference to Part 4.3.3 in the previous paragraph, in OHCHR’s view.

63. The requirement that the request for a dispute resolution should deal with issues that “have not yet crystallized into, or become matters of, disagreement or dispute” seems confusing, as it seems to address the nature and objective of the submission rather than to a specific eligibility criterion that should be met by the filing party. The same holds true for the corresponding requirement that the matter subject to a request for dispute resolution should “have become the subject of an identified disagreement or dispute.” It is therefore recommended to delete these two proposed requirements.

[5.3] PROCESSING

64. As pointed about above, the use in this section of different terminology for the communications to be handled under the different PPM procedures is confusing, as are the references to the forms of communication pertaining to the various PPM procedures (e.g para 58: “For eligible concerns...”; para 59: “Eligible dispute resolution requests...”). It is therefore recommended to streamline the different communications leading to different procedures under an umbrella term (e.g. “communication”, “submission”) and refer explicitly to the applicable PPM function (e.g. “Communication under the pre-emptory review procedure,” etc.). The use of subheadings in this section could also contribute to improving its readability (i.e. Pre-emptory review for paras 58-59; Dispute resolution for para 60-61; Compliance review for paras 61-62).

Para 58	<i>MD-CEIU may...engage independent experts to assist in resolution of any complex matters arising out of any eligible concern.</i>
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65. The possibility of engaging independent experts is already provided for in paragraphs 50-52 of the document. The reference in paragraph 58 therefore seems to be redundant and could be removed, in OHCHR’s view, as it may give the wrong impression that an independent expert may only be engaged in the context of pre-emptory review procedures and not in connection with the other procedures.

Para 59	<i>Eligible dispute resolution requests will be to clearly identify the dispute(s) at issue and prioritize the major problems...</i>
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66. The above sentence seems to include additional eligibility conditions to those already set forth in the relevant section on eligibility and therefore seems unwarranted.

Para 61	<i>Where MD-CEIU determines a complaint to be eligible and proposes to carry out a compliance review, a report determining the eligibility and recommending conduct of a compliance review is circulated to the Board on a no-objection basis for at least 10 days.</i>
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67. As stated in its previous comments, OHCHR considers that the PPM’s independence could be enhanced by granting the mechanism the authority to make autonomous decisions in relation to key areas of the mandate, including the ability to decide to conduct a formal compliance review in relation to an eligible complaint.¹⁹

[5.4] RESOLUTION

68. Paragraphs 64 and 65 seem to refer to the PPM pre-emptory review function (initiated by an “eligible concern,” as provided for in para 22) and the dispute resolution functions. It would seem that paragraphs 62-63, referring to the remedial action plans resulting from a compliance review procedure and its follow-up would be better placed under this heading. Moreover, in OHCHR’s view, an action plan should be a requirement rather than discretionary, where non-compliance with relevant AIIB policies or procedures has been found.

69. The section could be reworded to better reflect the steps leading to the formal closure of the respective procedures (e.g. adoption of a remedial action plan in the case of pre-emptory review procedures and adoption of formal procedures in the case of dispute resolution procedures). The section should also explicitly acknowledge the possibility that a PPM investigation under the complaint or pre-emptive procedures could be closed by the PPM where the AIIB management is found in compliance with the ESP.

Pre-emptory review

Para 64	<i>Remedial action through the PPM for eligible concerns is essentially an agreement to address ESP-related concerns. This may, for example, include reconsidering or restructuring the design of the Project.</i>
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70. In OHCHR’s view, this paragraph should clarify the role of the Board in the adoption of the remedial action plan, as provided for in the case of the compliance review procedure (cf para 62). The same holds true for the procedure to monitor and follow-up the implementation of the plan (cf paras. 63, 65).

71. Given the preventive nature of the pre-emptory review procedure, the kind of remedial action resulting to this procedure should not be necessarily limited to the reconsideration or restructuring of the design of the project, but also to cancel the project where the PPM finds a non-remediable incompatibility between the project and the AIIB policies.

¹⁹ OHCHR Submission 2017, para 17.

[5.5] INTERIM REMEDIES

72. The title of this section may lead to confusion in this context, and may be rephrased as “interim measures,” reflecting a more common terminology in international law and practice. In OHCHR’s view, this section would more logically be placed before the section on “resolution” (section 5.4).

Para 66	<i>During the review of any eligible concern, request for resolution or complaint, MD-CEIU may, at the request of the PPM Secretariat or on his/her own volition, dispatch PPM staff for fact-finding through a site visit to the Project area of influence.</i>
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73. The possibility that the PPM undertake on-site visits as part of its investigations is provided in Section 5.8 of the document (Site visits). Paragraph 66 is therefore redundant and could be possibly deleted.

Para 67	<i>If such noncompliance continues beyond the 60-day period or any extended time mutually agreed between MD-CEIU and VP IO, or if at any time the PPM fact-finding concludes that there is serious likelihood of substantial, irreparable harm as a result of non-compliance by the Bank, the MD-CEIU may raise the matter with the President and inform the Board accordingly.</i>
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74. While found in environmental regulations in some countries, the “substantive irreparable harm” (SIH) standard is not common in international law and practice. It would be recommended to substitute it simply by a simple “irreparable harm” standard, which is the common standard associated to the provision of interim or precautionary measures, or, alternatively, the SIH standard could be defined in the glossary. The qualification of “serious” likelihood seems to be unnecessary and redundant and could be removed.

75. Paragraph 67 should expressly allow for the possibility that the Board may decide to suspend the implementation of the project, in OHCHR’s view, in line with paragraph 35. As paragraph 67 is presently worded, it is not entirely clear whether the authority to suspend the implementation of a project is to be exercised by the AIIB President, the Board, or both.

[5.6] DEFINITION OF RETALIATION

Fn 28	<i>Retaliation for such purposes refers to any detrimental act, direct or indirect, recommended, threatened or taken against a party filing a submission under the PPM. It includes harassment, discriminatory treatment or withholding of an entitlement intended to silence or prevent the complainant from filing a submission, or taking any other related action under the PPM.</i>
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76. OHCHR notes that the definition of retaliation in the document draws from the definition included in the AIIB Policy on Prohibited Practices.²⁰ However, given that the latter policy refers to instances of

²⁰ AIIB, Policy on Prohibited Practices (8 December 2016), para 2.1(13).

maladministration by AIIB Staff, the definition of retaliation is focused chiefly on internal retaliation deriving from reporting prohibited practices or cooperation with related investigations.

77. The context and needs of complainants to IAMs concerning negative impacts of investment projects is of course very different. The risks in the latter context derive mainly from external actors, including private companies' employees and government officials,²¹ though there have also been reported cases of potential complainants experiencing intimidation by staff members or contractors of developing financing institutions. The risk involved in raising concerns about negative social and environmental impacts of development projects include not only harassment and discrimination, but "threats of physical violence to people themselves or their family members, and even criminalization or incarceration as a result of speaking out against the impacts of a project."²² Violence and killings are regrettably on the rise. The United Nations Special Rapporteur on human rights defenders has raised the alarm about the increasing and intensifying violence against land and environmental defenders, including targeted killings.²³

78. While no authoritative definition of "retaliation" exists, OHCHR would strongly recommend that the definition in footnote 28 be broadened to include the actual, life-threatening risks that people accessing IAMs could potentially face when voicing concerns about development projects.

[5.7] TRANSPARENCY AND ACCESS TO STAFF

Para 72	<i>...The PPM Secretariat will actively maintain a publicly accessible, updated and informative website and will post timely summaries of PPM findings and assessments on pre-emptive, dispute resolution and compliance reviews, as well as its own annual reports.</i>
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79. Transparency is a foundation stone for accountability, and is therefore essential for accomplishing the PPM's mandate. Transparency is also a basic human rights principle with a strong foundation in international human rights law.²⁴

80. In line with the practice of other IAMs, OHCHR recommends that the PPM website should publish the full documents produced by the PPM relating to its investigations, and not just "summaries" thereof.

²¹ Zeid Ra'ad Al Hussein, "Development banks need to wake up to the human rights crisis in Honduras," *The Guardian*, 20 March 2016, available at:

<https://www.theguardian.com/commentisfree/2016/mar/20/development-banks-human-rights-crisis-honduras-agua-zarca>. See also, Human Rights Watch, *At Your Own Risk: Reprisals against Critics of World Bank Group Projects* (2015), available at: https://www.hrw.org/sites/default/files/report_pdf/worldbank0615_4up.pdf

²² CAO Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations (October 2017), p. 1, available at: [http://www.cao-](http://www.cao-ombudsman.org/newsroom/documents/documents/CAOApproachtoThreatsandIncidentsofReprisals_October2017.pdf)

[ombudsman.org/newsroom/documents/documents/CAOApproachtoThreatsandIncidentsofReprisals_October2017.pdf](http://www.cao-ombudsman.org/newsroom/documents/documents/CAOApproachtoThreatsandIncidentsofReprisals_October2017.pdf)

²³ Report of the Special Rapporteur on the situation of human rights defenders, A/HRC/71/281 (3 August 2016), available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/71/281&Lang=E>

²⁴ OHCHR, Recommendations for AIIB Public Information Interim Policy (30 May 2017), available at: <http://www.ohchr.org/Documents/Issues/Development/DFI/RecommendationsAIIBPublicInformationInterimPolicy.pdf>

Moreover, in OHCHR’s view, the documents disclosed in the PPM website should not be restricted to “finding and assessments” of the mechanism, but should also include:

- (1) A full case registry with other official documents produced by the PPM in the course of its various procedures, such as notices of registration, notices of non-registration, eligibility decisions, and follow-up and monitoring reports;
- (2) relevant documents reflecting Board discussions and decisions relating to PPM procedures, where applicable;
- (3) relevant documents produced by the AIIB Management relating to PPM procedures, including Management’s action plans and periodic monitoring reports of those plans;
- (4) the original communication (concern, request for resolution or complaint) provided that the authors have given their consent and that its publication will not jeopardise the confidentiality of the authors’ identities or other confidential information (see above comments on Sec 5.6).

Para 74	<i>... No AIIB staff, PPM-recruited expert, task force member or other person involved in, or connected with, any PPM activity may disseminate electronic or hard copy documents or information restricted...without approval from the appropriate authority empowered to authorize such disclosure.</i>
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81. The reference to “authority” make generate some confusion in this context, as the term is normally used in the sense of public authority. It is recommended to rephrase the sentence to refer to the “AIIB official or body authorised to disclose such information.”

[5.8] SITE VISITS

Para 75	<i>...PPM-originated site visits will be undertaken in the spirit of AIIB-Member (and Project proponent) partnership, given the practical necessity of sovereign consent.</i>
Para 76	<i>The PPM Secretariat will obtain AIIB Member concurrence to undertake a site visit to the Project area of influence through the responsible AIIB operational department (following the usual approach for any AIIB fact-finding mission) on a Project-by-Project basis....</i>

82. These two paragraphs seem to be redundant and could be streamlined into a single statement that the site visits of the PPM will take place with the consent of the AIIB Member concern and should be standard practice in order to enable the PPM to assess eligibility. While the consent of the State concern is a common precondition for all kinds of investigations taking place within the boundaries of that State, the mechanism utilised to seek that consent could vary. In this regard, for the sake of clarity and predictability, the consent of AIIB Members to potential site visits by the PPM should be integrated within the legal agreements signed with the Bank as part of the approval process for Sovereign-backed financing.

[5.9] USE OF CO-FINANCIER'S AND CLIENTS' SYSTEMS

Co-financing

Para 77	<i>The ESP allows use of a co-financier or a Client's...environmental and social policies and procedures where these are "materially consistent" with the ESP. This is distinct from the typical situations involving self-standing AIIB financing, or when AIIB is a lead co-financier. In both these latter situations, AIIB's own ESP provisions and use of the PPM apply for all Projects-financed activities.</i>
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Para 78	<i>AIIB can agree to the application of ESP-equivalent provisions of a lead co-financier. In these cases, the co-financier's IAM will be the applicable mechanism for handling any submissions from Project-affected people about a co-financed Project. In these circumstances, however, the PPM will continue to monitor the co-financier's handling of submissions from Project-affected people under the co-financier's IAM procedures and make best efforts to coordinate with the IAM to ensure timely and responsive resolutions for any submissions from Project-affected people.</i>
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83. These two paragraphs seem to be redundant and could be streamlined into a single statement that the site visits of the PPM will take place with the consent of the AIIB Member concern. While the consent of the State concern is a common precondition for all kinds of investigations taking place within the boundaries of that State, the mechanism utilised to seek that consent could vary. In this regard, for the sake of clarity and predictability, the consent of AIIB Members to potential site visits by the PPM should be integrated within the legal agreements signed with the Bank as part of the approval process for Sovereign-backed financing.

84. AIIB's business model relies, to an important extent, on joint investments with other international, regional and national development institutions. In order to ensure sustainability and accountability in relation to the projects co-financed by the Bank, it is crucial that the PPM defines clear rules of cooperation with the AIMs of other co-financing institutions. This may be particularly important in relation to national development finance institutions, the environmental and social systems and complaints mechanisms of which may be more limited than those of the AIIB and other MDBs.

85. In this regard, paragraphs 77 and 78 describe a model to co-financing whereby the AIIB ESP and the use of the PPM will apply automatically in cases in which the project is entirely financed by the AIIB or the Bank is the lead co-financier. When the lead-financier is another institution, the draft document stipulates that the "AIIB can agree to the application of ESP-equivalent provisions" (para 18). OHCHR notes that the model described by these differ from the approach taken by the ESP. According to paragraph 10 of the policy, the application of the co-financiers' environmental and social policies and procedures will depend on the AIIB's assessment, "on a case-by-case basis," of the appropriateness of those policies and procedures based on a "materially consistency" test with the Bank's own ESP and ESS. Therefore, the scope of application of co-financier's policies and procedures should in principle be independent of the level of participation of the Bank in a given co-financing arrangement. When adequate systems are not in place, the AIIB ESP should

continue to apply even if the Bank is in a minority position. This seems to be the approach reflected in the 2016 co-financing agreement between the AIIB and the World Bank.²⁵

86. OHCHR would therefore suggest that the drafting of paragraphs 77 and 78 be streamlined to clarify the existing alternatives, while aligning it more closely with the ESP. The significant consequences of the AIIB's decision on whether or not to apply the co-financiers' systems should require that these decisions be subject to compliance review, in OHCHR's view (*supra*, para 31).

87. In addition, nothing in the ESP suggests that the application of the environmental and social system of the co-lead financier should automatically involve the use of the co-financier's accountability mechanism. In this regard, in OHCHR's view, paragraph 78 should clearly stipulate that, the AIIB will make a separate determination regarding the use of the co-financier's accountability mechanism based on the Bank's analysis of the adequacy and effectiveness of the latter mechanism.

88. At the same time, in OHCHR's view, the application of co-financier's policies and procedures should be independent from the issue of PPM accessibility. In other words, the mechanism should, in principle, be competent to receive and investigate complaints in relation to projects in which the AIIB is not the lead co-financier. Moreover, OHCHR notes that nothing in the ESP precludes the possibility that complainants may simultaneously file cases with the IAMs of other co-financing institutions. Indeed, it is established practice that the different IAMs may receive complaints regarding the same project either through joint investigations or through parallel review procedures. In this regard, in OHCHR's view, the determination whether the PPM should conduct a review of a co-financed project should be made on a case-by-case basis, according to relevant provisions of the MoUs between the IAMs of the respective institutions and the existing patterns of cooperation within the IAM network.²⁶

89. Finally, the statement in paragraph 77 that the ESP and the use of the PPM apply in relation to projects "involving self-standing AIIB financing" seems to be redundant and could be possibly deleted to avoid confusion, or otherwise be reflected at the beginning of section 5.9 as a matter of general principle.

Para 78 [2]	<i>...any submission is excluded from PPM review if it relates to the AIIB's decision to use a lead co-financier's ESP-equivalent provision.</i>
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90. Please see above comments on Section 4.3.5 (Subject matter exclusions).

²⁵See Co-Financing Framework Agreement between Asian Infrastructure Investment Bank and International Bank for Reconstruction and Development and International Development Association (13 April 2016), Section 2.04 (information to the other party on "complaints made by third parties to the World Bank's Inspection Panel or AIIB's oversight mechanism referred to in AIIB's environmental and social policy"); Section 3.02(a) (stipulating that "the World Bank will conduct the environmental and social due diligence and supervision for the Project).

²⁶See e.g., Inspection Panel Operating Procedures, para 62; European Bank for Reconstruction and Development (EBRD) Project Complaint Mechanism (PCM) Rules of Procedure (May 2014), para 23.

Clients' systems

Para 79	<i>Where AIIB allows the use of a country or corporate system, Project-affected people who wish to raise issues regarding Project-level noncompliance with any local ESP-equivalent provisions would be expected to use local dispute or complaint redress mechanisms...</i>
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91. The expectation that affected people should use “local dispute or complaint redress mechanisms” is ambiguous and unwarranted, in OHCHR’s view, and seems to contradict the ESP which expressly states that the “[u]se of a Client’s systems does not preclude of affected stakeholders to the Bank’s oversight mechanism or Project-level redress mechanism” (para 54). While the use of local mechanisms may well be a desirable scenario for many complainants in many situations, such mechanisms are often inadequate, inaccessible or simply unavailable, and in some situations, may even heighten the risks of retaliation against complainants.

92. Moreover, a requirement of prior recourse to local mechanisms would seem to impose a disproportionate burden upon complainants, over and above the proposed eligibility criteria of prior recourse to the AIIB Management and/or GRM (and we note that a GRM can exist even if a country or corporate system is used). While it is reasonable to expect that PPM investigations should consider relevant decisions by local mechanisms and avoid contradictory findings, this should not preclude the PPM’s independent carriage of its functions. Moreover, in OHCHR’s view, further clarity is needed in respect of the proposed requirement in paragraph 79 that the PPM “avoid making any pronouncements on functioning of local courts and tribunals.” If there are inadequacies in the latter mechanisms which have a legitimate bearing on complainants’ rights to access the PPM, these should be discussed openly and rationally, like any other relevant issue.

93. Furthermore, given that paragraph 79 refers to the use of both country and corporate environmental and social systems, the exact scope of the term “local dispute or complaint redress mechanisms” does not seem sufficiently clear and may warrant further elaboration. The UN Guiding Principles on Business and Human Rights differentiate between “State judicial and non-judicial grievance mechanisms,” on the one hand, and to “non-State grievance mechanisms” (encompassing both corporate and multi-stakeholder mechanisms), internationally agreed terminology that could be applied in this context.²⁷

Para 80	<i>Any eligible submission in such cases will be reviewed by applying a standard of good international practice, except if the submission challenges AIIB’s decision that the Client’s environment and social management system is materially consistent with the ESP. In cases that challenge AIIB’s determination of “material consistency,” the complainant will need to establish that AIIB has been grossly negligent in the application of the ESP, given the relative complexity underpinning such determinations.</i>
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94. In OHCHR’s view, the introduction of a “gross negligence” standard seems to place an excessively high burden on the complainant, which may make this provision nugatory in practice and undermine the objectives of fostering trust, institutional accountability and sustainability. In its ordinary legal meaning, the standard of “gross negligence” refers to reckless disregard, and, in some jurisdictions, it amounts to

²⁷ UNGPs, paras 26-31.

intentional wrong. Moreover, in OHCHR's view, a "gross negligence" standard seems to contradict the "good "international practice" standards that should guide the AIIB in making a determination relating to the use of a Client's system (defined in page iii as the reasonable "exercise of professional skill, diligence, prudence, and oversight").

95. The practice of other IAMs could provide valuable guidance in this regard. For example, the procedures of the ADB Accountability Mechanism expressly stipulate that the Bank's Compliance Review Panel can examine "ADB's assessment of the equivalence between ADB's [policies]...with the country safeguard systems...in materially achieving the objectives of the Safeguard Policy."²⁸ OHCHR would recommend that the draft policy incorporate a similar formulation.

²⁸ ADB Accountability Mechanism 2012, p. 81, para. 20.