

SUBMISSION I

Office of the United Nations High Commissioner for Human Rights

Recommendations for AIIB Policy on Public Information

16 March 2018

Introduction

1. OHCHR welcomes the opportunity to comment on the Asian Infrastructure Investment Bank's (AIIB, or "Bank") draft Policy on Public Information ("draft Policy"). These comments build upon OHCHR's prior submission relating to the 2016 Interim Policy.¹
2. OHCHR notes the vital function that freedom of information laws and policies play throughout the world in fostering transparency, accountability and good governance. Transparency is fundamental to sustaining relations of trust and an active public dialogue and awareness about the AIIB's mission. It is also a foundation stone for better long-term investment and development results.
3. OHCHR notes a number of clear improvements in the draft Policy, compared with the AIIB's Public Information Interim Policy. In particular, OHCHR welcomes the fact that the draft Policy clearly reflects the presumption of full disclosure of all information in the Bank's possession (para. 2.1, and para. 4), subject to exceptions defined by reference to protected interests, a number of which are recognised in other development financing institutions' information policies and/or national legal systems.
4. We also welcome the Policy's recognition of a duty of proactive disclosure; the inclusion of a positive override (permitting information disclosure where a legitimate interest outweighs a protected interest); the deletion of the qualifiers "where feasible" and "whenever possible," and the recognition that the Bank's accountability extends to "stakeholders" (including but not limited to shareholders). We also note that the Public Information Requests Processing Directive ("Directive") provides for an internal appeals mechanism and outlines timelines for processing requests for public information, although in our view these details should be included in the draft Policy and benefit from public consultation.
5. However, OHCHR notes that, in many important respects, the draft Policy falls well short of the standards set by other multilateral development banks (MDBs) and many national legal systems. In OHCHR's view, significant strengthening would be needed if the Policy is to help the Bank fulfil its commitments of accountability and operational transparency, and provide the basis for informed dialogue and trust between all stakeholders on which the reputation and successful operation of the

¹ Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommendations for AIIB Public Information Interim Policy (30 May 2017), available at: <http://www.ohchr.org/Documents/Issues/Development/DFI/RecommendationsAIIBPublicInformationInterimPolicy.pdf>

Bank depend. The following comments and recommendations are offered respectfully, in the spirit of the continued constructive collaboration between our institutions towards the shared goal of sustainable development.

A. The right to freedom of information

6. International organizations are subjects of international law and are bound by general rules of international law,² 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 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). Global trends in this regard are mixed, however: on the one hand, the demands of people for transparency and accountability of public institutions has never been higher; but on the other hand, civil society space in many countries is shrinking or has disappeared entirely. The AIIB's human rights commitment is particularly important in this context.

7. In OHCHR's view, consistent with the AIIB's human rights commitment, the anchoring point for policy discussions on access to public information should be article 19 of the Universal Declaration on Human Rights: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19 of the International Covenant on Civil and Political Rights, which has been ratified by 169 countries, contains a similar provision as does the UN Convention on the Rights of the Child. We note that all but three of the 15 countries where AIIB has commenced or is proposing projects,³ and all but 8 of the AIIB's 57 founding members,⁴ are parties to the Covenant. All are bound by the Convention on the Rights of the Child. OHCHR strongly recommends that the right to freedom of information, as a component of the internationally recognised right of freedom of opinion and expression,⁵ be respected and safeguarded in the AIIB's Public Information Policy, as the ADB and EIB have done.⁶

B. Specific comments

[2] SCOPE

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| Para 2.1. | <i>This Policy is without prejudice to specific information disclosure requirements adopted by the Board of Directors in other policies...</i> |
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² Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20).

³ The exceptions are Myanmar, China and Oman. China has signed, though not ratified the Covenant, which means that it is obliged to refrain from acts that would "defeat the object and purpose" of the Covenant (Vienna Convention on the Law of Treaties, art. 18(a)).

⁴ The exceptions are Brunei, Malaysia, Myanmar, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

⁵ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 (Sept. 12, 2011), paras. 18-19.

⁶ In its discussion of "Recent Global Trends in Public Communications", para 17 of the ADB Public Communications Policy notes: "Freedom of information is recognised as a fundamental human right as set forth in the Covenant on Civil and Political Rights. Citizens are demanding greater transparency and holding governments and private sector corporations to higher standards of accountability."

8. An important threshold issue, in OHCHR’s view, is the lack of clarity concerning the scope of application of the policy and its relationship with information disclosure requirements in other AIIB policies. Paragraph 2.1.1 appears to be the reverse of the presumption of harmonisation in accordance with information policy disclosure requirements, in other MDBs’ policies.⁷ In OHCHR’s view, it is important that disclosure requirements across the full range of the AIIB’s policies are clear and internally consistent, and harmonised upwards in accordance with the draft Public Information Policy’s objective to ensure maximum transparency.⁸

[4] OVERARCHING INTENTIONS

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| Para 4.2. | <i>The adoption of such a principles-based, rather than a list-based, approach to required public disclosure, is intended by the Board of Directors to generate maximum disclosure and achieve a culture of operational transparency at the Bank.</i> |
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9. While strongly endorsing the objective of achieving a “culture of operational transparency,” OHCHR does not see that a categorical distinction between principles and lists is warranted, nor that the application of principles, alone, will guarantee transparency. For instance, some of the more rigorous information disclosure frameworks, such as those of the World Bank and ADB, are guided by principles yet contain detailed lists of documents which are either disclosed or subject to legitimate exceptions. In order to provide clarity and promote consistency, efficiency and proactiveness in Policy implementation, OHCHR recommends that lists of disclosed and exempt documents be included within the body of the Policy, rather than the accompanying Directive, accompanied by declassification timelines and deadlines for disclosure following specific functional events, and be publicly consulted upon.

10. There are numerous good examples of specific, proactive events-based disclosure in other MDBs. For instance, paragraph 34 of the IFC’s Information Disclosure Policy 2011 provides: “IFC makes the [Summary of Investment Information and the Environmental and Social Review Summary] publicly available no later than sixty days, in the case of Category A projects, and thirty days, in the case of all other projects, prior to consideration of the investment for approval by IFC’s Board of Directors (or other relevant internal authority).”⁹ Para 36 provides: “For projects or investments with potential significant adverse environmental or social risks and/or impacts, disclosure of the ESIA should occur early in the environmental and social assessment process. For these projects, IFC will also endeavour to provide access to the draft ESIA prepared by the client even before IFC has completed, or in some cases even started, the review of its investment.” And para 51 of the ADB’s Public Communications Policy provides, in part: “In accordance with the requirements under the Safeguard Policy Statement, ADB shall post on its website ... a draft environmental impact assessment (EIA) for an environment

⁷ See for example para. 34 of the ADB’s Public Communications Policy, and para 1.3 of the EIB Group’s Transparency Policy.

⁸ Para 1.3 of the EIB Group’s Transparency Policy appears to be among the clearest and strongest in this regard: “In applying this Policy, the EIB Group takes into account other EIB Group Policies and rules such as the Anti-Fraud Policy, the Whistleblowing Policy, the Complaints Mechanism Principles, and relevant Codes of Conduct applicable to staff and governing bodies. This Policy does not override these Policies and rules but must be read in conjunction with them as they are mutually reinforcing. In case of conflict between specific transparency and disclosure rules in other EIB Group Policies and this Transparency Policy, the provisions of the latter shall prevail.”

⁹ Para. 35 provides: “There may be some limited circumstances that may prevent the observance of these time periods (see paragraph 14). In such cases, the Board of Directors would be informed of any such delay in the release of the [Summary of Investment Information] and the relevant environmental and social information.”

category A project, at least 120 days before Board consideration;” and “a draft environmental assessment and review framework, where applicable, before appraisal[.]”

11. OHCHR would strongly recommend that the AIIB adopt similar requirements for comparable documentation, and that the disclosure provisions in AIIB’s Environmental and Social Framework be interpreted in light of the draft Public Information Policy’s (clearer) requirements.¹⁰

12. OHCHR notes that the interpretation of the draft Policy should be guided by the “Overarching Intentions” outlined in Section 4 (“Transparency Enhances Accountability” and “Maximum Disclosure and Transparency”). However, OHCHR would recommend that the word “Objectives” would be a clearer and stronger anchoring for the Policy than “Overarching Intentions”, and would communicate more clearly the requirement that these objectives be taken into account in interpreting and implementing the Policy, and that an interpretation or outcome that favours these objectives should prevail over one that does not.

[5] GOVERNING PRINCIPLES

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| Para 5.1.1 | Principle 1. Presumption in Favor of Disclosure. <i>The Bank shall ensure transparency and openness by disclosing information that the Bank holds, unless such information falls within an exception stated by this Policy.</i> |
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| Para 5.1.2 | Principle 2. Duty of Proactive Disclosure. <i>The Bank shall fulfil its public disclosure requirements by proactively disclosing information on its own initiative.</i> |
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13. OHCHR notes that there are also weaknesses and contradictions in the Governing Principles (para. 5) which – if not addressed – may significantly undermine the Bank’s quest for transparency and accountability. Principles 1 and 2 are clearly written and, on their face, vital for the purposes of transparency and accountability. However, in OHCHR’s view, the explanatory information in the Background Paper on the Public Information Interim Policy Review (Jan. 22, 2018) (“Background Paper”) raises questions as to how effectively Principles 1 and 2 would serve the goal of transparency in practice.

14. In the India Gujarat Rural Roads Program case study (page 3 of the Background Paper), the draft Environmental and Social Impact Framework and Tribal Population Planning Framework were posted on-line only 12 days prior to the Appraisal decision. While the project is category “B” (rather than “A”), this is a short period of time given the clearer and more proactive events-based disclosure provisions of other MDBs’ public information policies;¹¹ the low literacy rates of the Scheduled Tribes in the Gujarat region (pages 63–65 of the ESIA),¹² and the fact that women do not appear to have been

¹⁰ Cf. AIIB Environmental and Social Framework, paras. 57 and 58, make no distinction between category A and other projects insofar as ESIA disclosure is concerned, and insofar as private sector investments are concerned, do not contain a clear requirement for disclosure prior to appraisal. The problem of potential incoherence between the draft Public Information Policy and the disclosure provisions of other AIIB policies is dealt with under “Scope of application”, above.

¹¹ See para. 9 above for illustrations.

¹² Gujarat Roads and Buildings Department, Environmental and Social Impact Assessment (ESIA) for Gujarat Rural Roads (MMGSY) Project, at https://www.aiib.org/en/projects/approved/2017/_download/India/environmental-social-impact-assessment.pdf.

included in community consultations for the project in more than a token way.¹³ Given the particular risks faced by women and girls in rural transport and construction projects, the latter omission is particularly significant, in OHCHR's view.

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| Para 5.1.3 | Principle 3. Non-Discrimination and Equal Treatment of Disclosure Requests. <i>The Bank shall not discriminate or give special or privileged access when considering requests for the disclosure of information.</i> |
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15. Principle 3 is also vital and very welcome, although it should be recognised that extra effort and proactiveness may be needed by the Bank and client in order to inform and engage population groups experiencing particular types of discrimination, such as indigenous peoples, ethnic minorities, persons with disabilities and many others.¹⁴ Translation of documentation into different languages and posting of documents produced in other languages, are typical examples. OHCHR would recommend that the AIIB clarify that positive measures of this kind, designed to address structural obstacles to participation, should not fall foul of the "special or privileged access" caveat in Principle 3.

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| Para 5.1.4 | Principle 4: Due Regard to the Efficiency of the Bank. <i>The Bank shall have due regard to the operational efficiency, administrative capacity and financial resources of the Bank when implementing this Policy.</i> |
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16. Principle 4 is highly problematic, in OHCHR's view, and appears to run counter to Principles 1-3. All MDBs have a legitimate concern for efficiency and must make the best use of limited resources and administrative capacities. The Background Paper (para. 15) notes that "Lean" is among the AIIB's core values. But efficiency is surely a means to an end, and subordinate to "effectiveness" and the Policy's goals to ensure maximum transparency (para. 4). To elevate "efficiency" to one of four Governing Principles may conflict with the Policy's overarching transparency objectives (para. 4) as well as para. 13(2) under which the President must assign resources for the "effective" (as well as efficient) implementation of the Policy. Prioritising efficiency, alone, may weaken the incentives for effective implementation.

17. Moreover, in OHCHR's view, the explanations in the Background Paper are not to the point. The Policy (para. 2.2) already makes it clear that the Bank is not required to develop or compile data which does not presently exist, as do other MDB information policies. And in OHCHR's view, the concern that information requests may be "frivolous, malicious or commercially motivated" is unwarranted and could lead the Bank into inappropriate speculation about requesters' motives, undermining the objectives of maximum transparency and accountability. Avoiding "repeated" requests is certainly a legitimate and well-recognised interest, by contrast, and OHCHR notes the potential relevance of the ADB's Public Communications Policy 2011 as a model.¹⁵

¹³ Gujarat Roads and Buildings Department, ESIA, at pp.73-142.

¹⁴ In international law, measures to remove structural obstacles to inclusion are called "special measures" or "positive measures", or in the case of persons with disabilities, "reasonable accommodation." See UN Convention on the Elimination of Discrimination Against Women, article 4(1); UN Convention on the Elimination of All Forms of Racial Discrimination, article 2(2); and UN Convention on the Rights of Persons with Disabilities, article 5(3).

¹⁵ ADB, Public Communications Policy 2011, para. 96: "ADB shall not be required to comply with, or respond to, repeated or unreasonable requests for information on the same subject from the same person,

[6] REQUIREMENT TO DISCLOSE INFORMATION PROACTIVELY

18. By comparison with the World Bank’s and ADB’s policies, OHCHR notes that the “event categories” in AIIB’s draft Policy (para. 6) and illustrative examples of documents in Annex A do not provide very clear guidance on the specific documents which will or will not be disclosed. Illustrative lists are inherently limited in this regard. Paragraph 13 of the Background Paper states that a “detailed list of information to be disclosed, including which events or processes will trigger a given disclosure”, will be made available in the Directive, to be approved by the Bank President. However as indicated earlier, OHCHR would recommend specific documents be listed fully within the body of the Policy, for the sake of transparency, efficiency and proactiveness, along with proposed declassification timelines and deadlines for disclosure following specific functional events, and be consulted upon publicly.

19. Subject to the content of the forthcoming Directive, OHCHR welcomes the fact that the examples in Annex A of the draft Policy include a number of important sources of information from governing bodies, identities of Governors and Executive Directors and contact details of senior management, the schedule and agenda of Board meetings, strategies, and certain other organisational, regulatory and financial information.

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| Para 6.1.1 | Financial Events. Financial Events shall comprise the approval or adoption by the Board of Directors of financial statements in either an annual audited, or quarterly unaudited. |
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20. OHCHR notes that other MDBs, such as AfDB, ADB, IDB and the World Bank, disclose their full budgets, rather than summaries. OHCHR would also strongly recommend the disclosure of full papers and reports produced by internal evaluation units, given the limitations of summaries, consistent with the practice of other MDBs.

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| Para 6.1.2 | Institutional Events. Institutional Events shall comprise the approval or adoption by the President, Board of Directors or Board of Governors of information in the exercise of the powers attributed to such governance organs by the Articles of Agreement. |
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21. However, OHCHR recommends that institutional information should include documents circulated to the Board (e.g. World Bank Access to Information Policy, s. III.B.4.d), advance notification of projects to be considered, and that the AIIB specify the notice period for the posting of documentation in advance of Board meetings.¹⁶ Early disclosure is essential if stakeholders are to be able to engage in good faith with the Board in relation to decisions that affect them.

22. Disclosure of institutional event-related documents should also extend to the documents relating to the procedures before the Project-affected People’s Mechanism (PPM) under its “pre-emptory,” dispute resolution and complaint functions. As indicated in OHCHR’s submission in relation to the PPM, and in line with the practice of IAMs of other development finance institutions, AIIB should be expected to disclose full documents (and not only summaries) of these procedures, including submissions by Project affected people; internal communications between the PPM, AIIB

organisation or group if ADB has provided such information after a previous request or has given reasons why it cannot provide the information.”

¹⁶ The ADB’s Public Communications Policy is a good practice in this regard: “ADB shall post on its website (i) the provisional schedule of items for Board consideration for the forthcoming 3 weeks on a rolling basis.” ADB, Public Communications Policy 2011: Disclosure and Exchange of Information, para. 85.

Management and the Board; and action plans deriving from complaint review procedures. The disclosure of PPM-related documents should be subject only to the exceptions stipulated in the draft Policy, and complainants' confidentiality and the need to prevent intimidation and/or reprisals.

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| Para 6.1.3 | Operational Events. <i>Operational Events shall comprise the approval or adoption by the President or Board of Directors of information related to the administration and operational functioning of the Bank.</i> |
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23. OHCHR notes the importance of disclosing project implementation and completion reports, as other MDBs routinely do, for the sake of transparency, accountability, and to provide the feedback loops necessary to sustain strong development outcomes. Disclosure of information relating to the implementation of the AIIB Environmental and Social Policy (ESP) is also particularly relevant, as provided for in para. 58 of the ESP. This includes notably the Bank's "reviews of the use of country and corporate systems," which OHCHR understands would include equivalence assessments and gap-filling measures.

Other documents

24. In line with the practice of the AfDB, ADB, EBRD, EIB, IDB and World Bank, OHCHR recommends that draft operational policies and sector strategies be disclosed before they are approved by the Board, in addition to the final versions after Board approval. OHCHR also recommends that the AIIB publish advance information about future strategy and policy reviews.

25. Other critical documents to be disclosed, in OHCHR's view, are Bank procedures and guidelines for staff including for project administration, and legal agreements relating to operations (which are routinely disclosed by other banks including the AfDB, ADB, IDB and World Bank). OHCHR also recommends that the Policy lay out specific timeframes for the release of social and environmental information about projects prior to their approval, and that any inconsistencies between the disclosure requirements of various policies should be resolved by reference to the draft Public Information Policy's goal to ensure maximum transparency.¹⁷

Translations

26. Translation of project documents as well as operational policies and strategies into relevant languages of affected communities and posting of documents produced in other languages, are among the other important measures enhancing transparency and accessibility of information. OHCHR notes that the draft Policy does not contain a commitment along these lines, in contrast to the policies of the ADB, EBRD and the World Bank.

[9] EXCEPTIONS TO DISCLOSURE REQUIREMENTS

OHCHR welcomes the approach reflected in the draft Policy to define exclusions by reference to the potential for harm to be caused in relation to protected interests. However, in OHCHR's view there is considerable room to strengthen the listing and substantive content of the exceptions, in line with best practice in other MDBs and in national legal systems.

¹⁷ See para 8 above.

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| Para 9.1.1 | Exception 1: Protecting the Privacy and Integrity of the Individual. <i>The Bank shall not disclose information if doing so would jeopardize the personal privacy, or physical or mental well-being, safety or security of Bank Personnel or any other natural person.</i> |
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27. OHCHR recognises that Exception 1 is clearly formulated and addresses a range of legitimate and important protected interests. However, OHCHR would recommend that the phrase “mental well-being” be clarified or deleted, given the potential for misunderstanding or misuse, contrary to the objectives of the Policy. An alternative may be to limit disclosure where to do so would “endanger the life, physical or mental health or safety” of any individual. A listing of specific documents that do (and do not) fall within this exception, as other MDBs have done, would greatly enhance clarity, efficiency and effectiveness of the Policy, in OHCHR’s view.

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| Para 9.1.2 | Exception 2: Protecting the Commercial and Financial Autonomy of the Individual and Legal Entities. <i>The Bank shall not disclose information, if doing so would prejudice the commercial or financial autonomy of an individual or the Bank or any other legal entity. Accordingly, the Bank shall not disclose information, if doing so would prejudice the financial worth or competitiveness of a natural individual person or the Bank or any other corporate entity, or their assets.</i> |
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28. OHCHR recognises that Exception 2 encompasses protected interests that are recognised in law and practice. However, the drafting of Exception 2 seems internally inconsistent: it is not clear whether the second sentence elaborates upon the first or alternatively sets out additional self-standing criteria. OHCHR suggests that a single sentence could capture all relevant criteria in a clear and synthetic way, and would suggest that the word “autonomy” (in the context of “commercial or financial autonomy”) either be defined or substituted with a more recognisable term. The ADB’s exception for commercial information is comparatively clear and may provide a model.¹⁸ A listing of specific documents that do (and do not) fall within this exception, as other MDBs have done, would greatly enhance clarity, efficiency and effectiveness of the Policy, in OHCHR’s view.

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| Para 9.1.3 | Exception 3: Protecting the Functional Integrity of the Bank. <i>The Bank shall not disclose information, if doing so would misuse its resources and facilities, or would be contrary to the purpose and functions of the Bank (in accordance with Articles 1, 2 and 9 of the Articles of Agreement). The Bank shall not disclose information if doing so would prejudice the administrative, deliberative or decision-making discretion of the Bank. Accordingly, the Bank shall not disclose information that is legally privileged, or would jeopardize an inspection, investigation, or audit involving the Bank. The Bank shall not disclose information, if doing so is inconsistent with its duty of due respect to national laws and regulations.</i> |
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29. Exception 3 is unduly vague, broad and problematic, in OHCHR’s view, and appears to mix legitimate protected interests (such as deliberative information and information subject to attorney-client privilege) with extraneous policy concerns. In OHCHR’s view, the risk of “misusing the Bank’s

¹⁸ ADB Public Communications Policy 2011, paragraph 97(v) excepts from disclosure information that “would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or another party that was the source of the information, or any confidential business information (information covered by a confidentiality agreement or non-disclosure agreement that ADB has entered into with clients and/or other related parties).”

resources and facilities” is particularly vague, unclear and amenable to misuse, and it is difficult to imagine disclosures that could be contrary to the Bank’s broadly defined purposes and functions as outlined in Articles 1, 2 and 9.

30. The category of “administrative discretion” should also be more clearly defined, in OHCHR’s view, given the scope for an unduly broad interpretation which frustrates the Policy’s transparency objectives.¹⁹ Moreover, in line with the ADB’s and EIB’s information policies, OHCHR recommends that the category of “deliberative discretion” be defined more clearly in accordance with the specific interests to be protected (that is to say, inhibiting the candid exchange of ideas, or seriously undermining the Banks’ decision-making process).²⁰ The possible jeopardising of the Bank’s “decision-making discretion” seems particularly unclear. A listing of specific documents that do (and do not) fall within this exception, as other MDBs have done, would greatly enhance clarity, efficiency and effectiveness of the Policy, in OHCHR’s view. Similarly, OHCHR recommends that the exception from disclosure for investigative information should be narrowed to protect the specific interest at stake, namely, the *integrity* of investigations.

31. Finally, we note that Exception 3 includes the requirements to interpret this particular exception in line with the purposes of the Bank as expressed in its Articles of Agreement, and with national law. OHCHR recommends that international law and national law be included within a definition of “applicable law”, for the latter purpose.²¹

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| Para 9.1.4 | <i>Exception 4: Protecting the General Powers and Sound Banking Principles of the Bank. The Bank shall not disclose information, if doing so would jeopardize its credit worthiness or access to capital markets at prices the Bank deems reasonable or would otherwise undermine the effective use of its powers in accordance with Article 16 of the Articles of Agreement. The Bank shall not disclose information if doing so would prejudice the principles of sound banking in accordance with Article 9 of the Articles of Agreement.</i> |
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32. Exception 4 is also unduly vague, broad and problematic, in OHCHR’s view, and the protected interests are not well defined. The phrase “sound banking principles” is not defined in article 9 of the Bank’s Articles, and the risk of jeopardising “access to capital markets at prices the Bank deems reasonable” seems particularly subjective and amenable to misunderstanding or misuse, contrary to the Policy’s transparency objectives. The powers of the Bank in article 16 to raise funds, buy and sell securities, and so forth, are of a very general nature, and it is not clear what this proposed exception adds to Exception 2. Consistent with best practice in other MDBs, OHCHR respectfully suggests that this proposed exception be deleted.

¹⁹ OHCHR recognises that the IDB (Annex I(F)) and AfDB (para. E(j)) information policies contain qualified exceptions of this kind but that, consistent with best practice in other MDBs, protected interests relating to most categories of administrative information are covered by other recognised exceptions (such as those relating to privacy, financial and deliberative information).

²⁰ ADB Public Communications Policy 2011, para. 97; EIB Group Transparency Policy 2015, para. 5.6.

²¹ OHCHR notes that the Inter-American Development Bank’s Access to Information Policy 2011, Annex I, B., uses the term “applicable law” rather than national law, and helpfully restricts the scope of relevant laws by the inclusion of the caveat “... such as restrictions imposed by securities and banking laws.”

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| Para 9.1.5 | Exception 5: Protecting the International Character of the Bank. <i>The Bank shall not disclose information, if doing so would jeopardize the international character of the Bank or interfere in the political affairs of any of the Members of the Bank, in accordance with Article 31 of the Articles of Agreement.</i> |
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33. Exception 5 appears unclear, redundant, and without precedent elsewhere. OHCHR takes it that the “international” character of the Bank, in the ordinary meaning of the term (that is to say, an international organisation like any other MDB, established by a treaty governed by international law and possessing its own international legal personality) is already clear and unassailable, in its Articles of Agreement, policies and operations. Paragraph 17 of the Background Paper does not shed much light on whether any specific meaning of “international character” is intended, or what if anything this term may add to the requirement to avoid political interference (article 31(2) of the Bank’s Articles). On its face, it is difficult to see how the Bank’s international character and the requirement to avoid political interference could be threatened by the good faith application of the Bank’s public information policy.²²

34. Moreover, OHCHR assumes that the AIIB does not interpret article 31(2) in a way which would arbitrarily curtail robust due diligence, full transparency and active stakeholder engagement on which the sustainability of projects and the long-term profitability of investments depend.²³ OHCHR respectfully suggests that this proposed exception be deleted.

Delayed release or redaction

35. OHCHR notes the provision in para. 9.2 of the draft Policy for delayed release or redaction, as an alternative to non-disclosure. OHCHR recommends that a specific provision on severability be included. The ADB policy may provide a useful model in this regard.²⁴

²² OHCHR notes that the prohibitions on political interference in Art. IV, s. 10 of the Articles of Agreement of the IBRD/IDA, on which article 31(2) of the AIIB Articles and comparable provisions in other MDBs were based, have been interpreted purposively and narrowly, to preclude lending or investment decisions based upon the form of government of shareholder members. *See e.g.* Ibrahim F. I. Shihata, *The Dynamic Evolution of International Organisations: The Case of the World Bank*, 2 J. HIST. INT’L L. 217, 246 (2000); Legal opinion of the General Counsel of the World Bank Group, 11 July 1995, in IBRAHIM SHIHATA, THE WORLD BANK LEGAL PAPERS (2000) at 29; Roberto Daniño, Senior Vice President and General Counsel [World Bank], Legal Opinion on Human Rights and the World Bank (Jan. 27, 2006); Ana Palacio, The Way Forward: Human Rights and the World Bank, Oct. 2006, available at <http://siteresources.worldbank.org/EXTSITETOOLS/Resources/PalacioDevOutreach.pdf>; and Anne-Marie LeRoy, “Legal note on Bank involvement in the criminal justice sector,” 9 February 2012.

²³ The importance of transparency for investment is recognised in s.4 of the IFC Access to Information Policy: “IFC encourages its clients to be more transparent about their businesses to help broaden understanding of their specific projects and of private sector development in general. In addition, IFC believes that when clients are committed to transparency and accountability they help promote the long-term profitability of their investments.”

²⁴ ADB Public Communications Policy 2011, para. 95: “If a document (or part of it) subject to posting on the ADB website is not posted because the information contained in the document falls under an exception, ADB shall make reference to the document or the information removed therefrom, unless citing the document or the removed information would itself violate an exception. If part of the information contained in a document to be provided upon request falls under an exception, such information shall be removed from the document and the requester shall be informed of the reason of such removal.”

[10] OVERRIDE OF DISCLOSURE REQUIREMENTS AND EXCEPTIONS TO DISCLOSURE REQUIREMENTS

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| Para 10.2.1 | Positive Override. Information shall be disclosed by the Bank if the Board of Directors determines that a legitimate interest served by disclosure outweighs the harm arising from the disclosure of such information. |
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| Para 10.2.2 | Negative Override. Information that the Bank is otherwise required to disclose in accordance with this Policy shall not be disclosed by the Bank if the Board of Directors determines that the harm arising from the disclosure of such information outweighs the legitimate interest served by disclosure. |
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36. OHCHR welcomes the inclusion by the Bank of a “positive override” and note that, in line with the practice of other MDBs, the Bank has also proposed to introduce a “negative override”. OHCHR notes that other MDBs have sought to limit the scope of negative overrides, in order to maximise transparency. The World Bank’s policy (s. IV(2)) may provide a useful model in this regard.

Internal review and appeal

37. OHCHR notes that the Directive makes provision for an internal appeals mechanism (paras. 18-22). However, in order to maximise the integrity of the appeals process and trust among all relevant stakeholders, OHCHR strongly recommends that a second-tier appeals panel be established, consisting of independent experts with recognised expertise in access to information matters. The ADB’s policy and practice would provide an excellent model for such a panel, in OHCHR’s view. OHCHR notes that the AfDB, IDB and the World Bank also protect the integrity and effectiveness of their information policies through independent appeals mechanisms. OHCHR reiterates its view that the provisions for internal review (and, as we propose, independent appeal) should be included in the draft Policy and be the subject of public consultation.

Access to the PPM

38. In OHCHR’s view, the possibility of appealing a non-disclosure determinations should be without prejudice to complainants’ access to the respective institution’s independent accountability mechanism.²⁵ OHCHR would therefore recommend that the scope of the proposed PPM include complaints arising from the alleged breach of the AIIB Policy on Public Information.

²⁵ See e.g. ADB Public Communications Policy 2011, para. 12; IDB Access to Information Policy 2011, paras. 9.1-9.3