

Comments and Recommendations on AIIB Draft Policy on Public Information

March 16, 2018

We, the undersigned non-governmental organizations, welcome the opportunity to comment on the Asian Infrastructure Investment Bank's (AIIB, or Bank) draft Policy for Public Information (Policy, or "draft PPI").

President Jin Liqun in his Opening Address at the 2017 Meeting of the AIIB Board of Governors laid out the vision that *“As an open and transparent organization, the Bank is duty bound to provide clear, accurate and timely information to the public. But much still remains to be done in our public communications, and we will continue to improve.”*¹

Harmonious with the acknowledgement about the Bank's adherence to values and principles of openness, transparency and accountability, we note that it is in AIIB's institutional interest to incorporate significant improvements to the draft PPI to not fall short of aforementioned operational accountability and transparency commitments and objectives.

The right to freedom of information

We welcome the AIIB's commitment to accountability and the recognition that the required public disclosure of information held by the bank should be consistent with 'transparency enhances accountability'², an overarching intention outlined in the draft Policy. Consistent with AIIB's unequivocal commitment to support human rights 'through the Projects it finances' (AIIB Environmental and Social Framework, para 8 under '*Social Development and Inclusion*'), policy discussion with respect to access to public information should be based on Article 19 of the Universal Declaration of Human Rights, that "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."

Major international financial institutions like the Asian Development Bank, European Investment Bank, the European Bank for Reconstruction and Development and other regional development and investment banks, have increasingly recognized the right to freedom of information, and the right of people to seek, receive and impart information in their public information policies.

Consultation process

We suggest that after the consultation period a matrix will be uploaded to the AIIB website in which all questions and remarks by stakeholders will be answered, instead of only a summary of inputs provided by stakeholders, since the latter would go against the aforementioned principles of openness, transparency and accountability. We also suggest a second round of consultations to address procedural and structural flaws that could seriously undermine the transparency the AIIB strives for.

¹ Opening Address of the Meeting of the AIIB Board of Governors by President Jin Liqun on June 16, 2017 (retrievable via https://www.aiib.org/en/news-events/news/2017/20170616_002.html)

² Para. 4.1 of AIIB's draft policy for public information

“Overarching Intentions” and proactive disclosure requirement

A “principles-based” rather than “list-based” approach is argued in the PPI to be the appropriate approach in achieving “maximum disclosure” and “a culture of operational transparency.” However, in the absence of a clear framework as to what type of documents the public and project-affected peoples have the right to access and, subsequently, the Bank to publicly disclose, the current ambiguous parameters in the PPI do not provide clear guidance on how to achieve the culture of operational transparency it intends.

The refusal to adopt a “list-based” approach in the PPI would risk trivializing the sound policies and principles laid down in AIIB’s Environmental and Social Framework (ESF), which specifically - with respect to information disclosure - requires a range of documents relevant to the environmental and social risks and impacts of AIIB-assisted projects to be disclosed by the client and the Bank. This documentation includes:

- Draft environmental and social assessment reports, Environmental and Social Management Plans (ESMPs), Environmental and Social Management Plan Frameworks (ESMPFs), Resettlement Plans, Resettlement Planning Frameworks (RPFs), Indigenous Peoples Plans and Indigenous Peoples Plans and Frameworks (IPPFs), or other approved forms of documentation;
- Final or updated environmental and social assessment reports, ESMPs, ESMPFs, resettlement plans, RPFs, Indigenous Peoples plans and IPPFs, or other approved forms of documentation; and;
- ESMPS, resettlement plans, Indigenous Peoples plans and monitoring reports required to be prepared by Clients during Project implementation under ESMPFs, RPFs, IPPFs, or other approved forms of documentation.’’³

In pursuit of clarity and consistency across the various policies of the Bank, an illustrative list of documents coherent with the required document disclosure outlined in ESF would therefore need to be integrated into the body of the Policy.

Information to be disclosed and time-bound disclosure requirements

While the commitment to proactive disclosure is encouraging, the ambiguity on what constitutes disclosure “in a timely and accessible manner” remains in the Policy. What lends substance to a policy on information disclosure are precisely rules on the public release of specific project documents, including the **clear timeframes** of when documents are made publicly available throughout the project cycle.⁴

The draft Policy should include time-bound requirements for disclosure of Project Summary Information (PSIs) prior to Board approval, as is required of ADB, EBRD, EIB, and IFC. For all Category A projects (public sector, private sector, and financial intermediaries and their Category A sub-projects), draft environmental and social impact assessments – including the list of draft documents under the requirement of Environmental and Social Policy of the AIIB’s ESF - should require disclosure of 120 days prior to Board approval.⁵

³ Asian Infrastructure Investment Bank, Environmental and Social Framework, Beijing, December 21, 2015, paragraphs 56 and 57.

⁴ Dr. Korinna Horta, Urgewald (2018), The Asian Infrastructure Investment Bank: Transparency and Accountability

⁵ This is consistent with ADB’s policy, which represents best practice in this regard. ADB Operational Procedures: Public Communications at para. 11. EBRD IFC’s policy also contains specific time-bound requirements for Category A projects that require a longer period of disclosure of summary information prior to Board approval. IFC Access to Information Policy at para. 34.

As a first step, the AIIB could follow the ADB's policy requiring 120 day public disclosure of draft environmental and social assessments "*where the subprojects financed by the financial intermediaries ... through either credit-line, other loans, equity, guarantee, or other financing instruments, have potential for significant environmental or social impacts.*"⁶ In the use of borrower systems (public and private loans), the assessment of borrower systems, the planned gap-filling measures and public input received on the assessment.

Non-project information, Institutional and Financial Information

Apart from the project information, there are the policies - country strategies, sectoral policies – and strategic framework for investments that should be disclosed (e.g. geographical composition, sectoral, forward looking spending), evaluations, board minutes, some of which already addressed in the Annex A of the draft Policy.

We request the AIIB to establish a public registry and adopt in its Policy a publication scheme setting out the type of environmental and social information it intends to record in this public registry.

Further, additional type of public information that requires disclosure should include board documents (information provided to the board for decision-making), project budget (e.g. forward looking, broken down in annual and quarterly allocations, capital spent), project contract, project/loan conditionality, and sub-national locations, client names and contacts. Project completion reports related to financing operations should also be published. The bank should be required to disclose a final list of final beneficiaries of financing support through Financial Intermediaries for different financial modalities.

Request for access to information (paras 7.1 – 8.4)

The draft Policy currently gives the Bank President too much discretion to determine the timetable and extent of information to be disclosed upon request by an external party. To enhance credibility and achieving the Bank's transparency objectives, we recommend establishing a clear timetable (and accompanying rules) for responding to request for information by external parties. Furthermore, it should be made clear and the specific type of documents to be disclosed within a clear timeframe. In the case of a denial for access to information, a written response which specifies the grounds on which the refusal is based needs to be issued publicly within a specific timeframe, accompanied by a clear timeline for an appeal process – all part of the practices commonly implemented internationally by other multilateral financial institutions and in national legal systems.

Problematic and open-ended exceptions (paras 9.1-9.2)

While exceptions in general address a range of legitimate and protected interests, many are unduly unclear to the point that they can be potentially misapplied or amenable to misuse. To avoid these scenarios, the final draft needs greater clarification and tightening of scope and details.

To be consistent with the Policy's objectives for maximum disclosure and transparency, as well as to ensure the clarity and efficacy of the Policy, there should be a list of specific types of documents either included or

⁶ ADB Safeguard Policy Statement (2009), Safeguard Requirements 4: Special Requirement for different finance modalities.

excluded from each exception. For example, any information relating to environmental and social impacts must be disclosed and should never be subject to exceptions.

Exception 1 (“*Protecting the Privacy and Integrity of the Individual*”) contains a reference to how ‘*the Bank shall not disclose information if doing so would jeopardize the . . . mental well-being . . . of Bank Personnel or any other natural person*’. Without a clear definition of what is meant by “mental well-being”, this exception is unreasonably vague and creates ample room to be misconstrued. This clause should be removed from the exception, as it is without precedent at other international and multilateral financial institutions and points to an ill-defined general harm without any corresponding injury test.

Exception 2 (“*Protecting the Commercial and Financial Autonomy of the Individual and Legal Entities*”) is designed to protect the commercial and financial autonomy of legal entities (such as the Bank and its clients) but omits how it might apply to AIIB lending to financial intermediaries. To ensure the effectiveness of the environmental and social management systems employed by the Bank’s clients or borrowers, information relating to sub-projects and all financing instruments (e.g. credit-line, loans, equity, technical assistance, and guarantees) should not fall under the exception. A listing of specific documents that fall within or outside this exception would warrant clarity and efficacy of the Policy.

Exception 3 (“*Protecting the Functional Integrity of the Bank*”) lists a range of vague clauses that, if indiscriminately applied, are at odds with the PPI’s objective of delivering information to the public. The exception that disclosing information ‘*would prejudice the administrative, deliberative or decision-making discretion of the Bank*’ is unduly inexplicit. The timely disclosure of social impacts arising from a large-scale infrastructure project – e.g. forced land acquisition, eviction, resettlement, or unchecked livelihood restoration - can potentially all fall under the blanket exception if they were perceived as prejudicing the decision-making discretion of the Bank. Further, the correlation between information disclosure and ‘*misuse of resources and facilities*’ is not clear and potentially prone to abuse.

Lastly, the Policy states that ‘*[t]he Bank shall not disclose information, if doing so is inconsistent with its duty of due respect to national laws and regulations*’. This should be removed from the Policy, since it suggests that the national laws of an autocratic regime may supersede the AIIB Policy, even when the national laws may be inconsistent with international laws.

Exception 4 (“*Protecting the General Powers and Sound Banking Principles of the Bank*”) writes ‘*[t]he Bank shall have due regard to the operational efficiency, administrative capacity and financial resources of the Bank when implementing this Policy*’. This clause is immoderately vague. In the Bank’s ongoing efforts to remain “fast and nimble” for its project loans, the rapid loan processing has not enabled time-bound release of documents, which goes against the objectives set out in the Policy. And as AIIB seeks to be a “lean bank” at the cost of a reduced administrative capacity, putting the operational efficiency first where clients may be unwilling to use adequate financial resources to assess and address environmental and social impacts is counterintuitive with the principles of openness, transparency and accountability set forth by the Bank.

While exceptions to information disclosure can be legitimate, these need to be clearly defined. Clearly, all information relating to environmental and social impacts, including forced displacement cannot be considered under exceptions.

Exception 5 (“*Protecting the International Character of the Bank*”) exempts from disclosure information that might “interfere in the political affairs” of any shareholders of the Bank. While the sovereignty of any Members of the Bank is privileged and sacrosanct, this exception must explicitly exclude environmental and social

impacts of AIIB-supported projects from its scope. The phrase ‘International character of the Bank’ is neither clearly defined in the Articles of Agreements or in the draft Policy, and appears to be extraneous. The best way to protect AIIB’s international character and meet the transparency objectives of the Policy, it would be in the Bank’s institutional interest to adopt a public information policy in line with the best international transparency practices already implemented by other international financial institutions

Reporting requirements: accountable to the public (para. 12)

As the draft Policy addresses the inherent need for the public to access information, it is insufficient for the Bank to limit its annual “Report on Public Information” on implementation of the PPI to a communication between the President and the Board of Directors. To enhance credibility and encourage a process of continual learning, this report should be published on AIIB’s website and, in addition to “recommendations of the Chief Information Disclosure Officer and resulting final determinations by the President”, should include a summary of refusals to provide information to the public, any recommendations for changes to the Policy, as well as any monitoring and evaluation of the implementation of Policy.

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