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# THE RIGHT TO KNOW

## The New Development Bank's Information Disclosure Policy in a Comparative Context

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# LIST OF ACRONYMS

ADB	Asian Development Bank
AfDB	African Development Bank
AIIB	Asian Infrastructure Investment Bank
AoA	Articles of Agreement
BoD	Board of Directors
BoG	Board of Governors
BRICS	Brazil, Russia, India, China, South Africa
EMDC	Economically More Developed Country
IADB	Inter-American Development Bank
IDP	Information Disclosure Policy
IMF	International Monetary Fund
NDB	New Development Bank
PAP	Project Affected Person
UN	United Nations
WTO	World Trade Organisation

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# 1 INTRODUCTION

The New Development Bank (NDB) was first proposed during the fourth BRICS Summit in New Delhi in 2012. It became the world's youngest development finance institution (DFI) when the leaders of the five BRICS nations – Brazil, Russia, India, China, and South Africa – signed the Agreement on the Bank at the sixth BRICS Summit in Fortaleza, Brazil, in July 2015.

The NDB was born out of a collective desire among BRICS leaders and policymakers regarding their enhanced role in the global governance and financial architecture as large emerging economies.<sup>2</sup> China and India, in particular, had proven resilient against the global financial meltdown in 2008-09 and, consequently, led global growth recovery in the years immediately after the recession.<sup>3</sup>

The enhanced roles of the BRIC nations – South Africa joined the group in 2010 – in the multilateral arena have been manifested in individual and collective thrusts for a greater voice in global institutions over the last decade. These include the United Nations Security Council, the International Monetary Fund (IMF), and the World Trade Organisation (WTO).<sup>4</sup> The NDB, it stands to reason, is a concrete expression of the group's collective will to provide a tangible Southern steer to global governance and development finance.

The Bank's purpose, according to its General Strategy (2017-2021), is to mobilise resources for sustainable infrastructure projects in the BRICS countries as well as other emerging markets and developing countries (EMDCs).<sup>5</sup> Contrary to initial reports stating that the NDB would be an alternative to the World Bank and IMF, its Articles of Agreement (AoA) states that it will complement the efforts of the Bretton Woods institutions as well as other regional DFIs to spur sustainable and balanced economic growth.<sup>6</sup>

The NDB attempts to be 'new' in three broad areas<sup>7</sup> as per its Strategy, namely:

- i. New relationships based on a distinctly South South Cooperation approach, in that they are based on mutual trust and equality between the Bank and member countries, placing national sovereignty at the heart of its operations.
- ii. New projects and instruments with a greater focus on financing sustainable physical infrastructure, particularly in the areas of renewable energy, waste and water management, and transportation, through innovative means including local currency financing, project bonds, and co-financing arrangements.
- iii. New approaches, in that it aims to be a 'lean' Bank with less bureaucracy and a non-resident Board of Directors (BoD) that focuses more on policy debates than administration, and one that is flexible and efficient while using a risk-based approach for project approval and oversight.

The NDB started with an initial authorized capital of US\$100 billion. The initial subscribed capital of US\$50 billion was shared equally among the founding BRICS members. The first round of project

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<sup>1</sup> <http://www.ndb.int/about-us/essence/history/> (last accessed 12.09.2017)

<sup>2</sup> Jeijin, Zhu (2015, p.2) <https://www.saiia.org.za/special-publications-series/740-brics-insights-2-new-south-south-co-operation-and-the-brics-new-development-bank/file> (last accessed 12.09.2017)

<sup>3</sup> Nagaraj, R (2016), China and India's Economic Performance after the Financial Crisis – A Comparative Analysis. Retrieved September 12, 2017, from [https://ncgg-new.princeton.edu/file/406/download?token=5utS\\_ilp](https://ncgg-new.princeton.edu/file/406/download?token=5utS_ilp)

<sup>4</sup> Duggan, Niall (2015, p.16), Springer International Publishing Switzerland; [http://www.springer.com/cda/content/document/cda\\_downloadaddocument/9783319190983-c1.pdf?SGWID=0-0-45-1511673-p177384805](http://www.springer.com/cda/content/document/cda_downloadaddocument/9783319190983-c1.pdf?SGWID=0-0-45-1511673-p177384805). (last accessed 12.09.2017)

<sup>5</sup> p.3, NDB's General Strategy (2017-2021); <http://www.ndb.int/wp-content/uploads/2017/08/NDB-Strategy.pdf> (last accessed 18.09.2017)

<sup>6</sup> p.1, Article 1, Agreement on the New Development Bank; <http://www.ndb.int/wp-content/themes/ndb/pdf/Agreement-on-the-New-Development-Bank.pdf> (last accessed 16.09.2017)

<sup>7</sup> p.3-4, NDB's General Strategy (2017-2021) (last accessed 18.09.2017)

lending began in April 2016 with its BoD approving assistance worth US\$811 million. K.V. Kamath, its Indian President, stated that the NDB had provided loans worth US\$1.5 billion in 2016 and would provide US\$2.5 billion through 2017-18.<sup>8</sup>

### ***Information disclosure: Rationale, results and significance***

Given that it has 13 projects under its belt already, there is merit in the proposition that the NDB's operations are required to be transparent and accountable. A central theme in the discourse of development practice, transparency is regarded as key to enhancing good governance, checking institutional corruption, and facilitating a role for members of project-affected communities and civil society to be involved at all stages of project execution.<sup>9</sup>

Transparency is intimately linked with accountability. Florini (2000)<sup>10</sup> states that it can be defined as an institutional release of relevant information to those including citizens, markets or governments which evaluate such institutions on their policies and performance. In the context of development finance, an access to information (or information disclosure) policy is a marked aspect of the transparency mechanism at DFIs since such institutions undertake financing of development projects that may impact peoples' lives and livelihoods. It facilitates the participation of communities likely to be affected by projects through the planning and implementation stages and enables them to hold such institutions accountable.

Nelson (2001) outlines four key dimensions to assess the disclosure policies at DFIs. These are the "fullness of disclosure, accessibility of documents, timeliness of information availability, and the mechanisms available for recourse and influence"<sup>11</sup> which promote effective transparency and enable interested members of the public and/or project-affected communities to evaluate the likely impact of DFIs' actions. This is because information would be available in a manner which makes such institutions "more visible and more understandable".<sup>12</sup>

Typically, information disclosure policies at DFIs are based on decisions taken privately by its senior management and/or its Board of Directors. As DFIs are not subject to traditional external controls, vague disclosure policies can make such institutions less accountable to member States, civil society and individuals. Carrasco, Carrington and Lee (2009)<sup>13</sup> have explicated the need for clear disclosure policies that would make knowledge available to civil society and project-affected constituents to provide "meaningful input, feedback, and criticism". A true presumption in favour of disclosure, the authors' state, could positively alter management behaviour to reflect concerns from a broad range of stakeholders.

Six DFIs, including the World Bank and the Asian Development Bank (ADB), adopted access to information policies in the 1990s, in turn making transparency a standard feature in the development discourse even if implementation has varied.<sup>14</sup> To be clear, an information disclosure policy is one driver of transparency. Other modes of meaningful exchange include the easy accessibility

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<sup>8</sup> Press Trust of India; NDB to more than double its lending to \$2.5 billion next year: K.V. Kamath; <http://indianexpress.com/article/india/india-news-india/brics-summit-2016-ndb-new-development-bank-kv-kamath-double-lending-3086203/>

<sup>9</sup> Galtung, Frederick (1998); Criteria for Sustainable Corruption Control; <http://bit.ly/2eSJos3>

<sup>10</sup> Florini, Ann M. (2000). Does The Invisible Hand Need a Transparent Glove – The Politics of Transparency. Carnegie Endowment for International Peace. Retrieved on September 12, 2017, from <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/florini.pdf>

<sup>11</sup> Nelson, Paul J. (2001). Transparency Mechanisms at the Multilateral Development Banks (p.1838). Pergamon. Retrieved from <http://www.sciencedirect.com/science/article/pii/S0305750X01000730> on September 12, 2017.

<sup>12</sup> Ibid.

<sup>13</sup> See E. Carrasco, W. Carrington & H.Lee. (2009). Governance and Accountability – The Regional Development Banks (p. 4-5). Boston University International Law Journal No. 27. Retrieved from <http://www.bu.edu/law/journals-archive/international/volume27n1/documents/carrasco.pdf> on September 13, 2017.

<sup>14</sup> Nelson, Paul J. (2001). Transparency Mechanisms at the Multilateral Development Banks (Pergamon). Retrieved from <http://www.sciencedirect.com/science/article/pii/S0305750X01000730> on September 12, 2017.

of Bank documents, an effective appeals mechanism for situations when information is not made available or is denied, as well the easy availability of relevant information in the language used by communities and their representatives.

It must be pointed out that the right to information is a recognized component of the freedom of expression<sup>15</sup> and a fundamental human right. Financial institutions such as the NDB, which utilize public resources, should be obligated to adhere to transparency and accountability norms in conjunction with accepted international and regional human rights standards. This principle is indicated by the United Nations Guiding Principles on Business and Human Rights (2011)<sup>16</sup> and the UN Working Group on the issue of human rights and transnational corporations and other business enterprises.<sup>17</sup> The 'Equator Principles' outline clear reporting requirements to advance the case for transparency as a central feature of stakeholder management while acknowledging the need to protect competitive information.<sup>18</sup>

Civil society – global, regional and local – have collaborated with DFIs closely over the last four decades to make their information disclosure policies a matter of course for a rights-based approach to lending for infrastructure projects. Oxfam's work in the field with project affected communities has demonstrated the importance of access to information in ensuring a strong community buy-in for development projects. Research undertaken by the organization over over the last two decades has also shown that access to information is a key aspect of guaranteeing that communities know who to turn to when projects are not going as planned.<sup>19</sup>

True sustainable development demands meaningful and institutionalized engagement by and with those likely to be affected by infrastructure projects. Access to relevant information and transmission of timely information through the complete cycle of development projects is key to identifying social and environmental risks. In turn, proactive engagement is expected to lead to more efficient project design and better outcomes for all stakeholders. A robust and inclusive disclosure framework, thus, enables the right of affected communities to be fully aware of all levels of project and organizational information, while helping them hold institutions affecting their lives and livelihoods to account.

### ***NDB and Access to Information: Preliminary Remarks***

The NDB released its Interim Information Disclosure Policy in July 2016 and followed that by adopting a ten-page Information Disclosure Policy (IDP) in June 2017. The adoption of the IDP is consistent with Article 15 of the Bank's AoA which highlights its commitment to transparency and accountability and states: "The Bank shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."<sup>20</sup> The fact that it reiterates this commitment to transparency in its General Strategy (2017-2021) document reflects the importance the Bank attaches to the issue.

The IDP also commits to a review of the document annually and "more often as may be deemed necessary".<sup>21</sup> This pegs its first date of review as June 2018. It also commits to a systematic appeals and review process of Bank decisions (para 3.3).<sup>22</sup>

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<sup>15</sup> <https://www.article19.org/pages/en/freedom-of-information-more.html> (last accessed September 12, 2017)

<sup>16</sup> [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (last accessed September 12, 2017)

<sup>17</sup> [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.31_en.pdf) (last accessed September 12, 2017)

<sup>18</sup> [http://www.equator-principles.com/resources/equator\\_principles\\_III.pdf](http://www.equator-principles.com/resources/equator_principles_III.pdf) (last accessed on September 14, 2017)

<sup>19</sup> p.14, *The Suffering of Others* (Oxfam, April 2015); [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/ib-suffering-of-others-international-finance-corporation-020415-en.pdf) (last accessed: 20/11/2017)

<sup>20</sup> p.7, Article 15; Agreement on the New Development Bank

<sup>21</sup> p.4, paragraph 1.3.2, *New Development Bank Information Disclosure Policy*; <http://www.ndb.int/wp-content/uploads/2017/01/information-disclosure-policy-revised.pdf>

<sup>22</sup> *Ibid.* p.9

It should be recognised that the NDB has adopted features which highlight a presumption in favour of disclosure and a commitment to being responsive to information disclosure requests. The Bank's IDP is, thus, partially in line with existing practices at other DFIs including the World Bank, ADB, Inter-American Development Bank (IADB), African Development Bank (AfDB) etc. It is also remarkably similar to the Public Information Interim Policy (2016) released by the Asian Infrastructure Investment Bank (AIIB) which began lending operations around the same time as the NDB.<sup>23</sup>

The following pages serve to provide an analysis of the sections of the NDB's IDP in its current form. It shall be placed against existing access to information policies of four comparator DFIs -the World Bank, ADB, IADB, and the AfDB – and shall provide recommendations to improve the text of the NDB's IDP where applicable. The chapters are divided as per analyses of the individual sections of the IDP, namely its 'Key Principles', 'Classification of Information', and 'Disclosure of Information'. It is emphasized that the information disclosure policies of the comparator banks are not meant to be represented as policy paragons but have been chosen merely due to their long-standing existence and evolution.

The NDB is required to uphold the right to information and this paper is intended to be a civil society contribution to the annual review of the IDP. It should be recalled that the disclosure policies at all comparator DFIs, including the World Bank, ADB, AfDB etc. were also evolved with considerable effort made by civil society to make processes to access knowledge and information more participative and inclusive. The value of public consultations involving civil society as key stakeholders has been recognized by these DFIs over the last two decades and they have attempted to make access to information a public endeavor.

The NDB is yet to take up public consultations ahead of any of its policy or strategy positions, including its disclosure policy. It is hoped that this paper can be a worthwhile starting point for the Bank and civil society to engage more closely on this particular policy issue ahead of the document's annual review in June.

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<sup>23</sup> Public Information Interim Policy (January 2016), Asian Infrastructure Investment Bank; [https://www.aiib.org/en/about-aiib/content/index/\\_pdf/20160226052345422.pdf](https://www.aiib.org/en/about-aiib/content/index/_pdf/20160226052345422.pdf)

# 2 KEY PRINCIPLES OF INFORMATION DISCLOSURE

*Keywords: Transparency, Accountability, Confidentiality, Exceptions, Access*

The Bank lays out the key principles of information disclosure – promoting transparency, enhancing accountability, and protecting confidentiality – in the first chapter of the IDP (2017).

## **a. Promoting Transparency**

*“The Bank is guided by an underlying presumption that information concerning the Bank’s activities will be made available in a timely manner to the public in the absence for an appropriate reason for confidentiality”*

The principle is laudable, based on a presumption in favour of disclosure, and upholds the premise of the right to information without any qualifications barring the term “appropriate reason for confidentiality”. This statement, it is assumed, is to be taken as those stipulated under Section 2.2 of the IDP. The statement confirms the NDB’s willingness to engage with all stakeholders and is consistent with the principles underpinning disclosure policies of the World Bank,<sup>24</sup> ADB,<sup>25</sup> AfDB,<sup>26</sup> and IADB.<sup>27</sup>

**Recommendations:** Inclusion of the phrase “maximization of access” to all documents in its possession and those it produces which are not qualified under Section 2.2 as well as an explicit commitment to “proactive disclosure” either within the ambit of this principle or as a separate principle. A recognition of “citizens’ right to access” would be a welcome inclusion in that statement as well as an explicit commitment to endorsing the use of accessible language and format which is important for project affected persons (PAPs) to understand.

## **b. Enhancing Accountability**

*“The Bank is committed to enhancing its accountability and therefore recognizes the importance of disclosing information to and communicating with the stakeholders on a regular basis”*

Like most comparator institutions, the NDB’s IDP is premised on the principle of accountability and includes the term “stakeholders” in the statement which reflects its understanding of the importance of the need to be open to those affected by its operations. This is in line with the policies of the ADB<sup>28</sup> and AfDB,<sup>29</sup> in particular, which specifically highlight the importance of a link between accountability and stakeholder participation to enhance impact. The IADB mentions accountability in its objectives and scope<sup>30</sup> while the World Bank’s policy on access to information does not mention the term accountability.

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<sup>24</sup> p.9, Bank Policy: Access to Information (World Bank, 2015), para.III.A.1; <https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b083057379.pdf>

<sup>25</sup> p.12, Public Communications Policy (Asian Development Bank, 2011), ch.5, paragraphs 27-30; <https://www.adb.org/sites/default/files/institutional-document/32904/files/pcp-2011.pdf>

<sup>26</sup> p.3, 9, Disclosure and Access to Information – The Policy (African Development Bank, 2012), ch.1, paragraphs 1.2.1, 3.1.2, 3.2.1; [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank\\_Group\\_Policy\\_on\\_Disclosure\\_and\\_Access\\_to\\_Information.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/Bank_Group_Policy_on_Disclosure_and_Access_to_Information.pdf)

<sup>27</sup> p.3-4, Access to Information Policy (Inter-American Development Bank, 2010), paragraphs 2.1, 3.1; <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35167427>

<sup>28</sup> p.6, Public Communications Policy (2011), Ch.2, para. 6;

<sup>29</sup> p.9, Disclosure and Access to Information – The Policy (2012), Ch.3, para. 3.2.4;

<sup>30</sup> p.3, Access to Information Policy (2010), para. 1.1



### **c. Protecting Confidentiality**

*“As a financial institution and an international organization, the Bank has a responsibility to restrict access to information whose disclosure could cause harm to specific parties or interests, particularly its members, clients, employees and other partners”*

The protection of confidential information is a common principle among the NDB's comparators and can be agreed to as a standard if interests are clearly defined and the list of exceptions are narrow and clear. This is explicitly stated by the IADB,<sup>31</sup> ADB<sup>32</sup> and AfDB<sup>33</sup> in their information disclosure policies. The NDB's IDP does not follow the language emphasizing the commitment to keeping exceptions limited and narrow. This is problematic as will be explained later in the paper when the section on confidential information is dealt with.

While it identifies broad categories as confidential, it does not spell out the interests it seeks to protect. As stated earlier, the right to information is a human right which must merit a mention along with the recognition of the importance of this right either in this principle, the first principle which spells out its commitment to transparency, or as a separate principle altogether.

**Recommendation:** An inclusion of statements outlining the commitment to keeping the exceptions under the IDP narrow and clear and a recognition of the right to information as a human right alongside the Bank's understanding of why there is a need to recognize it. A clearer articulation of the interests it seeks to protect, as opposed to mere categorization, is suggested.

Furthermore, the NDB must also consider establishing clear timeframes for declassification of certain categories of information contained within the list of exceptions in line with the extant policies of the World Bank,<sup>34</sup> IADB,<sup>35</sup> and AfDB,<sup>36</sup> and mention the commitment to such a step within this principle.

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<sup>31</sup> Ibid. p.3, para. 2.1, Principle 2

<sup>32</sup> p.9, Public Communications Policy (2011), ch.3, para 19;

<sup>33</sup> p.3, 6 & 9, Disclosure and Access to Information – The Policy (2012), para. 1.1.9, 2.1.3, 3.2.3

<sup>34</sup> p.15-17, Bank Policy: Access to Information (2015), Sec. III.B.6

<sup>35</sup> p.7, Access to Information Policy (2010), Sec.7, para.7.2

<sup>36</sup> p.22, Disclosure and Access to Information – The Policy (2012), Sec.4.8, para.4.8.2

## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
1.1.1: Promoting Transparency	<ul style="list-style-type: none"><li>• Inclusion of commitment to maximization of access to information, proactive disclosure, and the endorsing of accessible language and format for all Bank documents, in statement of principle</li><li>• Inclusion of the recognition of citizens' "right to access" information in statement of principle</li></ul>
1.1.3: Protecting Confidentiality	<ul style="list-style-type: none"><li>• Inclusion of commitment to keeping exceptions clear and narrow in statement of principle</li><li>• A commitment to declassification with specific timeframes of certain categories of information in statement of principle</li><li>• An articulation of interests to be protected as opposed to broad categories in statement of principle</li></ul>

# 3 CLASSIFICATION OF INFORMATION

*Keywords: Classification, Information, Public, Confidential, Governance, Operations, Financial*

The NDB has divided information into two categories – public and confidential information.

Public information is stratified into ‘Governance Information’, ‘Operational Information’, ‘Financial Information’, and ‘Policies and Strategies of the Bank’. Confidential information covers ten distinct categories.

The following analyses will highlight specific observations gleaned from the second chapter of the NDB’s IDP and will attempt to place them in a comparative context to the relevant sections contained in the access to information policies of other development finance institutions, namely the World Bank, ADB, AfDB, and IADB. Recommendations will be evolved thereafter to create a more inclusive and robust framework for the information to be accessed by the public.

## 2.1 PUBLIC INFORMATION

In the IDP, paragraph 2.1 in conjunction with paragraphs 2.1.1 through to 2.1.4 covers public information which refers to “information that can be accessed by anyone inside and/or outside the Bank”. Through its stratification, the Bank commits to publish a non-exhaustive list of basic documents on its website ([www.ndb.int](http://www.ndb.int)). It acknowledges that the list “constitutes a minimum” and “does not make any judgments on the confidentiality of other documents of information not mentioned below”.<sup>37</sup>

Among the list of items to be published are the Bank’s Agreement, Rules of Procedures of the Board of Governors (BoG) and Board of Directors (BoD), Composition of the BoG, BoD and Management, Recruitment Principles, Organizational Structure, Financial Information, Operational and Project Information etc. stated as per the highlighted paragraphs.

### 2.1.1 Governance Information

- Information regarding the BoG, BoD and management are provided through sections (a), (c), (d) and (e) in paragraph 2.1.1 on issues including the rules of procedure, composition, committees, working schedules, and minutes of meetings.

However, unlike existing practices at comparator institutions, the NDB makes no commitment to publicly posting the schedules and agendas for upcoming meetings or discussions to be held by the BoG or the BoD or a timeframe for the same on its website. Importantly, it also does not provide any timeframes for the disclosure of minutes, or any commitment to sharing the documents produced by Committees or documents circulated to the Boards for consideration.

The ADB, in particular, endorses a better practice by committing to post provisional schedules of items for its Board’s consideration for the “forthcoming 3 weeks on a rolling basis”. It also commits to providing minutes of Board meetings “no later than 60 days after the Board meeting”<sup>38</sup> and summary proceedings of Annual Meetings including BoG decisions and speeches “within 60 days of each Annual Meeting”.<sup>39</sup>

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<sup>37</sup> p.5, New Development Bank Information Disclosure Policy, Ch.II, Sec. 2.1

<sup>38</sup> p.22, Public Communications Policy (2011), Ch. 6, para.85

<sup>39</sup> Ibid. p.21, Ch.6, para.81

The AfDB also commits to making the Board’s work plans and agenda available and, in a limited manner, states that the highlights of final Committee reports to the Board, and resolutions adopted by the Board, among other things, are to be publicly disclosed.<sup>40</sup> The IADB also provides the agenda of upcoming Board and Standing Committee meetings and chair reports on its website.<sup>41</sup> The World Bank discloses the Board Work Program for the fiscal year at the beginning of each fiscal year and also discloses the calendar of bi-weekly meetings of the Board on an on-going basis.<sup>42</sup>

In paragraph 2.1.1(c), the NDB states that it will provide the three-level organizational structure of the Bank, including the organizational chart of the Bank.

The IDP, however, does not make any commitment towards disclosing the names and contact information for members of the BoG, BoD and/or Management. A better practice is shown by the ADB which provides the contact information for Board members and their voting groups, Committee members, members of the ADB management and senior staff.<sup>43</sup>

## Summary

PARAGRAPH	RECOMMENDATION(S)
2.1.1: Governance Information	<ul style="list-style-type: none"> <li>• Include agendas of upcoming BoG and BoD meetings with set timeframes among categories of information</li> <li>• Include set timeframes for disclosure of minutes of BoG and BoD meetings and working schedules in paragraph 2.1.1(e)</li> <li>• Include documents produced by NDB Committees and documents circulated to Boards with set timeframe</li> <li>• Provide contact information for BoG and BoD members, Committee members and senior management in paragraph 2.1.1(c) which outlines organizational structure</li> </ul>

### 2.1.2 Operational Information

Through paragraph 2.1.2, the IDP focuses on committing to follow modern standards and existing practices of information disclosure with regard to the projects it will be financing and implementing across member countries. This commitment, in principle, is welcomed, as is the NDB’s commitment to establishing a procedure to disclose project information “not only after the approval of a project but also during the project lifecycle” through a section in its website.<sup>44</sup>

However, much of the language contained in this section requires revisiting given that it is ambiguous. For instance, the policy qualifies the establishment of the procedure to disclose project information by introducing the phrase “shall aim at” which leaves its intentions up to scrutiny by those most likely to be affected by the projects it finances, namely affected communities and their representatives. It is also of concern that the policy – finalized in June 2017 – states that it “shall

<sup>40</sup> p.11, Disclosure and Access to Information – The Policy (2012), footnote 9 to para.3.3.1 A(ii)

<sup>41</sup> <http://www.iadb.org/en/about-us/board-meetings-agendas-and-minutes,1321.html> (last accessed 12.09.2017)

<sup>42</sup> p. 9, Unlocking the World Bank’s Access to Information Policy -<http://pubdocs.worldbank.org/en/86181433517862674/Access-to-Information-Handbook-Attachment-A.pdf> (last accessed 20.11.2017)

<sup>43</sup> p.21, Public Communications Policy (2011), Ch. 6, para.80

<sup>44</sup> p.6, New Development Bank Information Disclosure Policy, para. 2.1.2 (b)

aim” to establish a crucial procedure well after project lending has begun the previous year and projects have been operationalized in member countries.

- The NDB’s IDP does not commit to specified timeframes to disclose the project documents it has outlined in 2.1.2(b) i.e. short summaries for projects recommended by borrowers, ‘project documents to the Board’ for sovereign operations, and summary documents for non-sovereign operations after the Board’s approval. It also does not commit to disclosing information that is produced by the Bank over the course of the project or upon its completion. On these issues, the NDB’s stated practice is a break from established practices at comparator banks.

The ADB sets a clear pathway for the release of an initial project data sheet (PDS) of a sovereign project containing summary information on the project upon the approval of the concept paper of the same, with updates to be conducted twice a year.<sup>45</sup> For non-sovereign projects, the ADB commits to posting the initial PDS “no later than 30 calendar days” before the Board’s consideration. For projects classified under Category A of its socio-environmental assessment, the ADB commits to posting the PDS “at least 120 days before Board consideration”.

In terms of the types of documents to be provided to stakeholders, paragraphs 47 through 75 of the ADB’s Public Communications Policy (2011) outline a host of categories of information which is to be published, including drafts of its environmental impact assessments/framework, resettlement plan/framework, indigenous peoples plan/framework, initial poverty and social analysis (IPSA), audited project accounts for sovereign projects, tranche releases, completion reports, independent evaluations, co-financing information where applicable etc.<sup>47</sup> The AfDB also specifies the categories of project information it shall disclose upon request as does the IADB. None of these comparator banks qualify the release of final project-related information subject to borrower consultation like the NDB has stated in paragraph (b).

- The IDP does not commit to translation of any project-related and/or operational documents in paragraphs 2.1.2 (a) and (b) which is a departure from practices at the other DFIs. The World Bank has mainstreamed a ‘translation framework’ as a practice, which addresses the “institution’s overall business and strategic thinking” and is translated to “six international languages” viz. Arabic, Chinese, French, Portuguese, Russian and Spanish.<sup>49</sup> The World Bank has also worked towards developing staff guidelines and furthering the capacity of its Public Information Centres (PICs) for quality translation, extending efforts to widen electronic outreach and integrating translation planning into its units’ communication strategies for publications including annual reports, procedures, operational policies, guidelines etc.<sup>50</sup>

The ADB commits to facilitating dialogue with project-affected communities and other stakeholders by providing information on multiple aspects of sovereign and non-sovereign programmes including socio-environmental issues and project design in a “language understandable to them and in an accessible place”<sup>51</sup> besides the appointment of a project focal point for regular communication. It also commits to publishing and disseminating knowledge products, operational documents including policies and strategic thinking, country programmes and other relevant information for interested stakeholders and shareholders “in support of the development of knowledge-based economies”.<sup>52</sup>

The NDB’s website appears to have endorsed only English as the medium of communication and the IDP, as stated, does not commit to translation of official or project-related documents and

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<sup>45</sup> p.15, Public Communications Policy (2011), Ch. 6, para.42-46

<sup>46</sup> Ibid. p.16-20, Ch. 6, para. 47-75

<sup>47</sup> p.27, Disclosure and Access to Information – The Policy (2012), Annex I

<sup>48</sup> p.12, Access to Information policy (2010), Annex II

<sup>49</sup> p.40, A Document Translation Framework for the World Bank Group (June 2003)

<sup>50</sup> See Executive Summary (para.2-4) in Translation Framework For The World Bank: Progress In Implementation (December 2006)

<sup>51</sup> p.16, Public Communications Policy (2011), Ch. 6, para.47

<sup>52</sup> Ibid p.27 (para. 112)

information. This is a concern given that its constituent members include those with Mandarin, Portuguese and Russian as official languages. This is a marked departure from the IADB,<sup>53</sup> AfDB,<sup>54</sup> ADB,<sup>55</sup> and the World Bank.<sup>56</sup>

- The NDB commits to disclosing information regarding procurement notices in relation to sovereign operations as specified by the Bank's Procurement Policy but loosely states that it will be published in a timely manner while also not specifying the borrower's procurement plan. The better practice here is that followed by the ADB which commits to publishing the borrower's procurement plan as well all contracts for "goods, works and consulting and other services required to carry out the project during the first 18 months", the proposed methods of procurement for each contract and annual updates to the borrower's procurement plan.<sup>57</sup> The AfDB also commits to disclosing country procurement assessment reports.<sup>58</sup>
- There is no commitment in the IDP to the disclosure of legal agreements including project agreements, loan and guarantee agreements, financing and cooperation agreements unlike the World Bank<sup>59</sup> which commits to disclosing indemnity agreements, project agreements and guarantee agreements and sets out clear processes and timeframes for the same. The AfDB commits to disclosing legal information<sup>60</sup> as does the ADB which commits to publishing all legal agreements for sovereign projects on its website after removing information deemed to be exceptions and any amendments to legal agreements within two weeks.<sup>61</sup>
- This paper will not delve into paragraph (c) which deals with disclosure of environmental and social information for NDB-financed projects as they are guided by the Bank's Environmental and Social Policy Framework. However, it is worth noting the civil society considers the timely release of draft and final indigenous peoples' plans, resettlement action plans, environmental and social impact assessments to be central to the process of project implementation.

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<sup>53</sup> The IADB website is available in English, Spanish, Portuguese and French, and all four are designated as official languages of the Bank.

<sup>54</sup> The AfDB website is available in English and French, and both languages are designated as official languages of the Bank.

<sup>55</sup> The ADB website is available in English and Chinese even though only English is designated as the official language of the Bank.

<sup>56</sup> The World Bank has a translation framework which serves as a practice and the website reflects content in English and a host of other languages and country pages. See <http://www.worldbank.org/en/language-resources> (last accessed 13/09/2017)

<sup>57</sup> p.20, Public Communications Policy (2011), Ch. 6, para.76 (i-vi)

<sup>58</sup> p.28, Disclosure and Access to Information – The Policy (2012), Annex I; also p.24, footnote 23

<sup>59</sup> p.54, Bank Directive and Procedure: Access to Information (July 2015), A.4.e(2)

<sup>60</sup> See Annex I, Disclosure and Access to Information – The Policy (2012)

<sup>61</sup> p.18, Public Communications Policy (2011), Ch. 6, para.59

## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
2.1.2: Operational Information	<ul style="list-style-type: none"> <li>• Remove phrase “shall aim at” in 2.1.2(b) and replace with concrete language (e.g. “will establish”) exhibiting a bias towards disclosure of information through all stages of a project’s lifecycle</li> <li>• Commit to timeframe of 60-90 days before board finalization for disclosure of draft documents outlined in 2.1.2(b) including draft versions of EIAs, SIAs, feasibility reports, resettlement plans, independent evaluations etc.</li> <li>• Commit to disclosing information under 2.1.2(b) produced by the Bank upon project completion within 60-90 days, including final versions of EIAs, SIAs, feasibility reports, resettlement plans, independent evaluations etc.</li> <li>• Commit to translation of all documents and, particularly, project-related information, as well as provide the option of viewing the website in the language of non-English-speaking founding members (i.e. in Portuguese, Russian, Mandarin) in 2.1.2</li> <li>• Commit to disclosing borrowers’ procurement plans and assessment reports and set timeframe for the same in 2.1.2 (d)</li> <li>• Commit to disclosing legal information such as project agreements, loan and guarantee agreements etc. as a separate category in 2.1.2</li> </ul>

### 2.1.3 Financial Information

The IDP commits to disclosing a wide range of financial information which is in line with the existing practices across DFIs including the World Bank, ADB, AfDB and IADB. It is particularly laudable that the NDB has decided to disclose information on the Management’s analysis of Bank’s capital resources and special funds, and the documentation of public offerings.

The only suggestion to be made in this section is with regard to the language contained in the IDP on disclosing of certain financial information, namely the qualification of disclosure of financial information subject to the evolution of its operational capabilities over the “coming months and years” is vague. Setting clear timeframes and outlining processes in the IDP for providing relevant financial information within the next annual review of the NDB’s disclosure policy in June 2018, particularly with project lending having already begun, is welcomed.



## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
2.1.3: Financial Information	<ul style="list-style-type: none"> <li>• Set timeframes for the information to be released under categories 2.1.3 (a)-(e)</li> <li>• Use concrete language in 2.1.3 (f) concerning evolution of processes and shift from using “could” to “will” for information to be released</li> </ul>

### 2.1.4 Policies and Strategies of the Bank

The NDB’s IDP contains no reference to making country systems analysis and sectoral strategies public either at the draft stage before approval by the Board of Governors or Directors or after approval from the relevant Boards, even though it commits to disclosing the country partnership plans approved by the Board of Directors. This departs from practices at comparator Banks.

The World Bank commits to publishing draft and final operational policies and sectoral strategy papers for consultation and public consumption after the papers have been seen by the Executive Directors. Country Assistance Strategies are disclosed after the Board discusses them and can be disclosed earlier with consent of the relevant government.<sup>62</sup> The ADB promotes participation of shareholders and stakeholders during the development and review processes of its sector and thematic policies strategies and posts a list of policies and strategies to be reviewed over the course of 12 months on its website. It also commits to posting one consultation draft of strategy papers and working papers or final proposals of strategies.<sup>63</sup>

The AfDB also commits to releasing sector strategies “provided to any committee of the Board of Directors” simultaneously to the public in order to allow “stakeholders the opportunity to review how comments provided during public consultations have been considered”, while also committing to disclose country and regional strategy papers at the same time as they are provided to the Board of Directors.<sup>64</sup> The IADB undertakes a commitment to a similar simultaneous disclosure policy for documents including draft country strategies, sector strategies, operational policies, loan proposals etc. and establishes a mechanism for stakeholders to review how its inputs during public consultations were considered.<sup>65</sup>

- The section also makes no reference to operations manuals which cover procedural or staff guidelines, particularly on project-related matters. This is a departure from standard practice at other DFIs including the World Bank<sup>66</sup> which publishes a staff manual containing the ‘Principles of Staff Employment’ and ‘Staff Rules’, and the ADB which posts its Operations Manual including project administration instructions and staff handbooks on its operations on its website.<sup>67</sup>
- A critical absence, equally relevant to 2.1.4 as it is to 2.1.2, is the absence of any mention of affected communities, civil society and similar stakeholders in feeding into operational, sectoral and country strategy policies which, as shown in the two paragraphs above, are endorsed by

<sup>62</sup> p.14-15, Bank Policy: Access to Information (2015), Sec. III.B.4(b)(i)(ii)

<sup>63</sup> p.20, Public Communications Policy (2011), Ch. 6, para.72-73

<sup>64</sup> p.23, Disclosure and Access to Information – The Policy (2012), para.4.10.1 (ii) and (iii)

<sup>65</sup> p.6, Access to Information Policy (2010), para. 5.1 & 5.2

<sup>66</sup> p.84, Bank Directive and Procedure: Access to Information (July 2015), Note C.3(3)

<sup>67</sup> p.20, Public Communications Policy (2011), Ch. 6, para.75



the four comparator banks. The IDP also does not commit to any timeframes regarding the review and/or updating of existing documents, a feature endorsed by the ADB which sets policies to be reviewed 12 months in advance.<sup>68</sup>

## Summary

PARAGRAPH	RECOMMENDATION(S)
2.1.4: Policies and Strategies of the Bank	<ul style="list-style-type: none"> <li>• Commit to making country systems analyses and sectoral strategies public either at the draft stage or after Board approval in 2.1.4 (b)</li> <li>• Commit to publishing all operational and project-related policies, documents and guidelines in official language(s) of non-English speaking founding members (Portuguese, Russian, Mandarin and Hindi). Also commit to responding in any other local language of member country if requested.</li> <li>• Set timeframe of 120 days for documents outlined in 2.1.4 to be reviewed</li> <li>• Set timeframe of 90 days for public inputs when the documents under 2.1.4 are to be reviewed</li> <li>• Commit to disclosing operations manuals covering staff and operational guidelines, particularly on project-related issues</li> <li>• Commit to facilitating project-affected peoples', civil society and other stakeholders to feed into operational, sectoral and country strategies either in 2.1.4 or 2.1.2</li> </ul>

## 2.2 CONFIDENTIAL INFORMATION

*Keywords: Interests, Protection, Disclosure, Clauses, Exceptions, Categories, Data, Projects*

The exceptions to what the NDB has committed to disclose is, perhaps, the most important section contained within the IDP. It delineates the boundary between public access and the Bank's prerogative to protect specific categories of information. The information disclosure policies for most comparator banks attempt to strike a balance between maximum access to information and a respect for confidential information, the disclosure of which is deemed to harm the Bank's interests.

The broad recommendations against confidentiality in the context of access to information as a human right has been articulated earlier under Principle 3. It is worth repeating that the protection of broad categories of information instead of interests and a clear definition of the harm posed to the interest(s) is reflective of international best practices.

The 'harm and public interest test' is instructive in this regard as it demands that restrictions on the right to access information be "proportionate and necessary".<sup>69</sup> Its existence is considered to strengthen the case for a right to information as a fundamental right. It is based on the principle

<sup>68</sup> Ibid., Ch.6, para.72

<sup>69</sup> See: <http://www.right2info.org/exceptions-to-access/harm-and-public-interest-test> (last accessed September 15, 2017)

that government agencies and businesses are required to disclose information in the absence of an overriding public interest against disclosure. The harm test requires the authority or organization to demonstrate that disclosure threatens to harm a protected interest. It must identify a legitimate aim while showing that the harm likely to be caused is specific and direct, not speculative. The public interest test requires a weighing of the harm likely to be caused to the protected interest by disclosure against the public interest served by such a disclosure.

Against this backdrop, of the 10 categories identified by the IDP, only two – (g) and (h)<sup>70</sup> – identify specific interests i.e. information that may adversely harm the Bank's relations with its members countries, and, information which may endanger or harm defense or national security or interests of a member country. "Privileged and investigative information" as in 2.2 (e) can also be considered to be in the interest of privacy. All other exceptions, however, refer to categories and there is a legitimate concern that they can be invoked to prevent a disclosure of relevant information when requested.

The much required inclusion of definite timeframes for the declassification of information has been highlighted earlier in the analysis of Principle 3. Importantly, the NDB needs to definitively state if it would endorse overriding listed exceptions in situations when public interest in such a disclosure will assume greater importance than the presumed harm to the protected interest.

The ADB, for instance, while clearly outlining its exceptions to disclosure in a narrow manner, commits to disclosing information "if it determines that the public interest in disclosing the information outweighs the harm that may be caused by disclosure" i.e. a positive override while also spelling out situations where it may endorse a negative override.<sup>71</sup> The World Bank also provisions for an override in its appeals process if a requestor "is able to make a public interest case to override the policy exceptions that restrict the information requested" within limitations set out in the clauses of corporate administrative matters, deliberative information and specific financial information.<sup>72</sup>

The AfDB makes a similar case as the World Bank's for overriding exceptions<sup>73</sup> while also entrusting the responsibility of deciding upon requests to override exceptions to its Information Disclosure Committee.<sup>74</sup> The IADB recognizes the case for overrides in the second principle of its information disclosure policy in situations when "benefit would outweigh potential harm"<sup>74</sup> and spells out situations where an override will be considered after receiving an authorization from the Access to Information Committee.<sup>76</sup>

Thus, it is recommended that a broad override policy be evolved and represented within the NDB's IDP to position an accommodative stance in the interest of the public during circumstances which warrant the exceptions to be overridden for the common good.

The comments on specific exceptions are as below:

- a. Personal data represents a broad category instead of a specific interest such as privacy. While medical data of staff qualifies for non-disclosure, other forms of personal information, particularly "information related to staff appointment or selection" (and relatedly the processes and criteria for selection), should be made public given that the Bank is a publicly-funded institution, as should the result of "internal investigations into suspected misconduct".

The IDP should either identify the interest being harmed by disclosure, say, eligibility criteria for staff selection, or introduce caveats as the IADB does on this clause where it makes an exception of "personal information which can be disclosed in accordance with Bank Staff

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<sup>70</sup> p.8, New Development Bank Information Disclosure Policy (June 2017), para.2.2

<sup>71</sup> p.25, Public Communications Policy (2011), Ch. 6, para.99-100. For list of exceptions, see paras.97(i) – 97(xii)

<sup>72</sup> p.18, Bank Policy: Access to Information (2015), para.III.B.8(a)(ii)

<sup>73</sup> p.20, Disclosure and Access to Information – The Policy (2012), footnote(17)

<sup>74</sup> Ibid. p.19, para.4.3.3

<sup>75</sup> p.3, Access to Information policy (2010), Principle 2: Narrow and Clear Exceptions

<sup>76</sup> Ibid. p.7, para.8.1

Rules<sup>77</sup> and also discloses the decisions of its Administrative Tribunal.

- b. The language in the clause concerning information intended for internal use only or classified as confidential under the Bank's guidelines is vague and open-ended and can be read to mean that almost any information can be kept secret if the Bank so chooses. Again, there is no interest or specific harm which is defined and this is removed from the established norm of keeping exceptions narrow and clear. The IDP needs to provide, at the very least, a reasoning behind the classification of such documents under this clause and articulate the nature of the content these documents contain in order to substantiate secrecy.
- c. The clause protects the confidentiality of Board documents to secure its deliberative or decision-making processes. The language identifying an open-ended list of documents is of concern since it effectively leaves discretion in the hands of Bank staff. This contradicts the IDP's first key principle which states that the Bank is guided by a presumption in favour of transparency absent a reason for confidentiality.

A better practice would be to identify the interest it seeks to protect, such as the ADB, which states that a disclosure of similar documents could compromise the decision-making process "by inhibiting the candid exchange of ideas and communication"<sup>78</sup> while also setting a clear timeframe for declassification of verbatim transcripts of the Board of Directors 10 years after their date of creation.<sup>79</sup> The AfDB also makes a similar commitment to declassify deliberative exchanges over time.<sup>80</sup>

- d. Information identified by its originator – advisors, consultants and/or any other third party – as confidential being kept protected is not a sufficient reason for protection more so if no interest (e.g. commercial or privileged information) is defined and given that the NDB finances projects that are likely to affect communities and are, therefore, of public interest. Again, a definition of a possible harm to disclosure is left undefined and given the broad nature of the statement, possesses the ability to undermine the right to access of information. The NDB should also clearly define what types of information fall under this category as, for example, demonstrated by the IADB's qualifications.<sup>81</sup>
- e. While privileged information is generally protected, the IDP does not attempt to expand on what category of information constitutes and, as such, leaves the clause open to interpretation in terms of its scope of legal privilege. A better practice is the protection of information subject to attorney-client privilege as stated in the exemptions list in disclosure documents of the ADB,<sup>82</sup> AfDB,<sup>83</sup> IADB<sup>84</sup> and the World Bank.<sup>85</sup> The clause also covers investigative information which, again, is an open-ended statement in the IDP and if the scope is not qualified – for instance, if the results of an investigation are to be made public – could lead to secrecy in various policy areas of public interest and be detrimental to the Bank's stated goal of being an accountable institution.
- f. The clause on exempting financial information from being disclosed is a norm at DFIs but NDB's IDP leaves the statement open to interpretation, particularly with the usage of the

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<sup>77</sup> Ibid. p.9, Annex 1(A)

<sup>78</sup> p.23, Public Communications Policy (2011), Ch. 6, para.97(i)-97(iii).

<sup>79</sup> Ibid. p.23, para.84

<sup>80</sup> p.11, Disclosure and Access to Information – The Policy (2012), footnotes (7) and (8)

<sup>81</sup> p.10, Access to Information policy (2010), Annex I(E)

<sup>82</sup> p.24, Public Communications Policy (2011), Ch. 6, para.97 (xi)

<sup>83</sup> p.12, Disclosure and Access to Information – The Policy (2012), para.3.3.1(c)

<sup>84</sup> p.4, Access to Information policy (2010), para.4.1(b)

<sup>85</sup> p.18, Bank Policy: Access to Information (2015), para.III.B.2(d)

word “including” in the first sentence which could subject all financial information including loan agreements subject to secrecy. An interest and harm being defined, for instance the disclosure of specific information providing an undue advantage to another entity i.e. the Bank’s own commercial interest, would be welcome. The ADB, in this regard, establishes a better practice by elucidating on this exemption to disclosure by stating that it would withhold information if it were to likely to “prejudice the legitimate financial or commercial interests of the ADB and its activities” or affect a member country’s ability to manage its economy.<sup>86</sup>

- g. The IDP states that this exemption clause covers information when released might endanger or harm or adversely affect the relations between the Bank and its member countries. The statement is broad and open to interpretation, particularly on the issues of human rights and project-related issues which may arise. Already, as shown in 2.1.2 (b), the information to be provided is subject to member countries’ approvals which goes against the grain of endorsing transparency and provides host governments with complete control of what information it chooses to allow for disclosure.

It also leaves the NDB open to public assertion of shifting the burden of responsibility regarding disclosure if and when there is documented evidence of human rights violations during project execution. A better practice would be for the NDB to discuss proactively country-specific material with the member country and then amend the document accordingly and produce either the document in full or in the form of an “aide memoire” as done by the World Bank<sup>87</sup> and introduce categories of information in this particular that is to be kept private in full, in part, or be made public.

- h. The clause to not disclose information that might endanger defense or national security of a member is a legitimate principle with a clearly defined interest and an articulation of potential harm. This principle is endorsed by the disclosure policies of the ADB<sup>88</sup> and IADB<sup>89</sup> as well.
- i. The exemption of disclosing information that could violate national laws of a country closely follows clause (g) and would call for a measurement of the standard of the national law in question against the NDB’s disclosure policy and which of the two would be applied to a disclosure request.
- j. The clause highlights information provided to the Bank by third parties under expectation of confidentiality as an exemption in the IDP. This clause neither identifies a clear interest nor defines a harm. Ostensibly, the privacy of a third party is already covered by clause (d) of the exceptions list and hence, the inclusion of this clause provides third parties with complete control of what information it chooses to make publicly available. The Bank also does not state that it will request the third-party for consent with regard to a document to be made public which may contain proprietary information, which goes against its stated commitment to transparency as a principle. A better practice is one adopted by the ADB which clearly identifies legitimate harms that can be caused to a third party requesting confidentiality, namely prejudicing its commercial and/or financial interests and its competitive position.<sup>90</sup>

Similarly, the AfDB defines third-party interests such as trade secrets and pricing information and states that it will disclose documents containing financial, business of proprietary information only with the permission of the involved party.<sup>91</sup> The IADB also states that it will not

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<sup>86</sup> p.24, Public Communications Policy (2011), Ch. 6, para.97 (viii)-(ix). See also para.97 (xii).

<sup>87</sup> p.13, Bank Directive and Procedure: Access to Information (July 2015), III.B.3(a)-(j)

<sup>88</sup> p.24, Public Communications Policy (2011), Ch. 6, para.97 (x)

<sup>89</sup> p.4, Access to Information policy (2010), para.4.1(d)

<sup>90</sup> p.24, Public Communications Policy (2011), Ch. 6, para.97 (v)

<sup>91</sup> p.12, Disclosure and Access to Information – The Policy (2012), para.3.3.1(c)

disclose proprietary information without the “explicit authorization” of the third party in question, reinforcing its commitment to maximizing access to information,<sup>92</sup> while clearly defining the types of information which will be withheld and also committing to lucid communication with the public whereby it shall notify the public that confidential information has been removed from country-specific documents.<sup>93</sup>

Thus, as it stands, there are multiple issues with the manner in which confidential information has been defined in the IDP, with most clauses open to interpretation and without a clear articulation of interests to be protected or harms to be avoided. The open-ended nature of the clauses makes the foundational basis of the IDP difficult to appreciate and is in contravention with the principles it outlines at the very beginning.

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<sup>92</sup> p.4, Access to Information policy (2010), para.4.1(e)

<sup>93</sup> Ibid., p.10, Annex I (E)

## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
<ul style="list-style-type: none"> <li>• 2.2: Confidential Information</li> </ul>	<ul style="list-style-type: none"> <li>• Commit to a predictable and consistent timeframe for declassification in line with existing practices at other DFIs</li> <li>• Clearly commit at the outset of the paragraph to endorsing an override of the confidentiality clause for specific information within the exceptions outlined in 2.2 if a case for public interest is made by the public and/or other stakeholders</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (a): Personal Data</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly identify interest and harm likely to be caused by disclosure</li> <li>• Remove phrase “information related to staff appointment or selection” from statement; remove phrase “internal investigations into suspected misconduct”</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (b): Information intended for internal use or classified as confidential under Bank’s guidelines</li> </ul>	<ul style="list-style-type: none"> <li>• Clarify which documents the Bank is referring to in this statement</li> <li>• Clearly identify interest and harm likely to be caused by disclosure</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (c): Board Documents and Deliberative Information</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly identify interest and harm likely to be caused by disclosure</li> <li>• Commit to listing the names of all such documents the statement covers</li> <li>• Commit to a system of declassification of Board documents with set timeframes</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (d): Information identified by originator as confidential</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly identify interest and harm likely to be caused by disclosure</li> <li>• Commit to listing the names of all such documents the statement covers</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (e): Privileged and investigative information</li> </ul>	<ul style="list-style-type: none"> <li>• Rephrase statement to cover protection of information subject to attorney-client privilege</li> <li>• Commit to naming all such types of information that will be exempted under attorney-client privilege</li> <li>• Commit to define scope of investigative information and qualify what comprises investigative information</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (f): Financial information</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly identify interest and harm likely to be caused by disclosure</li> <li>• Remove “including” from statement to limit scope and interpretation</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (g): Bank relations with member countries</li> </ul>	<ul style="list-style-type: none"> <li>• Commit to naming all such categories of information to be kept private</li> <li>• Commit to disclosing amended documents or ‘aide memoires’ after consulting with member country</li> </ul>
<ul style="list-style-type: none"> <li>• 2.2 (j): Third-party information provided with expectation of confidentiality including proprietary information</li> </ul>	<ul style="list-style-type: none"> <li>• Clearly identify interest and harm likely to be caused by disclosure as 2.2 (d) makes a similar exemption</li> <li>• Commit to listing the names of all such documents the statement covers</li> <li>• Commit to seeking authorization from third party if such information is requested</li> </ul>

# 4 DISCLOSURE OF INFORMATION

*Keywords: Request, Independent Review, Appeals, Translation, Language, Timeframe*

The NDB's IDP has attempted to adhere to the existing practices evolved and followed comparator development finance institutions (DFIs). It is appreciated that on the issue of 'vehicle of disclosure' (paragraph 3.1) and requests for information (paragraph 3.2),<sup>94</sup> it has identified the Bank's website as the main vehicle of disclosure.

The IDP has also provided clear timeframes for acknowledging a request receipt (within five days) and a response period of 30 days. It also commits to receiving disclosure requests in various formats including the online form provided on the website,<sup>95</sup> via e-mail, fax and mail, and clearly identifies to whom these requests should be addressed.

Commentary on specific sections of the chapter outlining information disclosure is as below:

## 3.2 REQUESTS FOR INFORMATION

It is commendable that the NDB has set out clear timeframes, formats for requests, and has committed to engaging with the requester to provide clarifications if required. A few changes and additions are proposed to the content of this paragraph, with the understanding that it would make the policy more inclusive for the public.

- The IDP must commit to receiving and responding to requests in languages of non-English speaking founding members, which includes Portuguese, Chinese, Russian etc. and/or local language of country where it financing or co-financing a project.

The ADB commits to a better practice of receiving request submissions in any of the official and national languages of its members and also provisions for requests in other languages to be submitted to resident missions.<sup>96</sup> Where it is unable to process the request on the basis of capacity constraints, it should establish a timeframe within which to respond to the requesting party asking for a submission in English or the official or recognised national languages of the country.

- The disclosure policy also does not state that it will publicly post all received disclosure requests it has reviewed with the status of each individual case available for public viewing. The ADB provides a better practice by publishing on its website a list of reviewed requests and their corresponding decisions with justifications for denial.<sup>97</sup>

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<sup>94</sup> p.9, New Development Bank Information Disclosure Policy (2017)

<sup>95</sup> See <http://www.ndb.int/data-and-documents/information-disclosure-request-form/> (last accessed 17.09.2017)

<sup>96</sup> p.31, Public Communications Policy (2011), Ch. 6, para.135

<sup>97</sup> p.31, Public Communications Policy (2011), Ch. 6, para.134



## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
3.2: Requests for information	<ul style="list-style-type: none"> <li>• Commit to receiving requests and responding to requests in languages other than English</li> <li>• Commit to establishing a timeframe to request party seeking information to submit disclosure request in English or the official/national languages</li> <li>• Commit to publicly posting all information disclosure requests received, their status, and the Bank's response in cases where it has answered the requestor, and justify denials</li> </ul>

### 3.3 APPEAL AND REVIEW

The paragraph outlining the NDB's appeals and review process suffer from shortcomings even if it outlines a clear timeframe to appeal a non-disclosure of information i.e. within 30 days after a decision of non-disclosure has been received. The IDP commits to informing the "appellant" within 20 working days of receiving the appeal of the reasons for non-disclosure after the Corporate Secretary consults with the Bank's legal and other relevant departments.

In case of a second negative decision, the Corporate Secretary is to inform the Board of Directors who can make the final decision if the matter is not within the "exclusive competence" of the Board of Governors (BoG). If it is, then the BoG makes the final decision. As can be seen, the appeals mechanism remains within the exclusive domain of the NDB itself without any independent review panel and/or mechanism to deliberate on such matters.

- The most glaring omission in the IDP in this paragraph is the commitment to establishing an independent review panel, a serious departure from the established practice at comparator banks. The ADB, AfDB, World Bank and IADB all establish a two-step appeals mechanism with clear timeframes.

The ADB's practice in this regard as contained in its disclosure policy is lucid. The first stage of the process involves the appellant filing an appeal with the Public Disclosure Advisory Committee (PDAC) within 90 days of non-disclosure to make a reasonable case that the ADB has restricted the release of information and also make a case of "public interest to override the policy exceptions".<sup>98</sup>

The PDAC is to acknowledge the receipt of the appeal within five working days and respond within 20 working days with a decision after consulting with the Board and President. If the initial decision is upheld, the appellant can file an appeal within 90 days of the decision<sup>99</sup> with the Independent Appeals Panel (IAP) which is to consider all appeals within 45 days.

The IAP, which consists of three independent experts on access to information matters who are nominated by the President and approved by the Board,<sup>100</sup> has the authority to uphold or reverse the PDAC's decision after considering all submissions made by the ADB, third parties, the appellant etc. The requester shall then be notified of the final decision i.e. whether the PDAC's decision is upheld or whether the requester will be provided with the information requested.

<sup>98</sup> Ibid. p.31-32, para.136-141

<sup>99</sup> Ibid. p.32, para.140

<sup>100</sup> Ibid. p.30, para.



The AfDB also establishes a similar two-step appeals mechanism, with the Information Disclosure Committee comprising the first stage and an independent Appeals Panel to be the second stage and which will report directly to the Bank President.<sup>101</sup> The IADB also commits to a two-step review mechanism for requestors seeking to appeal a denial of a disclosure request through an inter-departmental Access to Information Committee as the first step of appeal and a three-member external panel as a second step.<sup>102</sup>

The World Bank’s two-step appeals mechanism is similar to that of the ADB’s and consists of a first appeal to be filed with the Access to Information Committee (AIC) within 60 calendar days of the initial non-disclosure if the requestor is able to establish that the access to information policy has been violated by the Bank “improperly or unreasonably restricting access to information that it would normally disclose” and make a public interest case to override the policy exception.<sup>103</sup> The AIC is to respond within 45 days of the appeal being filed and if the original decision is upheld, then the requester can file an appeal to the Bank’s independent Appeals Board within 60 calendar days of receiving the communication from the AIC regarding the decision being upheld.<sup>104</sup>

## Summary

PARAGRAPH(S)	RECOMMENDATION(S)
3.3: Appeal and Review	<ul style="list-style-type: none"> <li>• Commit to setting up an independent review panel in two-step appeals process</li> <li>• Commit to stating the process of selection of members of independent review panel</li> <li>• Commit to clear timeframes for responses for each stage of appeal</li> <li>• Commit to clear timeframes to request further information at each stage of appeal</li> </ul>

<sup>101</sup> See: p.20-21, Disclosure and Access to Information – The Policy (2012), para.4.5.1 & 4.5.2

<sup>102</sup> See: p.7, Access to Information policy (2010), para.9.1-9.3

<sup>103</sup> p.18, Bank Policy: Access to Information (2015), para.III.B.8(a)(i)-(ii)

<sup>104</sup> Ibid. p.19, para.III.B.8(b)(i)-(ii)

## 5 CONCLUSION

The NDB's IDP manages to align itself to certain aspects of disclosure policies at other development finance institutions (DFIs). However, if it is to promote transparency and accountability in its governance and operations as a publicly-financed institution, there remains much ground to cover. Communities, in particular, have a right to know about how projects will affect their lives and livelihoods. It is pivotal for the Bank to acknowledge the access to information as a human right by facilitating exchanges with affected community representatives in an accessible and timely manner.

A number of issues have been identified in this paper and it is hoped that the Bank will proactively consider the analysis and recommendations evolved ahead of the review of the IDP in 2018. A greater detailing of the rationale for its list of exceptions, its appeals system, a commitment to translating key documents into languages of non-English speaking founding members, and setting timeframes to disclose information on operational and project-related documents are issues meriting an immediate revisit.

The list of public information published by the NDB constitutes a minimum. The clear lack of a procedure relating to the release of project information or any mention of country strategies must also be addressed in the review. It is also imperative that the IDP recognizes the role of civil society in furthering the Bank's transparency efforts given the considerable history of civil society engagement with DFIs on such matters. This is required to be done through not just making information access easier with the tools of disclosure but also in creating a space for civil society to provide inputs during the framing and/or review of key operational and project-related documents and processes. Public consultations for such documents, particularly through every stage of a project's lifecycle as well as during policy reviews, must be instituted as a feature in the IDP.

These issues, alongside open-ended language noted in specific sections, reflect a lack of harmonization with disclosure policies of other DFIs. As stated earlier, there are criticisms for each of these Banks' disclosure policies but they remain closest to evolved practices which presently exist in multilateral development finance.

It must be acknowledged that the IDP is still in its first stage and currently represents a theoretical construct more than one that can be tested fully. It would be prudent for the Bank, through partnerships with civil society, to undertake on-ground assessments of projects to test how far the NDB has been successful in translating its intentions as espoused in the IDP into actions.

The recommendations produced by the paper constitute a minimum. It is hoped that the NDB will attempt to go beyond them over time and become a truly inclusive bank for Southern citizens, its primary constituent in terms of service delivery. The experiences over decades of the DFIs analysed for this study already provide the NDB with a template to learn from, replicate and improve its policy on information disclosure. It is the ability of the Bank to first adapt to existing practices and then evolve further over time through its own experiences which will make the NDB a truly accountable and transparent lending institution.

# APPENDIX: TESTING THE NDB'S ONLINE INFORMATION DISCLOSURE TOOL

This appendix reflects the experiences of four organisations, comprising civil society and academia, which tested the NDB's online information disclosure tool available on its website. The experiences of the representatives (named as respondents below) who made submissions are largely similar and does reflect the need for the Bank to be more responsive and detailed in its responses to the queries submitted.

## **RESPONDENT 1**

**Name:** Gonzalo Roza

**Organisation:** Coalition for Human Rights in Development

**Country:** Global coalition

**Mode of submission (e-mail, website form etc.):** Website form & E-Mail

**Date of request submission:** 15.05.2017 (15th May, 2017)

**Date of acknowledgement:** 17.05.2017 (17th May 2017)

**Date of response received from the Bank:** We did not receive a formal response from the Bank but did receive an informal response from a member of the Bank's Communications department on November 13, 2017 after sending a reminder.

**No. of reminder(s) sent:** One

**Date(s) of reminders:** 01.10.2017 (1st October, 2017)

**Information Disclosure Request:** (please attach questionnaire sent to the Bank or highlight key asks): *"We request, in accordance to the Interim Information Disclosure Policy of the Bank, the following information: That the bank provide us (and publish in its website) the "Policy on Transactions without Sovereign Guarantee (except Loans to National Financial Intermediaries)" that is mentioned in the footnote 1 in the Policy on Loans with Sovereign Guarantee, but it is not available on the Bank's website: <http://ndb.int/charter.php>. That footnote states: "...Lending without a sovereign guarantee to sub-national governments, government agencies, majority public sector enterprises, and private sector enterprises is covered by the Policy on Transactions without Sovereign Guarantee (except Loans to National Financial Intermediaries)..."*

**Satisfaction with response (on a scale of 1-5):** 2

### **Reasons for score:**

After sending the reminder on October 1, 2017, a member of the NDB's Communications department answered on October 2: "Following your request, our team published Policy on Transactions without Sovereign Guarantee on the Bank's website on 7 August 2017, and this document is available here: <http://www.ndb.int/wp-content/uploads/2017/08/10-Policy-on-Transaction-without-Sovereign-Guarantee-20161220.pdf>. I apologise for a late reply and not sending an e-mail directly after the document was uploaded to the website".

Thus, even though the Bank uploaded the requested document to the website and they sent an informal response after sending a reminder, we never received a formal response from the Bank in a proper manner or within a specific timeframe.

**In your opinion, what are the positives of the information disclosure process at the NDB?**

We can highlight that the Bank provides a quite easy way to make a request i.e. through a specific request form on its website which is really easy to complete. The acknowledgement of the request was made in a proper time and manner (not the case for the formal response to the request).

## **RESPONDENT 2**

**Name:** Laura Trajber Waisbich

**Organisation:** South-South Cooperation Research and Policy Centre (Articulação SUL)

**Country:** Brazil

**Mode of submission (e-mail, website form etc.):** Website form

**Date of request submission:** July 2017 (Approximate date)

**Date of acknowledgement:** Automatic acknowledgement received just after submitting the request through the online form

**Date of response received from the Bank:** No response

**No. of reminder(s) sent:** No reminders sent. I wanted to test whether the Bank was abiding by their own policies and standards, as per their own Information Disclosure Policy (2017).

**Date(s) of reminders:** N/A

**Information Disclosure Request:** (please attach questionnaire sent to the Bank or highlight key asks): The request made to the bank was a disclosure request of NDB's "Technical Assistance Policy", mentioned in the 2017-2021 Strategy as one of the existing Operational Policies, although not currently available online in the "NDB Basic Documents" section of the Bank's website.

**Satisfaction with response (on a scale of 1-5):** 1

**Reasons for score:** I never got a formal response from the Bank since my submission in July 2017 and neither was the policy proactively disclosed in any other format, such as through the "NDB Basic Documents" section of the Bank's website. Hence, my level of satisfaction is low.

**In your opinion, what are the positives of the information disclosure process at the NDB?**

I recognize that the Bank has worked to improve the amount of information it proactively discloses online through their website, for instance, with regard to basic documents and policies. Equally important was its creation of the online form for information request, which can be seen as a more accessible mechanism than the previous one (i.e. stakeholders having to reach out directly to individual staff in the Communications team).

## **RESPONDENT 3**

**Name:** Caio Borges

**Organisation:** Conectas Human Rights

**Country:** Brazil

**Mode of submission (e-mail, website platform etc.):** Website form

**Date of request submission:** 03.08.2017 (August 3rd, 2017)

**Date of acknowledgement:** No acknowledgment

**Date of response received from the Bank:** No response

**No. of reminder(s) sent:** Two (2)

**Date(s) of reminders:** First reminder was sent on 04.12.2017 (December 4th, 2017) to a member of the NDB's Communications department. The second reminder was sent to a member of the senior management staff on 03.01.2018 (January 3rd, 2018).

**Information Disclosure Request:** (please attach questionnaire sent to the Bank or highlight key asks):

*São Paulo, August 3, 2017*

*To: Chief, Corporate Communications*

*Dear Sir/Madam,*

*Conectas is a non-governmental, non-profit organization founded in 2001, based in São Paulo, Brazil, whose mission is to promote the rule of law and the realization of human rights in the Global South.*

*Pursuant to the New Development Bank's Information Disclosure Policy, of June 2017, the public has the right to submit requests for information (Chapter III).*

*The NDB has vowed to take a different approach than other multilateral development banks (MDBs) in respect of the use of country systems. The Bank has declared that country systems will be the "starting point" for the assessment of potential diverse project impacts on the environment or social groups, as well as in the establishment of requirements to ensure that projects are well-managed from a financial perspective (NDB's General Strategy: 2017 – 2021, p. 16). According to the NDB Environmental and Social Framework, if gaps are identified, the NDB commits to work with the client to strengthen the country systems (para. 28).*

*Considering that the NDB has also pledged to verify "ex-ante the quality of borrowing-country environmental, social, fiduciary and procurement systems" (NDB's General Strategy: 2017 – 2021, p. 15), Conectas respectfully requests the following information:*

*a) Documents, including third-party studies and analyses, with an assessment undertaken by the NDB to verify the "quality", adequacy and the overall features of the Brazilian country system;*

*b) Documents that contain the NDB judgment over the consistency of the Brazilian country system with NDB policies, notably NDB's E&S Framework, as well as measures identified by the NDB as necessary to fill eventual gaps;*

*c) If applicable, additional information about the analysis of the Brazilian country system performed as part of the approval of the loan extended to the Brazilian National Economic and Social Development Bank (BNDES), including an assessment of the BNDES own policies, if applicable.*

*With best regards,*

*Juana Kweitel, Executive Director*

*Caio Borges, Coordinator*

## **Satisfaction with response (on a scale of 1-5): 1**

**Reasons for score:** There was no acknowledgment of the receipt of the disclosure request and no response to follow-up e-mail to Communication department.

## **In your opinion, what are the positives of the information disclosure process at the NDB?**

It is progressively improving, such as the information about projects posted on the website. However, transparency standards of the NDB are still relatively low compared to other MDBs.

## **RESPONDENT 4**

**Name:** Tomojit Basu

**Organisation:** Oxfam India

**Country:** India

**Mode of submission (e-mail, website platform etc.):** Website form

**Date of request submission:** 05.09.2017 (September 5th, 2017)

**Date of acknowledgement:** 08.09.2017 (September 8th, 2017)

**Date of response received from the Bank:** No response

**No. of reminder(s) sent:** None (0) – the purpose of submitting the information disclosure request was to assess if the NDB was maintaining its stipulated deadlines for responses

**Date(s) of reminders:** N/A

**Information Disclosure Request:** (please attach questionnaire sent to the Bank or highlight key asks):

*To,*

*The Chief,*

*Corporate Communication Division,*

*New Development Bank.*

*Sub: Request for information regarding NDB's Indian engagements*

*Dear Sir,*

*Oxfam India is an independent civil society organization (CSO), with its headquarters in New Delhi, India, which works to address root causes of poverty and inequality through a Rights Based Approach where people are seen as the bearers of civil, political, economic and social rights.*

*The New Development Bank (NDB) is proving to be a lithe financial institution with a host of projects already underway in various stages across the five BRICS nations. We believe that the three projects in India possess the potential to go some way in the effective promotion of building a sustainable future. We expect the Bank's sustainability criteria to ensure that the infrastructure being financed by the NDB will safeguard "the physical and social environment for current and future generations".*

*As per Chapter III of the New Development Bank's (NDB) Information Disclosure Policy (IDP – v2. 2017), the public has the right to submit requests for information.*

*Pursuant to this understanding, Oxfam India wishes to respectfully request the following information:*

1. Document(s) outlining and explaining the sustainability criteria adopted by the Bank in its endeavor to finance sustainable infrastructure projects.

2. In accordance to Section 2.1.2 of the IDP, any document(s) or information confirming the decision, modalities and implementation status of the project information disclosure procedure highlighted in the said Section, as well as a clarification on whether the procedure will contain social and environmental impact assessments conducted by the Bank and/or third parties, the point of contact within the NDB with whom the public is supposed to engage if queries are to be raised on project-related technicalities.

3. In accordance with Clause (c) under Section 2.1.2 of the IDP, document(s) in the form of the Bank's and/or third-party analyses, studies or assessments outlining the environmental and social information for the projects in India, namely:

- Sovereign-guaranteed renewable energy projects (Canara)
- Sovereign-guaranteed project with the Government of Madhya Pradesh on upgrading major district roads
- Sovereign-guaranteed project with the Government of Madhya Pradesh on water supply and sanitation and rural development
- Document(s) containing relevant information the identified contractor(s) and sub-contractor(s) for the three projects mentioned in (2) as well as the current status of the projects' execution

4. Document(s) in the form of the Bank's or third-party studies, analyses and/or assessments undertaken by the NDB to learn about or verify the overall features of the Indian country system and its adequacy.

5. Documents containing the judgement of the NDB on the Indian country system with the NDB's internal policies, particularly the NDB's Environment and Social Framework, as well as the measures identified by the Bank to fill identified gaps in the said country system.

We thank you for taking the time to peruse this information disclosure request and shall look forward to hearing from you soon.

Sincere regards,

Tomojit Basu

Programme Coordinator – India and the World,

Oxfam India.

#### **Satisfaction with response (on a scale of 1-5): 1**

**Reasons for score:** There was no response received either in part or in full to any of the queries or documents requested in the information disclosure request.

#### **In your opinion, what are the positives of the information disclosure process at the NDB?**

The response from the Communications department acknowledging the receipt of the disclosure request was provided within the stipulated time-period of 5 days outlined in the Bank's Information Disclosure policy. However, there was no response or requests for extensions made to address the queries raised in the submission. It remains unanswered as of February 28, 2018.