Comments on Toward Greater Transparency Through Access to Information: The World Bank's Disclosure Policy: Revised Draft (October 16, 2009)

3 November 2009

Executive Summary

This paper contains Comments by the Global Transparency Initiative (GTI) on *Toward Greater Transparency Through Access to Information: The World Bank's Disclosure Policy: Revised Draft* (October 16, 2009). We have reviewed the Bank's proposals in light of the GTI's *Transparency Charter for International Financial Institutions*, as well as the *Model World Bank Policy on Disclosure of Information*. The structure of the Comments follows the nine principles set out in the Charter.

The GTI very much welcomes the commitment by the World Bank to review its information disclosure policy. We commend the Bank for its proposals to transform the policy from a so-called positive list approach to a real presumption of disclosure, whereby all information is subject to disclosure apart from information covered by a limited regime of exceptions set out in the policy. The Bank's proposal to establish an independent appeals body is also an important forward-looking step. At the same time, the proposed policy could be improved in important ways. The GTI's key concerns are highlighted below, and elaborated upon in greater detail in the full set of Comments.

Principle 1: The Right of Access

The draft Policy goes a long way towards recognising a true presumption of disclosure by providing for the release of all information held by the Bank, subject only to the regime of exceptions. While the draft Policy does not go as far as to recognise the fundamental human right to access information held by the Bank, it does embrace the wider ideas of ownership, participation, dialogue and external oversight.

At the same time, the positive principles set out in the draft Policy are undermined by the near absolute protection it provides for so-called deliberative process information. We recommend instead more nuanced and precise harm-based exceptions to protect legitimate deliberative interests. Furthermore, the draft Policy grants countries and other third parties a veto over the release of information provided to the Bank by them, again instead of establishing clear and precise harm-based exceptions.

Principle 2: Automatic Disclosure

We welcome the draft Policy's commitment to "routinely make available to the public as much information as practical" and to "expand the categories of information that it routinely discloses." However, further clarity in this area is needed, along with a clear commitment to disclose additional documents. The commitment to simultaneous release of certain documents as they go to the Executive Board is useful, but it should not be subject to country agreement.

Principle 3: Access to Decision-Making

The draft Policy makes some modest advances towards disclosing information to facilitate more participation in decision-making. Unfortunately, with few exceptions, it still unduly limits the sharing of information in draft form, in particular based on the broad application of the deliberative process exception. For example, it does not propose routine disclosure of draft Country Assistance Strategies. Similarly, although the proposals would expand the disclosure of Board papers, many would be released only after Board consideration. We recommend that the policy strike a clearer, and more appropriate, balance between its goal of strengthening stakeholder engagement and the need to protect candid internal discussions. It should also establish a standard notice and public comment period for key Bank decision-making processes.

We reiterate our position that, as a public body, the Bank should allow public access to meetings of the Executive Directors. At a minimum, we recommend that this be done on a pilot basis to assess whether or not it really does inhibit the candour of Board discussions.

Principle 4: The Right to Request Information

The draft Policy should be much clearer about the manner in which requests for information will be processed. It should state clearly that requests may be made in different forms and in different languages, that requesters do not have to provide reasons for their requests, and that the Bank will provide assistance to requesters as needed. Additional clarity in the policy is also needed regarding the notice to be provided in case of refusals of access, the forms in which information may be accessed, and any fees which may be charged.

Principle 5: Limited Exceptions

The draft Policy states that access to information will be denied only where "disclosure could cause harm," but its substantive provisions fail to live up to this standard. The GTI does not believe that it is legitimate to withhold all information relating to the deliberative process, which is defined very broadly in the draft Policy. The task of defining the specific harm to be avoided in this area – such as the free and frank provision of advice or the success of a policy initiative – has been addressed successfully in many right to information laws and this approach should be taken in the Bank's policy as well. At a minimum, the policy should restrict the scope of this exception to opinions, advice or recommendations relating to the formulation of policy, and exclude background studies or statistical information.

While it is appropriate to protect the legitimate interests of third parties, this does not require granting them a veto over the release of information, an approach which does not conform to the draft Policy's commitment to harm-based exceptions. Other overly broad exceptions include certain financial information held by the Bank and attempt to extend the Bank's secrecy regime to national law. The public interest override in the draft Policy apply to all exceptions and it should not be used to extend secrecy.

Principle 6: Appeals

The GTI applauds the proposal in the draft Policy to create an independent appeals mechanism. It would be preferable to set out in more detail in the policy how the members are to be appointed and how the body is to function in practice. Furthermore, it should have wider powers, for example to decide on public interest disclosures and to make general recommendations for reform or improvement.

Principle 7: Whistleblower Protection

The Bank should make a clear commitment to bring its whistleblower policy into line with the standards set out in the GTI Charter.

Principle 8: Promotion of Freedom of Information

The draft Policy includes a number of commitments in the area of implementation which signals the Bank's seriousness in instituting the new policy. At the same time we recommend extending these by including annual reporting on implementation of the new policy, incorporating the policy into Bank systems, in particular into corporate incentive structures and appraisal processes, and establishing a system of sanctions for wilful failure to implement the policy.

Principle 9: Regular Review

The Bank should make a commitment to undertake a comprehensive review of the policy within three years.

Key Recommendations

Principle 1 The Right of Access

- Protection of the deliberative process should not be elevated to a separate principle in the policy. Instead, the narrow interests which warrant confidentiality should be protected in the same way as exceptions.
- The policy should not allow third parties and countries to veto release of information.
- All bodies associated with the World Bank should review their information disclosure policies and practices to ensure that they meet the standards in the new World Bank policy.

Principle 2 Automatic Disclosure

- The policy should provide a comprehensive list of documents subject to routine disclosure, including documents not currently listed but for which an abiding public interest exists (for example, draft Country Assistance Strategies), along with a commitment to disclose them in a timely manner
- The third party veto for simultaneous disclosure of operational documents and full mission aide memoires should be removed.
- The policy should commit to the proactive disclosure of more basic operational information in translated form and include minimum requirements for Public Information Centers.

Principle 3 Access to Decision-Making

- The policy should provide access to draft information at key milestones to promote stakeholder engagement and ownership. This should include a standard notice and comment period for key Bank decision-making processes.
- The policy should specify the criteria according to which information, particularly Board papers, would be classified as "confidential" or "strictly confidential."
- The policy should establish a pilot program of conducting a select number of Board meetings in public.

Principle 4 The Right to Request Information

- The policy should describe the manner in which requests may be made and include a commitment to assist requesters who need help.
- A framework of translation commitments in the context of requests should be added to the policy.
- The basic framework for fees should be set out in the policy, including a commitment not to charge for smaller requests or requests in the public interest, or for collating or processing requests.

Principle 5 Limited Exceptions

- The deliberative process exception should be replaced by a narrow exception designed to protect legitimate interests such as the free and frank provision of advice, the success of a policy, testing procedures or ongoing investigations. At a minimum, the policy should restrict the scope of this exception to opinions, advice or recommendations relating to the formulation of policy, and exclude background studies or statistical information.
- The originator veto should be removed from the policy and replaced with a harm-based exception to protect commercial confidentiality and the flow of information to the Bank.
- The policy should not try to extend its regime of exceptions to information exchanged between Executive Directors' offices and national authorities.
- The corporate administrative and 'certain' financial information exceptions should be removed from the policy and replaced with a harm-based exception to protect the legitimate commercial interests of the Bank.
- A harm-test should be added to the personal information and Ethics Committee exceptions.
- All categories of information should presumptively be subject to historical disclosure.
- The power to use the public interest override to block disclosure should be removed from the policy.
- The public interest override to enable disclosure should apply to all of the exceptions, not just to three of them, and it should apply whenever the public interest is engaged, not just in "exceptional circumstances".

Principle 6 Appeals

- The grounds for appeal, and the associated remedies, should be broadened to include complaints about timeliness, fees and form of access.
- The policy should clarify the appeals process regarding disclosure decisions by the Board.
- The policy should clarify how the members of the independent appeal body are to be appointed, and how this body will function and to whom it will report.
- The independent appeal body should have the power to make recommendations regarding public interest disclosures and to make more general recommendations for reform.

Principle 7 Whistleblower Protection

- The World Bank should make a clear commitment to bring its whistleblower policy into line with the standards set out in the GTI Charter.

Principle 8 Promotion of Freedom of Information

- The Bank should report annually on implementation of the new policy.
- A commitment should be made to raise external awareness about the new policy.
- Implementation of the policy should be incorporated into Bank corporate structures, including incentive and appraisal systems, as well as sanction regimes.

Principle 9 Regular Review

- The policy should include a commitment to undertake a comprehensive review within three years

Introduction

Consultations around the World Bank's review of its Policy on the Disclosure of Information began in January 2009 with the release of the Bank's Approach Paper, *Toward Greater Transparency: Rethinking the World Bank's Disclosure Policy* on 29 January 2009. This was followed by the publication of an actual draft policy paper, *Toward Greater Transparency Through Access to Information: The World Bank's Disclosure Policy: Revised Draft* on 2 October 2009 and again on 16 October 2009 (draft Policy).

The Global Transparency Initiative (GTI) very much welcomes this undertaking by the World Bank to review its disclosure policy. We commend the very significant advances reflected in the Bank proposals. In particular, we welcome the commitment by the Bank to move, for the first time, to a real presumption of disclosure, whereby all information it holds would be subject to disclosure, unless it comes within the scope of the regime of exceptions defined by the policy. We also welcome the proposal to establish an independent appeals mechanism, the first time any international financial institution will have done this.

At the same time, we note that the draft Policy contains some serious shortcomings. The most serious of these is the unduly broad regime of exceptions and, in particular, the very wide exception in favour of deliberative processes and the third party veto. The public interest override is also too narrow in scope, applying to only three of the ten exceptions outlined in the draft Policy. Other key problems with the draft policy include its failure to do enough to promote timely disclosure of information to facilitate participation in decision-making and its failure to elaborate important procedural rules.

The GTI provided Comments on the January 2009 Approach Paper in May 2009. Between April and June 2009, the World Bank conducted a number of consultations on the proposals in the Approach Paper in cities around the world. The GTI was active in these consultations, including by co-organising a discussion on the Approach Paper with the World Bank on 25 April 2009.

This Comment contains the GTI's analysis of the draft policy document released by the Bank on 16 October 2009. It relies on two key GTI Policy documents, the *Transparency Charter for International Financial Institutions* and the *Model World Bank Policy on Disclosure of Information*. It is, in particular, organised along the lines of the nine key principles set out in the Charter, and frequent reference is made to the provisions of the Model Policy.

Analysis in Light of GTI Charter Principles

Principle 1: The Right of Access

The right to access information is a fundamental human right which applies to, among other things, information held by international financial institutions, regardless of who produced the document and whether the information relates to a public or private actor.

The draft Policy has gone a long way towards recognising a right of access as compared to previous policies, in particular by recognising a true presumption of disclosure. We welcome the fact that the draft Policy, for the first time, proposes to apply a uniform set of rules to all of the information held by the World Bank, regardless of when that information was created or came to be held by the Bank. At the same time, there are important shortcomings in the draft Policy.

Basis for the Policy: The draft Policy does not, unlike the GTI Charter, recognise the fundamental human right to access information held by public bodies, including global public bodies like the World Bank. However, the GTI welcomes the very strong, almost exemplary, statement of the importance of transparency in the very first paragraph of the draft Policy. This refers to the role of openness in promoting sound development and the Bank's poverty alleviation mandate, in fostering ownership and participation, in building public dialogue and awareness, and in enabling public oversight.

However, para. 4, outlining the paradigm shift towards a true presumption of disclosure and describing in more detail the importance of openness to the ability of the Bank to fulfil its roles, is far more limited in scope. It refers to the importance of transparency to the Bank generally as a development institution, for financial accountability purposes, to attract purchasers and to provide its employees with information to perform their duties. The wider ideas of ownership, participation, dialogue and external oversight are missing here.

Presumption of Disclosure: The draft Policy makes a strong commitment to bring about a "paradigm shift" in access to information by moving away from the "positive list" approach upon which previous policies were based towards a system founded on a presumption of disclosure subject to harm-based exceptions. We welcome the Bank's clear statement on maximising access to information, reflected in Principle 1 of the draft Policy, which states, in part:

> The World Bank recognizes the fundamental importance of transparency and accountability in the development process. Accordingly, the Bank would disclose any information in its possession that is not on a list of exceptions. (para. 7, Principle 1)

We also welcome the commitment in Principle 2 of the draft Policy to apply only harm-based exceptions:

> The Bank would deny access only to information whose disclosure could cause harm to well-defined interests. The types of information that would consequently not be made publicly available—hereafter referred to as "exceptions"—would be clear and easy to interpret. (para. 7, Principle 2)

Deliberative Exception: The strong recognition in Principles 1 and 2 of a presumption of disclosure defeated only by harm-based exceptions is, however, immediately and seriously undermined by Principle 3: Safeguarding the Deliberative Process. It is not clear to the GTI why what is treated in other policies and national laws as simply another exception has been elevated in the draft Policy to the level of an independent principle. The numerous references in the draft Policy to the "deliberative process", not found in previous policies or the policies of other international financial institutions, reflect a strong preoccupation with the notion that the deliberative process somehow warrants special protection.

The GTI considers the near absolute protection for the deliberative process in the draft Policy to be entirely inappropriate and to pose a very serious risk to the achievement of the policy's stated goals. The proposed exemption for "deliberative information" is too broad and too vague. It could potentially cover a vast array of information held by the World Bank and the limited efforts in the draft Policy to narrow its scope (for example in para. 10) are wholly inadequate to redressing this risk. Importantly, throughout the draft Policy, and contrary to the central idea of harm-based exceptions, no mention of harm is ever made in the context of the deliberative process. A more nuanced and precise exception could protect legitimate interests – such as the free and frank provision of advice or avoid harm to a policy through premature disclosure – and yet remain consistent with the presumption of disclosure. Section 5 below elaborates on this point.

Third-party Information: The draft Policy incorporates an approach to information provided by third parties that also directly contradicts the stated presumption of openness. The draft Policy treats information provided by countries and other third parties as being owned by the originator, and gives them a veto over release of that information (see para. 17(g) and (h)). Although cast as an exception, this is really a limitation on the presumption in favour of disclosure. The GTI has consistently argued against a third party veto, which is not an approach that is employed in national right to information laws, and which substantially undermines the principle of access. Instead, we call for harm-based exceptions to protect legitimate third party interests and relations with countries and other intergovernmental organisations. Third parties interests should also receive procedural protection in the form of a right to be consulted whenever there is a possibility that information provided by them may be disclosed. Further commentary on this issue is included in section 5.

We would like to see the policy include a commitment by the Bank to make an effort to ensure that it holds information relevant to its operations and activities, even if this information is normally created or held by another actor, such as a contractor. This could be achieved through inserting transparency and/or access to information clauses in contracts, so as to require third parties to provide key information to the Bank, either automatically or upon request. An example of such a commitment is found at para. 3 of the GTI's Model Policy:

Information held by third parties

To give full effect to the presumption of disclosure, the Bank includes, from the date of adoption of this Policy, clauses in the contracts it concludes to ensure that, subject only to reasonable operational constraints, it can access the information created or obtained pursuant to those contracts, by the parties to those contracts. This includes access to key documents held by borrowing governments or direct service providers created or obtained pursuant to a contract with the Bank.

Other World Bank bodies: The draft Policy is limited in scope to the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) (see footnote 1 and paras. 17(e) and 18). Other World Bank bodies – other members of the World Bank Group, such as the International Finance Corporation (IFC) and the Multilateral Investment guarantee Agency (MIGA), and the Department of Institutional Integrity, the Sanctions Board, the Inspection Panel and the Independent Evaluation Group – should now undertake reviews of their own disclosure commitments and practices to ensure that they conform to best practice in this area or, at a minimum, the standards in the new World Bank policy.

Recommendations:

- The list of reasons why transparency is important in para. 4 should be widened to cover the full range of interests listed in para. 1.
- Protection of the deliberative process should not be elevated to a separate principle in the policy. Instead, the narrow interests which need protection should be included in the list of exceptions, as with other exceptions, and be made subject to a requirement of harm.
- The policy should not allow third parties and countries to veto release of information. Instead, legitimate interests should be protected, subject to a requirement of harm.
- The Bank should make a commitment to ensure that it either holds or can access information relevant to its operations, even if this information is created by a third party.
- All bodies associated with the World Bank should review their information disclosure policies and practices to ensure that they meet the standards in the new World Bank policy.

Principle 2: Automatic Disclosure

International financial institutions should automatically disclose and broadly disseminate, for free, a wide range of information about their structures, finances, policies and procedures, decision-making processes, and country and project work.

The Bank currently releases a large amount of information on a routine basis, both on its website and through its Public Information Centers. We acknowledge the Bank's progress in this regard and welcome the Bank's commitment to "routinely make available to the public as much information as practical, particularly on its external website" (para. 7, Principle 4).

In addition, we commend the Bank for committing to "expand the categories of information that it routinely discloses" (para. 9). The draft Policy identifies a number of documents that would for the first time be disclosed on a routine basis under the new policy, such as Decisions of Project Concept Reviews; simultaneous public disclosure of Bank policies and strategies, as well as potentially Country Assistance Strategies, Project Appraisal Documents, and Program Documents upon distribution to the Board; portions of Implementation Status and Results Reports; project financial statements; summaries of Board discussions; and more analytical and advisory documents (see Appendix for list of these).

The systematic release of the "new" documents listed in the draft Policy would represent a significant expansion of routine disclosure by the Bank. Several of these disclosures are particularly noteworthy, while at the same time raising questions:

- Decisions of Project Concept Reviews would provide information much earlier in the project cycle. At the same time, is unclear why the Project Concept Note is not subject to routine disclosure, especially since many of these documents are already posted on the Bank's website, albeit on an ad hoc basis.
- Disclosure of Country Assistance Strategies, Project Appraisal Documents and Program Documents upon distribution to the Board would represent a significant step forward. It would provide stakeholders with an opportunity to review these critical operational documents shortly before (generally 10 days) Board consideration. However, the simultaneous disclosure of these Bank documents is subject to the veto of the relevant borrower. We view such third-party veto rights (in this case, over Bank-produced documents) as inappropriate.
- For the first time the Bank proposes to disclose substantive information on ongoing operations through the release of portions of Implementation Status and Results Reports (ISR) as well as "key" decisions resulting from Bank supervision and midterm review missions. We are concerned, however, that all staff comments and detailed risk ratings in the ISR would be withheld, based presumably on an *a priori* determination of potential harm to relations with borrowers if this information were to be disclosed. This blanket assertion appears unwarranted. We are also concerned that only "key decisions" from supervision missions would be disclosed and that the Bank would grant veto rights to borrowers over the release of "full mission aide memoires" (see Box 1). We again note the inappropriateness of a third-party veto. Full aide memoires should be disclosed, subject to the regime of exceptions.

We assume that the "new" documents slated for routine disclosure are indicative, and that other documents will also be routinely released under the principle of "maximizing access" (para. 7, Principle 1). Annex B of the draft Policy provides a sample list of documents that would be routinely disclosed under the new policy. We note some inconsistency between the documents subject to routine disclosure listed in the actual policy and in Annex B. For example, CAS Consultation Plans, Debt Sustainability Analyses, Project Concept Review decisions, and nearly all the new Board disclosures (summaries of discussion, Board committee minutes and reports, etc.) are not included. The list of documents subject to routine disclosure should be expanded to include, at a minimum, the following documents:

Country Strategy and Related Information
- Draft Country Assistance Strategy/Partnership
- Rationale for Country Policy and Institutional Performance (CPIA) ratings
- PRSP Annual Progress Reports
- PRSPs Status Reports
- Chairman's Summing-up on the discussion of a PRSP
- Transitional Support Strategies

Analytic and Advisory Services
- All Economic and Sector Work (ESW) Reports and Policy and Advisory Notes[1]
- Poverty and Social Impact Analysis

Lending Documents and related Information
- Initiating Memoranda
- Project Concept Notes
- Draft Project Appraisal Documents
- Draft Program Document
- Beneficiary Assessments
- Back-to-Office Reports
- Aide Memoires
- Project Performance Assessment Reports

Borrower documents
- Project Implementation Plans
- Draft safeguard documents (EA, Resettlement instruments, Indigenous Peoples instruments)
- Social Assessments

Other
- Quarterly Management Reports
- Staff Directory
- Staff Manual, Procedures, Guidelines
- QAG Quality Assessments
- Annual Report on Portfolio Performance

Timeliness: While the draft Policy stipulates the timing for the release of some routinely disclosed documents (such as Board documents), it leaves others unspecified. Timely access is critical to fulfil the stated goals of stakeholder engagement and public oversight (see para. 1). For example, annual audited project financial statements should be completed and disclosed expeditiously to enhance third-party monitoring. We recommend the incorporation of a general statement on timelines for release of documents into the policy, in addition to clear identification of milestones at which specific documents would be released. Such a statement might state: "Documents subject to routine disclosure are made publicly available as soon as possible."

Proactive Measures: We applaud the clear statement in para. 30 of the draft Policy regarding the need to ensure greater dissemination of operational information in order

[1] Core ESW diagnostic Reports include Core diagnostic products include: Poverty Assessment (PA), Country Economic Memorandum (CEM)/Development Policy Review (DPR), Public Expenditure Review (PER), Country Procurement Assessment Report (CPAR), Country Financial Accountability Assessment (CFAA), Integrative Fiduciary Assessment (IFA). In addition, other diagnostic ESW Reports include Corporate Governance Assessments (ROCS), Country Gender Assessments, Country Infrastructure Frameworks, Education Sector Reviews, Energy- Environment Reviews, Financial Sector Assessment Program, Health Sector Reviews, Investment Climate Assessments, Risk and Vulnerability Assessments, and Rural Development Assessments. Advisory or Policy Notes may include a range of issues, including Commodities Studies, Debt and Creditworthiness Studies and Economic Updates and Modeling, Foreign Trade, Foreign Direct Investment, and Capital Flows Studies, Law and Justice Studies, and Public Investment Reviews.

to build closer links between the Bank's Disclosure Policy and increased participation of beneficiaries. The draft Policy notes the need to increase collaboration with stakeholders to improve local outreach. At the individual project level, the draft Policy calls for "special components" to improve outreach and communications and notes "for example, through information kiosks." We welcome this elaboration and encourage the Bank to specify these measures in the forthcoming policy.

Form of Dissemination: The draft Policy does not address the need to provide information in diverse forms and channels. The GTI Model Policy addresses this issue as follows:

> 13. The Bank utilizes a wide range of dissemination mechanisms to disclose information to the public in an accessible form, including in gender and culturally sensitive forms. All automatically disclosed information is disseminated, at a minimum, through the Bank's website. Information relevant to local or affected communities is made available in a form and manner which they can access in practice. Information provided via the Bank's website is available in different formats, including in a text only format, to accommodate varying qualities of Internet access, and in a format that does not require particular proprietary software to access.

Translation: We welcome the draft Policy's acknowledgement of the "importance of making certain information available in languages other than its working language – English" (para. 35). The draft Policy notes that the Bank's existing Translation Framework provides sufficient latitude to respond to the "significantly higher demand for document translation" expected after adoption of the new policy. While the draft Policy states that the framework "does not prohibit any public documents from being translated," we encourage the Bank to adopt more proactive measures to ensure that stakeholders may access core information without having to request and wait for translations. In addition to responding to requests on a case-by-case basis, we call on the Bank to make a commitment to regularly translate Country Assistance Strategies into a country's official languages, and for operations, at a minimum, to translate project information documents and to provide brief summaries of relevant documents into languages understood by affected people. The Bank should also ensure that translations of project documents undertaken by the borrower are readily accessible, including on its own website.

Public Information Centers: We welcome the draft Policy's call to strengthen the Public Information Centers and to provide intensive training to staff during the rollout of the new policy (para. 36). We recommend that the policy include language regarding minimum requirements for these Centers. On this issue, the GTI Model Policy states:

> 14. The Bank has at least one Public Information Center (PIC) in every borrowing member country and, where resources permit, several PICs across the country. Anyone may access PICs during working hours, and for free. Each PIC has a walk-in facility and at least one public computer terminal equipped with accessible modern recording devices (CD writer, pen drive) and connected to the Internet. Facilities are also available for photocopying and printing Bank documents, free of charge.

Recommendations:

- The policy should provide a comprehensive list of documents subject to routine disclosure, including documents not currently listed but for which an abiding public interest exists (for example, draft Country Assistance Strategies).
- The third party veto for simultaneous disclosure of operational documents and full mission aide memoires should be removed.
- The policy should make a commitment to make routine disclosures in a timely manner.
- The policy should elaborate in more detail proactive dissemination measures and forms of dissemination.
- The policy should commit to the proactive disclosure of more basic operational information in translated form.
- Minimum requirements for Public Information Centers should be set out in the policy.

Principle 3: Access to Decision-Making

International financial institutions should disseminate information which facilitates informed participation in decision-making in a timely fashion, including draft documents, and in a manner that ensures that those affected and interested stakeholders can effectively access and understand it; they should also establish a presumption of public access to key meetings.

We welcome the draft Policy's clear statements regarding the linkages between openness, increased public engagement, and improved development outcomes, contained in the opening paragraph:

> The World Bank recognizes that transparency and accountability are fundamentally important to the development process and central to achieving the Bank's mission to alleviate poverty. The Bank's commitment to openness is also driven by a desire to foster public ownership, partnership, and participation in World Bank operations from a wide range of stakeholders. Transparency is essential to building and maintaining public dialogue and increasing public awareness about the Bank's development role and mission. Openness promotes engagement with stakeholders, which, in turn, improves the design and implementation of projects and policies, strengthening development outcomes.

This principled statement suggests that the policy would establish a robust framework for stakeholder participation in development decision-making in Bank-financed operations. While the draft Policy does improve the possibility of stakeholder participation through the disclosure of more information, the improvements remain modest.

Draft Information: Stakeholder engagement in and ownership of development initiatives is predicated in large part on the degree to which stakeholders are involved in decision-making processes. The Bank acknowledged this principle long ago: "With public participation, the main lesson learned is that the meaningfulness of the exercise is proportional to the scope for influencing decisions which may affect the

participants."[2] Access to information while it is still subject to revision is essential. If stakeholders are only presented with fixed decisions and final outcomes, meaningful engagement is not possible.

Unfortunately, with few exceptions, the Bank's revised policy appears to limit the sharing of information in draft form, in particular based on the broad application of the deliberative process exception:

> While the bank would be fully **open about its decisions, results, and agreements**, it would protect the **confidentiality of the processes** that lead to these decisions, results, and agreements…. (Para. 7, Principle 3)
>
> [T]he Bank would distinguish the kinds of information that are truly of a deliberative nature from those that convey the results of its deliberations, so that it can (a) **disclose final outcomes and results** of its deliberations at key process milestones …. (para 10)
>
> (a) **final decisions and outcomes** of the Board's deliberative process [would] be disclosed, and (b) deliberative Board records [would] not be disclosed [until declassification]. (para 11) [emphasis added]

A literal reading of these provisions would lead to the conclusion that only decisions and outcomes would be reported to stakeholders, while proposals still being formulated would not. This approach seems to place a premium on reaching final internal consensus before public engagement, which may close off important alternative approaches to development issues. Furthermore, it falls far short of establishing a participatory framework for decision-making.

For example, we were struck that the draft Policy does not propose routine disclosure of draft Country Assistance Strategies. The CAS, prepared by the Bank, provides a 3-5 year Bank business plan for client countries. It is a pivotal document and Bank best practices call for broad public consultations on CAS development. While the draft Policy indicates that the consultation plan for CASs would be routinely disclosed, actual draft CASs are not listed (raising questions about the documentary basis for CAS consultations). We do to understand this omission, and question whether the excessive deliberative process exception is being applied to this critical public engagement process. We note that the lack of a requirement for routine disclosure of draft CASs contrasts with the Bank's longstanding requirement to disclose draft sector strategy papers[3] and the clear commitments of other multilateral development banks to disclose draft country strategies.[4]

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[2] World Bank, *Environmental Assessment Sourcebook,* vol. 1 (World Bank Technical Paper 139, Washington, DC: World Bank, 1991), p. 209.

[3] Paragraph 13 of the Bank's 2002 disclosure policy states that "the draft Concept Note and Consultation Plan for an SSP [Sector Strategy Paper] under preparation, as well as the draft SSP, are publicly available upon notification to the Executive Directors of such proposed disclosure."

[4] For example, the **Asian Development Bank**: "ADB shall make draft strategies and programs available to in-country stakeholders for comment before consultations. They shall be made available (i) after the initiating paper is completed; and (ii) after the strategy and program is drafted but before its management review meeting." (ADB Public Communications Policy, para. 64, 2005); the **African Development Bank**: "The draft CSP will be released to in-country target audiences, as part of the consultation process, to enhance information for CSP consultation. … Draft CSPs will be released via

We recommend that the policy strike a clearer, and more appropriate, balance between its goal of strengthening stakeholder engagement and the need to protect candid internal discussions.

Notice and Comment: The draft policy does not establish a standard notice and public comment period for key Bank decision-making processes, such as those related to organisational procedures, rules and directives; institutional policies and strategies; country strategies; lending, grant, credit and guarantee operations; and institutional and project-level evaluations and audits. Without a clearer and more consistent public engagement framework, the Bank will not achieve its stated desire to improve stakeholder engagement.

Acknowledging exclusion: The draft Policy fails to acknowledge the all too real barriers faced by marginalised communities and individuals in accessing information and participating in development decisions. There is also no acknowledgement of potential gender differences in accessing and utilising information.

Board Information: The draft Policy makes several advances regarding access to the decision-making processes of the Bank's Executive Directors. We welcome expanded disclosure of Board papers (although many would be released only after Board consideration, and the draft Policy does not stipulate criteria for classifying such papers as confidential or strictly confidential, which could block release for 20 years under the proposed declassification regime).

We particularly commend the proposal to disclose Bank strategies and polices to the public at the same time they are distributed to the Board. This will provide a brief, albeit important, window for external stakeholders to assess how input from public consultations has been incorporated and to raise any final concerns with their Executive Directors.

The proposal to disclose CASs, Project Appraisal Documents (PADs) and Program Documents (PDs) when they are distributed to the Board – provided the relevant country consents – is particularly noteworthy, although, as noted, we do not agree with country vetoes.

For Development Policy Loans/Grants (DPLs), simultaneous disclosure would provide external stakeholders with a first opportunity to review the agreed economic, social or governance reforms (contained in the Program Document) before they are approved by the Board. This is a significant advance, given that the content and secrecy of such reforms have been a matter of strong public criticism of the Bank. At the same time, this potential disclosure window is limited, given that these documents are typically distributed only 10 days before Board consideration. To further improve

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the Bank Group website at least 50 days prior to formal Board discussion… Such drafts will however exclude confidential information as agreed with the government." (AfDB Disclosure of Information Policy, para. 4.3, October 2005); and the **European Bank for Reconstruction and Development:** "The draft country strategy will be publicly released and posted on the Bank's web site, following a process which includes consultation with the country concerned. The draft country strategy will be posted for a period of 45 calendar days, during which time the public is invited to send comments to the Bank." (EBRD Public Information Policy, para. 2.1.1, September 2008).

timely access to information on critical DPL reform proposals, we recommend that the Bank mandate and ensure that Program Information Documents be updated at appraisal to include details on specific proposed reforms and borrower actions. Current PIDs are often only 3-5 pages, general in focus, and not updated.

We welcome the draft Policy's commitment to expand access to documents related to Board proceedings. Release of Summaries of Discussion, as well as minutes and reports of Board committees, will provide the public with greater insight into the positions being taken by the Board. At the same time, we note that these records remain unattributed, so citizen monitoring of their government's positions at the Board is limited.

We reiterate our position that, as a public body, the World Bank should provide public access to meetings of the Executive Directors. As we noted in our comments on the Approach Paper, allowing observers to attend executive bodies is an increasingly established practice, even at the World Bank itself. Observers now attend executive body meetings of the Bank's Clean Technology Fund, Strategic Climate Fund, Forest Investment Program, Forest Carbon Partnership Facility and Pilot Program on Climate Resilience. It has also been longstanding practice at the Global Environment Facility. Many UN bodies provide public access to decision-making bodies.[5] And the US Federal Reserve has taken steps to allow the public to access its meetings.[6] At a minimum, the Bank's Board should launch a pilot programme of conducting select meetings in public and test the effects open meetings have on candour and the quality of the deliberations.

We note that the Bank proposes to begin releasing transcripts of Board meetings and statements of Executive Directors after a 10-year waiting period. We maintain that citizens have a strong public interest in the positions taken by their governmental representatives at the Bank and should not have to wait 10 years to ascertain those positions. The Bank argues that "[i]f the view of each Executive Director is immediately known to the public, it may put undue pressure on Executive Directors, and could politicise the Bank's decision-making process" (para. 11). Even if this is the case, there is no need to withhold such statements for 10 years; these statements should be disclosed soon after the conclusion of the pertinent deliberations. At a minimum, Directors who wish to disclose their statements should not be prevented from doing so.

We also fail to see the justification of withholding transcripts of Board meetings for 10-years, particularly given the generous proposed set of disclosure exceptions. Transcripts should be released when they have been agreed, subject to potential redaction of information that poses a risk of serious harm to a well-defined interest.

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[5] The rules of procedure for the UN Security Council provide for public meetings: "Unless it decides otherwise, the Security Council shall meet in public" (Rule 48). See http://www.un.org/Docs/sc/scrules.htm. We note, however, a trend in recent years at the UNSC to meet in closed session. Many other UN bodies provide webcasts of certain meetings and deliberations, including the UN General Assembly, International Labor Organization, UNESCO and the UN Human Rights Council.

[6] At the U.S. Federal Reserve, the "public is welcome to attend all meetings except those that the Board [of Governors] determines should be closed under legal exemptions" of U.S. law. See http://www.federalreserve.gov/boarddocs/meetings/sunshine.htm.

Recommendations:

- The policy should provide access to draft information at key milestones to promote stakeholder engagement and ownership.
- The policy should include a standard notice and comment period for key Bank decision-making processes in order to provide a more consistent framework for stakeholder access and participation.
- The policy should specify the criteria according to which information, particularly Board papers, would be classified as "confidential" or "strictly confidential."
- The policy should establish a pilot program of conducting a select number of Board meetings in public to test the effects of greater openness.

Principle 4: The Right to Request Information

Everyone has the right to request and to receive information from international financial institutions, subject only to a limited regime of exceptions, and the procedures for processing such requests should be simple, quick and free or low-cost.

The GTI welcomes the general commitment, in Principle 4 of the draft Policy (see para. 7) to "adopt clear and cost-effective procedures for requesting information and for processing requests for information, including appropriate timelines for decision-making." The substance of the procedures is mainly set out in Annex F: Disclosure Authorization Procedures and Timelines.[7] Although helpful, this fails to provide a sufficiently detailed set of rules to meet the stated commitment to adopt 'clear' procedures or to underpin an effective requesting system. Pursuant to para. 34(d), Management is required to issue guidelines on procedures for processing requests. The GTI believes that the basic framework for processing requests should be included in the actual policy.

Making Requests: The draft Policy says little about the manner in which requests may be made, although it provides that country offices, the InfoShop and the Archives Unit will process requests (see para. 25). It would be preferable to state clearly in the policy that requests may be made in different forms – including in writing or orally, electronically or by mail or fax – and at different locations – ideally anywhere the Bank has a physical presence, as well as through a central email address – and in different languages – including any official language of a member country. The policy should also make it clear, although this is to be assumed, that requesters do not have to provide reasons for their requests. However, providing such reasons may help the Bank determine whether or not the public interest override might apply, and the option of providing reasons for this purpose should be communicated to requesters.

Assistance: The draft Policy is silent as to any commitment by the Bank to provide assistance to requesters. The provision of such assistance can be essential for requesters who are not familiar with making requests for information or with how the Bank operates. It can also save the Bank time and effort since working with requesters

[7] We note that Annex F is not included in the list of provisions for which formal Board approval is sought, pursuant to para. 48 of the draft Policy. The precise implications of this are not clear to us.

to focus their requests on the information they really want can significantly streamline the requesting process.

Timelines: Although Annex F appears to provide for different processes for information dated before and after 1 July 2010, the differences relate primarily to the application of the public interest override (which may lead to a more lengthy process). Otherwise, requests must be acknowledged within five working days and responded to within fifteen days. This is in accordance with the standards set out in the Charter, which also refer to a fifteen-day time limit. The Charter, however, also calls for a commitment to respond to requests as soon as possible, making it clear that fifteen days is simply a maximum. Some better practice national access laws also provide for shorter maximums for information which is required on an urgent basis, for example to avoid harm (see para. 30 of the GTI Model Policy).

Notice: The draft Policy is largely silent as to the notice that must be provided to requesters whose requests have been refused, although Principle 4 (para. 7) does say that the Bank would give reasons for denying access to information. Such notice should indicate the exact provision of the policy which has been relied upon to refuse access, as well as the right of the requester to lodge an internal and then external appeal.

Form of Access: The draft Policy is also silent as to the question of form of access. Requesters should be able to specify the manner in which they would like to access information – for example by inspection, photocopy, electronic copy or transcript – and to access the information in this form unless there are overriding reasons for refusing this. Form of access should also extend to the language in which the information is provided. The draft Policy does refer in para. 35 to the issue of translations, opining that it will likely lead to "significantly higher demand" for translations, but leaving this to be addressed through the existing Translation Framework. It would be preferable to set out a framework of commitments regarding translation, including to provide project information documents in a language accessible to those affected by the project.

Fees: The draft Policy is essentially silent as to the matter of fees, providing instead that the Disclosure Committee it creates would establish a fee structure. However, footnote 36 does give some indication of Bank thinking on this issue, providing that information posted on the external website would continue to be made available for free, that commercial documents would continue to be sold, although a free full-text version of books would be made available, and that project information on a requester's own country would be free, but that requests that require photocopying, scanning, processing or collating information would attract "reasonable fees".

These are largely positive statements. At the same time, we are concerned that fees, which have hitherto not been charged by the Bank, may exert a chilling effect on requests for information. We recommend that a framework of commitments be set out in the policy, not just a footnote, and that it go beyond what is currently contained in footnote 36. We recommend, for example, that no fees be charged for processing or collating information, that the first 100 pages of photocopying be provided for free, that maximum photocopy rates be set centrally, and that requests which are in the public interest be provided free of charge.

Collation of Information: Para. 19 of the draft Policy gives the Bank the right to refuse requests which, among other things, require the Bank to "create, develop, or collate information". It is accepted that the right to information does not place an obligation on public bodies to create information, but only to provide access to information they already hold. However, under most national right to information laws, public bodies are expected to collate information, for example where it is spread across different documents or needs to be extracted from a database. Indeed, without this, the right to information would be seriously undermined. Furthermore, the draft Policy clearly recognises the importance of collation of information, since it provides for charging fees for this (see above).

Recommendations:

- The policy should describe the manner in which requests may be made, as well as the fact that requesters do not have to provide reasons for their requests.
- A commitment to assist requesters who need help should be added to the policy.
- The policy should make it clear that requests will be responded to as soon as possible and that fifteen days is simply an upper limit.
- Consideration should be given to including a commitment to respond to urgent requests more quickly.
- Requesters should be able to stipulate their preferred manner of accessing information.
- A framework of translation commitments in the context of requests should be added to the policy.
- The basic framework for fees should be set out in the policy, including a commitment not to charge for smaller requests or requests in the public interest, or for collating or processing requests.
- The Bank should not be able to refuse requests simply because they involve the collation of information.

Principle 5: Limited Exceptions

The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

The draft Policy makes a strong statement on exceptions, providing, in Principle 2 (see para. 7), that access to information will be denied only where "disclosure could cause harm". Unfortunately, the substance of the draft Policy fails to live up to this high standard. The first sign of this comes in Principle 1, which provides for the release of information unless it is "on a list of exceptions". The idea of a list of exceptions fits at best uncomfortably with a harm-based approach, which mandates the application of a test – would disclosure of the information create harm – rather than a list. Many of the exceptions in the draft Policy are not in fact based on a risk of harm.

Deliberative Process: As noted above, the draft Policy reflects a strong preoccupation with the idea that it is necessary to protect the deliberative process. The first reference

to this comes in para. 4, announcing the paradigm shift to a real presumption of disclosure, but marking early on that this will not apply to deliberative information. The importance attached to deliberative processes is highlighted by its elevation to a separate principle, Principle 3, as opposed to treating it simply as another exception, as is universally the case with other information policies and national right to information laws.

A key problem with the very notion of the deliberative process is that it is potentially extremely broad, covering much of the information held by the Bank. Para. 17(i) defines it in an essentially circular fashion as information about deliberations (whether internal or between the Bank and clients or third parties).[8] This would appear to cover practically all information that is not a decision. Para. 17 specifically excludes all emails that do not contain "key decisions or outcomes". Para. 10, for its part, attempts to distinguish between deliberative information and "final outcomes and results" of deliberations. Para. 9 of Annex C even extends the deliberative exception to statistics and analyses carried out to inform decision-making processes and audit reports.

The GTI does not believe that it is legitimate to withhold all information relating to the deliberative process, as defined in the draft Policy. A true presumption of disclosure allows for transparency unless harm would result, and yet the draft Policy does not refer to harm in the context of the deliberative process exception. The task of defining harm in this context has been addressed successfully in many right to information laws. It is only by drilling down to underlying interests – such as the free and frank provision of advice or the success of a policy – that interests which might be harmed by disclosure can sensibly be identified. It is these interests, rather than the vastly wider notion of the deliberative process, that the policy should protect. Significantly, Principle 3 points to two legitimate grounds for non-disclosure, protecting relationships of trust and preserving the free and candid exchange of ideas; unfortunately these are not employed as the basis for this exception.

Looked at from another perspective, the disclosure of a large majority of the information that would be covered by the deliberative process exception as defined in the draft Policy would not lead to any harm whatsoever. This is clear from practice at the national level, where most of this information is routinely disclosed in many countries.

A comparison between the standards in the draft Policy and those of national right to information laws is instructive. In a few countries – such as India and Jamaica – the right to information law does not include a deliberative exception. This has been a matter of some debate in India, where it is seen by some as undermining the ability of the government to function effectively. A survey of some other countries clearly establishes that their internal deliberations exceptions are far narrower than the one proposed by the Bank. Some examples are as follows:

Azerbaijan

[8] We note that formally, pursuant to para. 48 of the draft Policy, the Board is asked to approve Annex C as the authoritative statement of the exceptions. There do not appear to be any inconsistencies between para. 17 of the draft Policy and Annex C, although the latter is in some cases more detailed.

- information the disclosure of which may impede the formulation of policy, until a decision has been made
- information the disclosure of which may undermine testing or a financial audit, until these processes have been completed
- information the disclosure of which may undermine the free and frank exchange of ideas within a public body (Article 35, Law on Right to Obtain Information, 2005)

Japan

- internal government deliberations or consultations the disclosure of which would risk unjustly harming the frank exchange of views or the neutrality of decision-making, unnecessarily risk causing confusion, or risk causing unfair advantage or disadvantage to anyone (Article 5, Law Concerning Access to Information Held by Administrative Organs, 1999)

Mexico

- opinions, recommendations or points of view provided by officials as part of a deliberative process prior to the adoption of a final decision (Article 14, Federal Transparency and Access to Public Government Information Law, 2002)

Peru

- information that contains advice, recommendations or opinions as part of the deliberative process; this exception is 'terminated' once the decision is made, but only if the public body makes reference to the advice, recommendation or opinion (Article 17, Law of Transparency and Access to Public Information, 2002)

South Africa

- an opinion, advice, recommendation, or account of a consultation or discussion for the purpose of assisting to formulate a policy
- information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the candid exchange of views and opinions within government, or the success of a policy by premature disclosure (Section 44, Promotion of Access to Information Act, 2000)

Thailand

- internal opinions or advice, but not background technical or factual reports upon which they are based (Section 15, Official Information Act, 1997)

Uganda

- information containing advice or recommendations, or an account of a consultation or discussion
- information the disclosure of which could reasonably be expected to frustrate the deliberative process by inhibiting the communication of an opinion, report or recommendation or the conduct of a consultation or discussion (Section 33, Access to Information Act, 2005)

United Kingdom

- information relating to the formulation of government policy or ministerial communications, but not to statistical information once the policy has been adopted
- information the disclosure of which would, or would be likely, to prejudice the free and frank provision of advice (Sections 35 and 36, Freedom of Information Act, 2000)

United States

- inter-agency memoranda which would not be available to parties in litigation (Subsection (b), Freedom of Information Act, 1966)

It is immediately clear that all of these examples are far narrower than the deliberative process exception in the draft Policy inasmuch as all are at least limited to opinions, advice or recommendations relating to the formulation of policy. Some – such as Thailand and the United Kingdom – in direct contrast to the draft Policy, specifically exclude background material. Several – including Azerbaijan, Japan, South Africa and Uganda – incorporate harm requirements linked to narrow interests such as the free and frank provision of advice, testing or audit procedures, or the success of a policy.

The Model Policy includes an exception to protect internal information as follows:

> *Policy formulation and investigations*
>
> 42. The Bank may refuse to disclose information where to do so would, or would be likely to:
>
> a. Seriously frustrate the success of a policy, by premature disclosure of that policy.
> b. Significantly undermine the deliberative process within the Bank by inhibiting the free and frank provision of advice or exchange of views.
> c. Significantly undermine the effectiveness of a testing or auditing procedure used by the Bank.
> d. Cause serious prejudice to an ongoing investigation by the Bank.
>
> 43. The constraints set out in paragraph 42 do not apply to facts, analyses of facts, technical data or statistical information. The constraints set out in paragraph 42(a) and (b) do not apply once the policy has been adopted.

At a minimum, the policy should restrict the scope of this exception to opinions, advice or recommendations relating to the formulation of policy, and exclude background studies or statistical information.

Originator Veto: The draft Policy largely regards information provided by countries and other third parties as "originator-owned" and grants them a veto over release of that information (para. 17(f) and (g) and Annex C, paras. 6 and 7). Furthermore, the veto is permanent and absolute. These documents never become eligible for routine declassification (para. 21 and Annex E, para. 2) and they are not subject to the public interest override (Annex F, para. 4(a)).

It is appropriate to protect the legitimate interests of third parties, as well as good relations with them, but this does not require granting them a veto over the release of information, an approach which does not conform to the draft Policy's commitment to harm-based exceptions. This is not the approach taken in national right to information laws, which instead define precise interests to be protected – such as trade secrets, commercial advantage and good relations with other States – and then subject these to a harm test. To ensure proper protection of these interests, the policy should grant third parties the right to make representations as to why information they have provided falls within the scope of an exception before it is disclosed. But it should not grant them a veto over release.

The draft Policy also appears to lack coherence in this area. Box 3 states that, for "country-owned documents that the Bank requires countries to disclose … the issue of confidentiality does not arise because the country prepares the document with the understanding that it will be disclosed". Fair enough. But the point could as well be generalised to state that third parties do business with the Bank in full awareness of its disclosure rules, and thus understand that documents will be disclosed absent a risk of harm to a protected interest. This is precisely how national right to information laws function, at least in relation to private third parties (although more deference is generally accorded to States and inter-governmental organisations).

The Model Policy protects these interests through two exceptions:

> *Confidential third party information*
>
> 38. The Bank may refuse to disclose information provided in confidence by a third party where:
>
> a. To disclose the information would, or would be likely to, cause serious prejudice to the trade, industrial, commercial or financial interests of a party other than the requester.
> b. To disclose the information would, or would be likely to, prejudice the future supply of similar information from a similar source, and the Bank has a significant and legitimate interest in the continued supply of such information.
>
> 39. The constraint set out in paragraph 38 does not apply where notice has been provided to the third party under paragraph 45 of an intention to disclose the information and that third party has not objected to its disclosure.
>
> *Information provided by other States*
>
> 44. The Bank may refuse to disclose information provided to it in confidence by a State or another international organisation, where to communicate it would, or would be likely to, seriously prejudice relations with that State or other international organisation, on an objective standard, or endanger the future flow of information from that State or other international organisation. This constraint does not apply where notice has been provided under paragraph 45 of an intention to disclose the information and the State or other international organisation has not objected to its disclosure. It also does not apply where the information in question would be subject to disclosure under a national access to information law.

It also gives third parties a right to be consulted regarding the possible release of information provided by them:

> *Third party notice*
>
> 45. Where a request for information relates to information provided to the Bank in confidence by a third party, the Bank will give written notice to that third party of the request and will give the third party eight days within which to object to disclosure of the information and to provide reasons as to why the information should not be disclosed. Where a third party objects to the disclosure of the information, the Bank will take this into account, among other things, when deciding whether or not to disclose the information.

Communications of Executive Directors: Paras. 44 and 45 of the draft Policy address the difficult question of the dual role of Executive Directors as both Bank officials and representatives of the countries they represent on the Board. These paras. assert that all documents "produced or received by" Executive Directors' offices in the course of their official duties are records of the Bank, and therefore subject to the Bank's disclosure policy. As such, the Bank would be free to disclose them as long as they do not fall within the scope of the regime of exceptions. More controversially, the draft Policy asserts, in para. 45, that member countries are bound to respect the confidentiality rules set out in the policy. Furthermore, all correspondence between "Executive Directors' offices and capitals would be regarded as deliberative in nature and not subject to disclosure."

We note, first of all, that the breadth of these provisions is extensive. It would cover, for example, a country study that had been sent to an Executive Director for purposes of a Bank discussion, whether or not that study had been prepared specifically for the Bank discussion.[9] It would certainly cover a country study that had been prepared for a Bank discussion. These rules could thus potentially reach back into quite a lot of country documentation.

Second, the contrast between the draft Policy's absolute respect for country ownership when the country wishes to assert confidentiality, and the almost complete negation of such ownership when the Bank wishes to assert confidentiality, is striking. The draft Policy would allow country authorities to throw a veil of secrecy over practically any document they produce in the course of working with the Bank, on the basis that the country authorities own the document, but would prevent them from disclosing the very same documents when the Bank claimed they were covered by an exception in the policy (other than the country veto itself). In other words, country ownership appears to be used selectively and opportunistically to ensure that an assertion of secrecy by either party will always win, rather than as something the Bank actually respects.

Third, these rules contradict many national right to information laws. While most of these laws include an exception in favour of documents provided in confidence by other states or inter-governmental organisations, better practice laws also apply a

[9] This may not be the intention of the drafters. Footnote 45 appears to contradict the language of para. 44 by listing a number of documents covered by para. 44 that it still deems not to be Bank records, although disclosure of these documents is still covered by the policy.

public interest override to this exception. The proposed rules seek to negate that override. We do not believe that courts in many countries will accept either the draft Policy's extremely wide claims about country obligations to respect Bank secrecy claims[10] or that these claims might override clear national statutory rules.

Fourth, we do not believe that these rules are necessary. Both the national right to information laws to which para. 45 refers, and long-standing practices of comity, create high barriers to the disclosure of any information in relation to which the Bank might have any legitimate expectation of confidentiality. In those rare cases where a confidential Bank document was disclosed pursuant to national right to information laws, for example on the basis that this was in the overall public interest, the Bank should simply accept that.

Corporate Administrative and Financial Information: The draft Policy includes exceptions in favour of information relating to "corporate administrative matters", such as corporate expenses, procurement and so on, as well as an exception in favour of "certain information about the Bank's financial activities" (para. 17(h) and (j) and Annex C, paras. 8 and 10). The former is vague in the extreme and yet it is not elaborated upon in Annex C. We note that this exception does not find any parallel as such in national right to information laws. Furthermore, this category of information never becomes subject to declassification (Annex E, para. 2).

The exception for certain financial information does find some elaboration in Annex C and would appear to protect a number of largely legitimate interests, such as preventing unfair commercial advantage or harm, protecting the financial interests of the Bank itself, and protecting the privacy of its clients. It would be preferable if the policy listed these interests, rather than using vague terms such as "corporate administrative matters" or "certain information about financial matters".

The Model Policy includes the following exception to protect the Bank's financial interests:

> *Commercial interests of the Bank*
>
> 41. The Bank may refuse to disclose information where to do so would, or would be likely to, cause serious prejudice to the legitimate commercial or financial interests of the Bank.

Other Overbroad Exceptions: A number of the other exceptions in the draft Policy are overbroad or subject to unduly weak harm tests. The exceptions in favour of personal information and information relating to the proceedings of the Ethics Committee for Board Officials (para. 17(a) and (b) and Annex C, paras. 1 and 2) do not include a harm test. For the former, the simple addition of the term 'unreasonable disclosure of personal information' would suffice. For the latter, it is probably necessary to identify

[10] Footnotes 46 and 47 both assert that the rule in Article VII, Section 5 of the Bank's Articles of Agreement about member countries respecting the inviolability of the Bank's archives means that member countries must respect Bank claims of confidentiality. Whatever this provision in the Articles means, it cannot mean that it is up to the sole discretion of the Bank to define, and change from time-to-time (as it does) the scope of secrecy, including as to documents and communications produced by member countries! No sovereign country would allocate that power to another entity.

the harm sought to be avoided – presumably mainly privacy – and then describe it in the policy.

The attorney-client exception (para. 17(c) and Annex C, para. 3) refers to all communications "provided and/or received" by the General Counsel and other legal professionals. This appears to be a free-standing exception (i.e. an extension of what is normally covered by attorney-client privilege). Many communications with the General Counsel fall outside of the ambit of attorney-client privilege, for example emails inviting him or her to a meeting. As such, this exception is significantly overbroad.

The harm test for the exception to protect the security and safety of Bank staff (para. 17(d) and Annex C, para. 4), namely "could compromise", is too low. This is exacerbated by the elaboration of this exception in Annex C, which covers all information 'about' security and about the logistical and transport arrangements for shipping personal effects, much of which would not compromise security. An example of this might be information about how much the Bank spends globally on transport of personal effects.

Classification of Records: Para. 32 of the draft Policy addresses the issue of classification, calling for the policy to be supported by a rigorous four-tier system of classification so that, when responding to requests, "staff would need to use minimal discretion in interpreting the policy". The draft Policy does not indicate what the implications would be of the different levels of classification (namely "Strictly Confidential", "Confidential" and "Official Use Only"). It also does not make it clear that classification should be based on the list of exceptions, rather than any other considerations.

Although classification would reduce the need to use discretion, it seems that the touchstone for whether a document might be released remains the regime of exceptions, and not the fact of classification, although this is not entirely clear from the draft Policy. For example, Annex F, setting out the procedure for dealing with requests, refers to the exceptions and not classification as the basis for deciding whether or not to release information. This is important since classification is normally done by the originator of a document, while consideration of a request may be done by someone else, and would be subject to appeal.

Historical Information or Declassification: We welcome the commitment in the draft Policy to declassify information over time. We note that certain types of information are never subject to declassification – including information provided by third parties and member countries and corporate administrative information – which is problematical since the sensitivity of this information generally declines over time as with all information.

It is also not clear to us why Board summaries of discussion and Board papers produced before the new policy goes into effect require a five-year declassification window when these same categories of documents will be immediately disclosed under the new policy.

The withholding of Board transcripts and statements of Executive Directors for 10 years is unjustified, given that the Bank is a public institution. We call on the Bank to release these documents shortly after the relevant deliberations have been concluded.

We do not understand the justification for withholding for 20 years the Board Executive Session minutes, the Executive Director's Board communications, financial information covered by the exceptions, and documents that were marked confidential prior to the new policy entering into effect. The sensitivity of these documents would disappear much earlier. A ten-year declassification window be more appropriate.

Public Interest Override: The draft Policy proposes a limited public interest override pursuant to which it would have the discretion, in "exceptional circumstances" to either disclose exempt information or to withhold information normally subject to disclosure (para. 7, Principle 2). It does not elaborate on how the override would be used to block disclosure or who would make this decision. We note that almost no national right to information laws include a power to override the disclosure of otherwise non-exempt information and that this is highly problematical, given the clear opportunity for abuse.

The procedure for applying the override to mandate disclosure is set out in Annex F. The override only applies to three exceptions: corporate administrative matters (para. 17(h) and Annex C, para. 8), deliberative information (para. 17(i) and Annex C, para. 9) and financial information (para. 17(j) and Annex C, para. 10). Where a request is for otherwise exempt information,[11] it is forwarded to the concerned director. If the director believes application of the override is warranted, he or she then forwards the information to the Disclosure Committee for a final decision, to be made within fifteen days. Otherwise, the requester is informed within five days that his or her request has been unsuccessful.

The laws in many countries provide for a comprehensive public interest override for all exceptions. Furthermore, the override is applied regularly, not just in "exceptional circumstances", whatever than means. A good example is the Indian Right to Information Law, 2005, section 8(2) of which provides:

> Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.

Severability: The policy should make it clear that exceptions only apply to specific information, not whole documents. Where only part of the information in a document is exempt, that should be redacted and the rest of the document released.

Recommendations:

- The broad exception to protect the deliberative process should be removed from the policy and replaced by a much narrower exception designed to protect legitimate interests such as the free and frank provision of advice, the success of a

[11] This procedure applies to information created after 1 July 2010. A slightly different but essentially analogous procedure, albeit without such strict timelines, applies to information created previously.

policy, testing procedures or ongoing investigations. At a minimum, the policy should restrict the scope of this exception to opinions, advice or recommendations relating to the formulation of policy, and exclude background studies or statistical information.

- The originator veto should be removed from the policy and replaced with harm-based exceptions protecting legitimate interests.
- The policy should not try to extend its regime of exceptions to information exchanged between Executive Directors' offices and national authorities. At a minimum, any such assertion of secrecy should be restricted to documents produced by the Bank, or the information contained within them, which are (legitimately) labelled confidential, and be subject to recognition of national public interest overrides.
- The corporate administrative and 'certain' financial information exceptions should be removed from the policy and replaced with harm-based exceptions protecting legitimate interests.
- A harm-test should be added to the personal information and Ethics Committee exceptions.
- The attorney-client exception should be limited to information covered by actual attorney-client privilege.
- The standard of harm for the exception in favour of staff safety should be "is likely to" and the exception should be restricted to information the release of which would engage this risk of harm.
- The policy should make it clear that information may only be classified to protect the exceptions it provides for.
- All categories of information should presumptively be subject to historical disclosure. To ensure protection of persisting confidentiality interests in some cases, a procedure to extend classification could be adopted.
- Documents subject to release under the new policy, including Board summaries of discussion and Board papers, should not be subject to withholding for five years simply because they were produced before the policy came into effect.
- Board transcripts and Executive Director statements should be released as soon as the deliberations to which they relate have been concluded, while other Board documents should be released after 10 years
- The power to use the public interest override to block disclosure should be removed from the policy. At a minimum, clear procedures should be put in place governing this use of the override.
- The public interest override to enable disclosure should apply to all of the exceptions, not just to three of them, and it should apply whenever the public interest is engaged, not just in "exceptional circumstances".
- The policy should include a clear statement on severability.

Principle 6: Appeals

Anyone who believes that an international financial institution has failed to respect its access to information policy, including through a refusal to provide information in response to a request, has the right to have the matter reviewed by an independent and authoritative body.

Principle 5 of the draft Policy commits to a two-stage appeals process, an internal appeal followed by an appeal to an independent panel (see also para. 26). Para. 27

refers to two grounds for appeal, namely for claims of a failure to provide access to non-exempt information and to make a public interest claim for disclosure. The second type of appeal may only be considered by the internal appeal body, reflecting the fact that the Bank sees the public interest override as being a matter for its internal discretion. The only remedy at either level of appeal is the provision of the information to the requester.

Pursuant to para. 28, internal appeals are considered by the Disclosure Committee, except where they concern disclosure decisions of the Board; it is not clear how appeals relating to the latter would be addressed. The Committee may refer the matter to the managing director if it feels that it is unable to resolve the problem itself. Three "outside experts" constitute the second, or independent, level of appeal.[12] They report their decisions, which are final, to the Board quarterly and publish them in an annual report. It is not clear who will appoint these experts, who they will report to and what sort of supporting secretariat will be created for them.

The GTI very warmly welcomes this commitment to provide for an independent appeal. It signals the importance that the Bank attaches to information disclosure and it should go a long way to ensuring the objective and proper implementation of the policy. We note that the Bank is breaking new ground with this commitment, being the first international financial institution to create a specialised, independent information appeal body.

At the same time, we would like to see the independent appeal body empowered to at least make recommendations, if not necessarily binding decisions, regarding public interest disclosures. It would also be useful to empower the appeal body to make more general recommendations for reform of the policy, where the complaints they receive suggest the need for structural reforms. Finally, the policy should make it clear that the appeals body will set out a clear procedure for the processing of appeals.

We also note that the grounds for appeal are too narrow, excluding such things as complaints about a failure to respect the timelines, charging excessive fees and not providing information in the form requested. The remedies are also too narrow, and should include, for example, the possibility of lowering or waiving a fee.

Recommendations:

- The grounds for appeal, and the associated remedies, should be broadened to include complaints about timeliness, fees and form of access.
- The policy should clarify the appeals process regarding disclosure decisions by the Board.
- The policy should clarify how the members of the independent appeal body are to be appointed, and how this body will function and to whom it will report.
- The independent appeal body should have a mandate to set clear rules regarding the processing of complaints.
- The independent appeal body should have the power to make recommendations regarding public interest disclosures and to make more general recommendations

[12] According to footnote 39, the three experts would be appointed for their "recognized reputation". The footnote suggests that they should include a lawyer, an independent expert on freedom of information and a representative from a client country.

for reform.

Principle 7: Whistleblower Protection

Whistleblowers – individuals who in good faith disclose information revealing a concern about wrongdoing, corruption or other malpractices – should expressly be protected from any sanction, reprisal, or professional or personal detriment, as a result of having made that disclosure.

The draft Policy does not address the issue of whistle-blowing. We note that the Bank adopted a new whistleblower policy in 2008. While this did strengthen protection for whistleblowers, it was also subject to criticism on various grounds

Recommendations:

- The World Bank should make a clear commitment to bring its whistleblower policy into line with the standards set out in the GTI Charter.

Principle 8: Promotion of Freedom of Information

International financial institutions should devote adequate resources and energy to ensuring effective implementation of their access to information policies, and to building a culture of openness.

The draft Policy includes a number of commitments regarding its implementation and promotion. Institutionally, it calls for the establishment of a Disclosure Committee chaired by the Vice-President for External Affairs (EXTVP), with a secretariat in the same unit. A Disclosure Implementation Working Group, also under the EXTVP, would be established for a period of six to seven months. After a transitional period, an Access to Information Unit would be established, overseen by the Legal Vice Presidency (LEGVP). The draft Policy also envisages a special team in the Archives Unit helping process requests for the first two years, along with strengthening of the Archives Unit, InfoShop, the Public Information Centers and the information function in country offices (paras. 24-25 and 36), as well as the website (para. 37).

The draft Policy envisages extensive training and the provision of guidance to all staff, as well as more intensive training for frontline information disclosure staff (para. 34). It also envisages putting in place a system for tracking requests for information, as well as the responses to them (para. 38). Finally, the draft Policy contains a relatively detailed assessment of the financial implications of implementation (paras. 39-42).

These are all very positive commitments, which signal that the Bank is serious about implementing this policy properly. At the same time, we note that other measures might also be considered. Requiring the Bank to report annually on implementation of the policy would ensure that thought was given to this on a regular basis and would also provide both internal and external stakeholders with an assessment of how implementation was progressing. We note that the Asian Development Bank releases an annual monitoring report on implementation of its disclosure policy. The Bank should consult with civil society organisations when developing this report. Efforts at

public education are also important, particularly among affected populations, to promote awareness about the new policy and its implications.

It is also important to incorporate the policy into Bank systems, in particular for staff, such as corporate incentive structures and appraisal processes. A system of sanctions for wilful failure to implement the policy should also be considered.

Recommendations:

- The Bank should report annually on implementation of the new policy, after consulting with civil society groups, including by providing an overview of requests and responses to them.
- A commitment should be made to raise external awareness about the new policy, particularly among project affected communities.
- Implementation of the policy should be incorporated into Bank corporate structures, including incentive and appraisal systems, as well as sanction regimes.

Principle 9: Regular Review

Access to information policies should be subject to regular review to take into account changes in the nature of information held, and to implement best practice disclosure rules and approaches.

The draft Policy notes that the Bank has a history of reviewing and improving its information disclosure policy (para. 2). At the same time, it does not specifically commit to continuing that process beyond issuing a "progress report" to the Board by the end of 2011. The GTI notes that there was a long gap between the last policy review involving widespread consultations, in 2001, and the current review. We therefore call on the Bank to commit to a policy review within a specific timeframe, for example of three years (see Section 3 of the Model Policy). A commitment to review is particularly appropriate given the very significant changes the draft Policy seeks to bring about, and the resulting need to assess how they are working before too much time passes.

Recommendation:

- The policy should include a commitment to undertake a comprehensive review within three years.

APPENDIX

New routine disclosures identified in Oct. 2 revised draft	
Projects Under Preparation	
	Decisions of Project Concept Review/Decision Meetings
At Approval (simultaneously disclosed when sent to Board, typically 10 days before consideration)	
	Country Assistance Strategies (CAS), with country's consent
	Project Appraisal Documents (PADs), with country's consent
	Program Documents (PDs), with country's consent
Projects under Implementation	
	Implementation Status and Results Report (ISR, but would be split in two and only the portion with "objective information" and overall ratings on Project Development Objectives and Implementation Progress will be released; staff comments and detailed risk ratings to be withheld)
	Audited annual financial statements of projects
	Key decisions at the end of supervision missions and project midterm reviews (complete mission aide memoires may be released if the Bank and Borrower so agree)
Board Proceedings	
	Board papers requiring discussion to be released after deliberation, unless classified as confidential or strictly confidential
	Board papers circulated for information purposes released upon distribution
	Summaries of Discussion
	Summings-up of Board meetings and Committee of the Whole meetings (when prepared)
	Minutes of Board Committee meetings
	Green Sheets (Board Committee papers) if subsequent Board discussion is not expected
	Annual Reports of Board Committees
Analytical and Advisory Activities (AAA)	
	"most remaining AAA reports"
	Debt Sustainability Analyses
Other	
	Consultation plan for Country Assistance Strategies
	Country Portfolio Performance Reviews (CPPR)
	Concept notes and consultation plans for policy reviews that are subject to external consultations
	Operational policy papers and Sector Strategy papers upon distribution to Board
	Documents prepared jointly with other development partners
	Quarterly Management Reports