

**REGULATION OF GOVERNMENT PROCUREMENT BY  
THE AIIB: CONVERGENCE WITH OTHER  
MULTILATERAL DEVELOPMENT BANKS AND THE  
IMPACT ON THE LIBERALIZATION OF  
PROCUREMENT MARKETS AND SUSTAINABILITY OF  
GOVERNMENT CONTRACTS.**

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## INTRODUCTION

The rules of procurement of goods, services and construction services related to the realization of projects financed by the Asian Infrastructure Investment Bank (AIIB) will play a predominant role in determining that institution's actual impact on issues such as liberalization of government procurement markets, trade flows, levels of inward investment, social and environmental standards, and integrity of public sectors in the borrowing countries. More than a year after the AIIB commenced operations in January 2016,<sup>1</sup> subsequent official statements, press releases by China's state media and AIIB's interim documents shed a lot of light on the final shape of such rules. The first major development in this regard was seen in February 2016 when the AIIB lifted the veil and released the general 'Procurement Policy,'<sup>2</sup> the purpose of which "sets out the principles on the basis of which the procurement under Projects financed by the Asian Infrastructure Investment Bank (the Bank) is to be conducted."<sup>3</sup> In June 2016, the Procurement Policy, which, can be mostly regarded as a general policy statement, was additionally supplemented with a more detailed Interim Operational Directive on Procurement Instructions for Recipients

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1. See Zheng Yangpeng, *Beijing to Host 1st AIIB Meeting*, CHINA DAILY USA (Jan. 7, 2016), available at [http://usa.chinadaily.com.cn/epaper/2016-01/07/content\\_22976580.htm](http://usa.chinadaily.com.cn/epaper/2016-01/07/content_22976580.htm) (last visited Apr. 6, 2017); see generally *Key Features of the AIIB*, CHINA DAILY USA (Jun. 30, 2015), available at [http://usa.chinadaily.com.cn/epaper/2015-06/30/content\\_21143722.htm](http://usa.chinadaily.com.cn/epaper/2015-06/30/content_21143722.htm) (last visited Apr. 6, 2017); Wu Jiao & Zhang Yunbi, *AIIB 'Open for Business by End of Year'*, CHINA DAILY USA (Nov. 19, 2015), available at [http://www.chinadaily.com.cn/world/2015xiattendG20APEC/2015-11/18/content\\_22482808.htm](http://www.chinadaily.com.cn/world/2015xiattendG20APEC/2015-11/18/content_22482808.htm) (last visited Apr. 26, 2017); see also text accompanying *infra* note 8.

2. See *Procurement Policy*, AIIB (Jan. 2016), available at [https://www.aiib.org/en/policies-strategies/\\_download/procurement-policy/policy\\_procurement.pdf](https://www.aiib.org/en/policies-strategies/_download/procurement-policy/policy_procurement.pdf) (last visited Apr. 6, 2017) [hereinafter AIIB Procurement Policy].

3. *Id.* § 1.1.

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(IDPIR)<sup>4</sup> as AIIB's core procurement related document,<sup>5</sup> the purpose of which has, in turn, "elaborate[d] on the principles contained in the Procurement Policy and sets forth the specific requirements applicable to the procurement of goods, works and services required for a Project and to be financed by the Bank."<sup>6</sup>

IDPIR's temporary character likely stems from the fact that the preparations for the commencement of operations by the AIIB at the turn of 2015/2016<sup>7</sup> coincided with the profound reform of World Bank's procurement rules. The World Bank Board of Directors approved completely new Procurement Regulations for Borrowers (WBPR) in July 2015<sup>8</sup> and have been applied in a restructured form to new projects from

4. See *Interim Operational Directive on Procurement Instructions for Recipients*, AIIB (June 2, 2016), available at <http://www.aiib.org/uploadfile/2016/0616/20160616030437630.pdf> (last visited Apr. 6, 2017) [hereinafter IDPIR].

5. The AIIB Procurement Policy lists a number of procurement-related documents, including: (i) the Directive: Procurement Instructions for Recipients (so far substituted by the IDPIR), (ii) the Directive: Procurement Instructions for Staff, (iii) the Environmental and Social Policy (including Standards), (iv) the Directive: Environmental and Social Procedures, (v) the Policy on Prohibited Practices, (vi) the Operational Policy on Financing, (vii) the Operational Directive on Sovereign-backed Financing, (viii) the Public Information Interim Policy, and (ix) the General Conditions applicable to Sovereign-backed Loans. *AIIB Procurement Policy*, *supra* note 3, § 8.

6. *IDPIR*, *supra* note 5, § 1.2.2.

7. The AIIB secretariat commenced operations in Beijing directly after 21 countries (Bangladesh, Brunei, Cambodia, India, Indonesia, Kazakhstan, Kuwait, Laos, Malaysia, Mongolia, Myanmar, Nepal, Oman, Pakistan, the Republic of the Philippines, Qatar, China, Singapore, Sri Lanka, Thailand, Uzbekistan, and Vietnam) signed the Memorandum of Understanding in October 2014 and was tasked with establishing the AIIB. The secretariat also assisted the Chief Negotiators' Meeting, which is the body responsible for the preparation of AIIB's Articles of Agreement. The Articles of Agreement were signed between June 29 and December 31, 2015 by all 57 countries that had filed applications by the deadline of March 31, 2015, and entered into force on December 25, 2015. The AIIB opened for business on January 16, 2016. See generally *History of AIIB*, AIIB, available at <http://www.aiib.org/html/aboutus/introduction/history/?show=0> (last visited Feb. 12, 2017).

8. See *Procurement Policy Review: Consultations*, WORLD BANK, available at <https://consultations.worldbank.org/consultation/procurement-policy-review-consultations> (last visited Apr. 16, 2017); see generally *Procurement in World Bank Investment Project Financing Phase II: The New Procurement Framework*, WORLD BANK (June 11, 2015), available at [https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/phase\\_ii\\_the\\_new\\_procurement\\_framework\\_-\\_board\\_paper.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/phase_ii_the_new_procurement_framework_-_board_paper.pdf) (last visited Apr. 16, 2017); see generally *Procurement Regulations for Borrowers, Procurement in Investment Project Financing*, WORLD BANK, available at [https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/annex\\_f\\_procurement\\_regulations\\_for\\_borrowers\\_june\\_11\\_2015.pdf](https://consultations.worldbank.org/Data/hub/files/consultation-template/procurement-policy-review-consultationsopenconsultationtemplate/phases/annex_f_procurement_regulations_for_borrowers_june_11_2015.pdf) (last visited Apr. 6, 2017) [hereinafter WBPR].

July 2016 onwards,<sup>9</sup> implying that they have not yet been tested in practice.<sup>10</sup> Generally speaking, the AIIB has joined the club of the multilateral development banks (MDBs) and the game of regulating government procurement by such institutions in a time of major change in the landscape of development aid. Previously, procurement of goods, services and works necessary for the realization of projects financed by the MDBs had, for a long time, been subjected to autonomous procurement rules set individually by each MDB.<sup>11</sup> At the same time, procurement regulated by the MDBs potentially falls within the concept of government procurement (or public procurement). Such procurement would normally be subjected to strict regulation in countries with well-developed national public procurement legislation - especially countries having to implement liberalizing commitments imposed by the Government Procurement Agreement (GPA) first adopted in 1979,<sup>12</sup> and GPA's subsequent revisions (GPA87,<sup>13</sup> GPA94<sup>14</sup> and GPA12),<sup>15</sup> including almost all developed countries.<sup>16</sup>

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9. See generally *Procurement Regulations for IPF Borrowers: Procurement in Investment Project Financing*:

*Goods, Works, Non-Consulting and Consulting Services*, WORLD BANK (July 1, 2016) available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=4005&ver=current> (last visited Apr. 12, 2017) [hereinafter *Procurement Regulations for IPF Borrowers*].

10. The World Bank eventually publicized an online version in July 2016 that does not substantially differ from the version adopted and published in 2015, yet some sections have been merged implying numbering of specific provisions was substantially changed. See WBPR, *supra* note 8; see *Procurement Regulations for IPF Borrowers*, *supra* note 9. This article makes references to the WBPR as originally approved as the outcome of World Bank's procurement reform in 2015 and as was available to the AIIB staff in the course of works on the Procurement Policy and the IDPIR.

11. See Robert R. Hunja, *Recent Revisions to the World Bank's Procurement and Consultants Selection Guidelines*, 6 PUB. PROCUREMENT L. REV., 217, 217-218 (1997).

12. Agreement on Government Procurement, GATT Doc. LT/TR/PLURI/2 (Apr. 12, 1979).

13. Agreement on Government Procurement, GATT Doc. L/6341, (Feb. 2, 1987), reprinted in AGREEMENT ON GOVERNMENT PROCUREMENT REVISED TEXT 1988 (GATT 1988).

14. Agreement on Government Procurement, Apr. 15, 1994, WTO Agreement Annex 4B, 417.

15. Agreement on Government Procurement, WTO Doc. GPA/113 (Mar. 30, 2012) [hereinafter GPA12].

16. As of December 2016, members of the GPA included: Armenia, Canada, European Union, Hong Kong, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Taiwan, Ukraine, and the United States. *Parties, Observers and Accessions*, WTO, available at [https://www.wto.org/English/tratop\\_e/gproc\\_e/memobs\\_e.htm](https://www.wto.org/English/tratop_e/gproc_e/memobs_e.htm) (last visited Apr. 6, 2017). Countries negotiating their accession to the GPA included: Albania, Australia, China, Georgia, Jordan, Kyrgyzstan Republic, Oman, Russian Federation, and Tajikistan. *Id.*

For long, potential conflicts between MDBs procurement guidelines and GPA, or other public-procurement-relevant international agreements, could be easily avoided because they used to have different addresses. Public procurement in the mostly developed countries was subjected to the GPA whereas, to quote Reich, developing countries used to find themselves in a “waiting room” for GPA accession.<sup>17</sup> At the same time, MDBs regulated some portion of procurement markets in the developing and least-developed countries. This is because those countries often rely on “soft loans” (loans on non-market terms) falling within the OECD’s (Organization for Economic Co-operation and Development) concept of (i) official development assistance’ (ODA) denominating “[f]lows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at least 25 percent;”<sup>18</sup> or (ii) other official flows (OOFs) denominating

[t]ransactions by the official sector with countries on the List of Aid Recipients which do not meet the conditions for eligibility as Official Development Assistance or Official Aid, either because they are not primarily aimed at development, or because they have a Grant Element of less than 25 per cent.<sup>19</sup>

These terms are also officially recognized by the World Trade Organization (WTO)<sup>20</sup> and the International Monetary Fund (IMF).<sup>21</sup> The cumulative value of competitive public procurement in developing economies was approximated at least US \$825 billion in 2012.<sup>22</sup> Among

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17. See Arie Reich, *The New Text of the Agreement on Government Procurement: An Analysis and Assessment*, 12 J. INT’L ECON. L. 989, 994 (2009).

18. *Glossary of Statistical Terms: Official Development Assistance (ODA)*, OECD (Aug. 28, 2003), available at <http://stats.oecd.org/glossary/detail.asp?ID=6043> (last visited Apr. 6, 2017).

19. *Glossary of Statistical Terms: Other Official Flows (OOFs)*, OECD (Sept. 25, 2001), available at <http://stats.oecd.org/glossary/detail.asp?ID=1954> (last visited Apr. 6, 2017).

20. The definition of the ODA has been referred to in the WTO documents by the Letter K, annex 1 of the WTO Subsidy and Countervailing Measures Agreement and includes references to the OECD 1998 Arrangement on Officially Supported Export Credits (also known as “Helsinki Package” or “Consensus,” TD/CONSENSUS(97)70), which in turn includes references to the ODA. See Annamaria La Chimia, *Untying Aid Through the Agreement on Government Procurement: A Means to Encourage Developing Countries’ Accession to the Agreement and to Improve Aid Effectiveness?* in *THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM* 390, 405-6 (Sue Arrowsmith & Robert D. Anderson eds., Cambridge University Press, 2011).

21. IMF, *EXTERNAL DEBT STATISTICS: GUIDE FOR COMPILERS AND USERS* 263 (2003).

22. *The World Bank’s Procurement Policies and Procedures: Policy Review: Initiating Discussion Paper*, WORLD BANK (Mar. 29, 2012), available at <http://siteresources.worldbank.org/INTECA/Resources/257896-1335553632562/Initiating->

the MDBs, for example, in 2013, the World Bank alone, commenced 285 new operations worth US \$31.1 billion<sup>23</sup> on top of its about 1,600 pre-existing operations worth US \$173 billion,<sup>24</sup> and carried out a post-review of 9,268 contracts worth US \$7,252.50 billion.<sup>25</sup> And, in such a landscape, the World Bank was considered as the “global leader in good procurement for development.”<sup>26</sup>

However, shifts in the global economy and trade in the last two decades have challenged this *status quo* and the World Bank’s dominance. MDBs’ regulatory functions have been gradually undermined by the proliferation of regional trade agreements (RTAs) concluded by vibrant emerging economies which, nonetheless, still rely on the MDBs’ assistance. Specifically, a recent strong trend in the new or revised RTAs to include public procurement-related chapters mirroring GPA’s procurement model<sup>27</sup> has brought the risk of actual conflicts between MDBs’ guidelines and national procurement regimes. On the other hand, the cheap commercial credit flooding emerging markets, along with the establishment of the AIIB and other institutions meant to finance future development projects, has forced the World Bank to evolve and compete

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Discussion-Paper-Eng.pdf (last visited Apr. 6, 2017) [hereinafter *World Bank’s Procurement Policies*].

23. *Procurement in World Bank Operations. Tables and Figures for FY13*, WORLD BANK, available at [http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Final\\_Tables\\_and\\_Figures\\_for\\_Procurement\\_FY13.pdf](http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Final_Tables_and_Figures_for_Procurement_FY13.pdf) (last visited Apr. 6, 2017).

24. *Financial Management and Procurement in World Bank Operations: Annual Report for FY12*, WORLD BANK (Mar. 12, 2013), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/AR-FY11-final-2-29-12.pdf> (last visited Apr. 6, 2017).

25. See *Procurement in World Bank Operations: Tables and Figures for FY13*, *supra* note 24, at 3-4.

26. *Procurement in World Bank Investment Project Finance: Phase I: A Proposed New Framework – Revised*, WORLD BANK 2 (Oct. 18, 2013), available at <http://siteresources.worldbank.org/PROCUREMENT/Resources/ProcurementProposedNewFrameworkOctober2013Final.pdf> (last visited Apr. 6, 2017).

27. See Arwell Davies, *Government Procurement*, in BILATERAL AND REGIONAL TRADE AGREEMENTS: COMMENTARY AND ANALYSIS 274, 274 (Simon Nicholas Lester & Bryan Mercurio eds., Cambridge University Press, 2008); Robert D. Anderson, Anna Caroline Müller, Kodo Osei-Lah, Josefia Paro de Leon & Phillipe Pelletier, *Government Procurement Provisions in Regional Trade Agreements: A Stepping Stone to GPA Accession?*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM 561, 561-656 (Sue Arrowsmith & Robert D. Anderson eds., 2011); see Working Party on GATS Rules, *Government Procurement-Related Provisions in Economic Integration Agreements*, WTO Doc. S/WPGR/W/49 ¶ 7 (Aug. 31, 2004); see Working Party on GATS Rules, *Government Procurement Related Provisions in Economic Integration Agreements*, WTO Doc. S/WPGR/W/49/Add.1 ¶ 6 (Sept. 28, 2009).

for its market share.<sup>28</sup> A number of later discussed, rather successful, steps have been taken in the WTO forum on the one side and by the existing MDBs on the other side to converge the two systems (see further section 0). However, the newly established China-led major MDBs like the AIIB and the New Development Bank (NDB), initially known as the BRICS Bank (i.e. including Brazil, Russia, India, China, and South Africa),<sup>29</sup> or wholly-China-owned New Silk Road Fund (NSRF)<sup>30</sup> have not been part of this process and might want to bring about some original procurement-related solutions.

The goal of this article is to discuss what one could reasonably expect from future procurement rules imposed by the AIIB as the leading China-led initiative potentially reshaping the current landscape of the MDBs' operations. This article starts by summarizing the discourse between the AIIB's critics who made *ex ante* admonitions about AIIB's possible procurement rules on the one hand (in section I.A) and AIIB's advocates claiming the opposite (in section I.B). Next, this article covers necessary background. It explains why, at least in the medium term (five to ten years), AIIBs procurement rules are very likely to follow already existing solutions largely delineated by the World Bank in some co-operation with other MDBs (in section II.A and section and II.B), and what the World Bank's procurement reform has brought about (in section II.C and II.D). It also explains how the approach to sustainability in procurement has evolved in the case of existing MDBs and procurement-liberalizing trade agreement (in section II.E), and how the conflict between procurement rules imposed by the MDB's on the hand and by trade agreements on the other hand have so far been resolved (in section II.F). Then, this article moves on to a detailed analysis of the IDPIR, including its structure and relations with

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28. See Christopher L. Pallas & Jonathan Wood, *The World Bank's Use of Country Systems for Procurement: A Good Idea Gone Bad?*, 27 DEV. POL'Y REV. 215, 220 (2009).

29. With authorized capital of USD \$100 billion, the NDB commenced operation in July 2015. Xinhua, *China's Top Legislature Ratifies BRICS Bank Agreement*, CHINA DAILY USA (July 2, 2015), available at [http://www.chinadaily.com.cn/world/2015xiatbricssco/2015-07/01/content\\_21152038.htm](http://www.chinadaily.com.cn/world/2015xiatbricssco/2015-07/01/content_21152038.htm) (last visited Apr. 11, 2017).

30. The NSRF's mission is similar to the World Banks' International Finance Corporation, although it is controlled by a consortium of state-owned enterprises rather than directly by Governments. See Ajay Chhibber, *China's One Belt One Road Strategy: The New Financial Institutions and India's Options* 1, 19-20 (Nat'l Inst. of Pub. Fin. & Pol., Working Paper No. 2015-155, 2015). The NSRF commenced operation in December 2014 with the capital of USD \$40 billion. Chen Jia, *Silk Road Fund Makes First Investment*, CHINA DAILY EUR. (Apr. 22, 2015), available at [europe.chinadaily.com.cn/business/2015-04/22/content\\_20501261.htm](http://europe.chinadaily.com.cn/business/2015-04/22/content_20501261.htm) (last visited Apr. 16, 2017); see also Li Xiang, *Silk Road Fund Gets Up and Running with Key Team in Place*, CHINA DAILY EUR. (Feb. 5, 2015), available at [http://europe.chinadaily.com.cn/business/2015-02/05/content\\_19493816.htm](http://europe.chinadaily.com.cn/business/2015-02/05/content_19493816.htm) (last visited Apr. 16, 2017).

other AIIB's documents (in section III.A), scope of application (in section III.B), core procurement principles (in section II.C), general provisions (in section III.D), specific procurement methods (in section 0), consultant rules (in section III.F), and use of country systems (in section III.G). In addition, this article also separately discusses the AIIB procurement rule's impact on international liberalization of procurement markets (in section IV) and how they address social and environmental concerns (in section V).

## I. CONCERNS ABOUT AIIB'S PROCUREMENT RULES.

### A. *Western Critics*

The early discussions about the establishment of the AIIB were accompanied by general, yet also procurement-related, concerns about governance, transparency and sustainability of projects financed by the AIIB, which were expressed mostly in the context of projects to be carried out in developing countries. Critics have pointed out social or environmental shortcomings of previous projects financed with China's bilateral aid<sup>31</sup> and speculated that the AIIB would accept projects rejected by existing MDBs in a kind of race to the bottom.<sup>32</sup> For example, on the occasion of signing AIIB's Memorandum of Understanding (MOU) in October 2014,<sup>33</sup> the U.S. Department of State, through Secretary Kerry, "made clear directly to the Chinese as well as to other partners that we [U.S.] welcome the idea of an infrastructure bank for Asia, but we strongly urge that it meet international standards of governance and transparency."<sup>34</sup> Japan raised similar concerns. As reported by Sekine, Japan's Foreign Minister, Fumio Kishida, during a press conference held on September 2, 2014, questioned "whether the proposed institution will ensure that it does not damage other creditors by providing lending that disregards debt sustainability."<sup>35</sup> Also, the materials from the meeting of Japan's Sub-council on Foreign Exchange and Other Transactions held on

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31. See Cecilia Torta Jada & Asit K Biswas, *New Bank a Challenge for Bretton Woods*, CHINA DAILY USA (Oct. 24, 2014), available at [http://usa.chinadaily.com.cn/opinion/2014-10/24/content\\_18794515.htm](http://usa.chinadaily.com.cn/opinion/2014-10/24/content_18794515.htm) (last visited Apr. 16, 2017).

32. See Martin Khor, *Many in West Back Winds of Change in World*, CHINA DAILY USA (Apr. 23, 2015), available at [http://usa.chinadaily.com.cn/opinion/2015-04/23/content\\_20513803.htm](http://usa.chinadaily.com.cn/opinion/2015-04/23/content_20513803.htm) (last visited Apr. 16, 2017); Jada & Biswas, *supra* note 32.

33. See Khor, *supra* note 33; Jada & Biswas, *supra* note 32.

34. See Zheng Yangpeng, *Accord Reached on Key Bank*, CHINA DAILY USA (OCT. 25, 2014), available at [http://usa.chinadaily.com.cn/world/2014-10/25/content\\_18800563.htm](http://usa.chinadaily.com.cn/world/2014-10/25/content_18800563.htm) (last visited Apr. 16, 2017); see also Eiichi Sekine, *Aims and Prospects of the Asian Infrastructure Investment Bank Proposed by China*, 6 NOMURA J. CAP. MARKETS 1, 4 (2015).

35. Sekine, *supra* note 35, at 5.

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April 7, 2015 revealed Japan's concerns, among others, about whether the AIIB would (i) "ensure fair governance (especially the importance of the governing council that represents member countries auditing and approving each project),"<sup>36</sup> and "take into consideration the environmental and social impact of the projects it finances."<sup>37</sup> At the very early stage, even original AIIB MOU signatories raised analogical doubts,<sup>38</sup> including, for example, Philippines in which case National Treasurer Roberto B. Tan, in October 2014, emphasised that "apart from the role of the AIIB Board of Directors, there is a need to ensure that transparent procurement processes are followed, as well as placing safeguard measures for projects,"<sup>39</sup> and "[t]hese safeguard measures are to be put in place to protect the environment, and as means of social protection for borrowing countries."<sup>40</sup>

Chinese intentions to lead a multilateral institution providing development assistance were an easy target for such critics arguably because of many myths, or just uncertainties, built around Chinese practices in granting bilateral aid, which have perhaps been somewhat exacerbated by the relative deficiencies of such practices' transparency.<sup>41</sup> Specifically, similar to other BRICS countries,<sup>42</sup> China has not joined the OECD Development Assistance Committee (DAC) implying that China only appears as the ODA's recipient but not as the ODA donor in OECD statistics.<sup>43</sup> Moreover, China has been reluctant to mimic the DAC

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36. *Id.*

37. *Id.*

38. See *supra* text accompanying note 6.

39. See Cai Ordinario, *Manila to Study AIIB Governance Before Joining*, BUS. MIRROR (Apr. 26, 2015), available at <http://www.businessmirror.com.ph/manila-to-study-aiib-governance-before-joining/> (last visited Apr. 16, 2017).

40. *Id.*

41. See generally Deborah Bräutigam, *China in Africa: Seven Myths* (Real Instituto Elcano Working Paper No. ARI 23/2011, 2011) (for one of the most common misconceptions about Chinese foreign development assistance).

42. As of March 2017, DAC members include: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, European Union, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, The Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, and the United States. See *DAC members*, OECD, available at <http://www.oecd.org/dac/dacmembers.htm> (last visited Apr. 16, 2017).

43. As a matter of fact, the amount of Official Development Finance (ODF) - including the bilateral ODA - grants and concessional and non-concessional development lending by multilateral financial institutions, and the ODFs received by China have gone from USD \$2.7013 billion (a 1.56 per cent share of the USD \$ 17.34 trillion total of the ODF) in 2009 to USD \$51.11 billion (a 0,24 per cent share of USD \$21.303 trillion total of the ODF). See *Total*

framework in bilateral or even trilateral projects co-financed with DAC members meaning that China's development assistance programs often happened to be misunderstood in the West.<sup>44</sup> The result is that the research on the regulatory environment of China's foreign development assistance, including regulation of government procurement, faces methodological difficulties. The Chinese government released only two official comprehensive reports on the development assistance, in 2011<sup>45</sup> and 2014<sup>46</sup> respectively. These reports revealed that the Chinese understanding of development assistance is broader than that of the ODA, and includes not only grants and interest-free loans, but also all forms of concessional loans.<sup>47</sup> On the one hand, as noticed by RAND's report, a large portion of such development assistance would often fall within the concept of the OOFs rather than the ODA.<sup>48</sup> On the other hand, as noticed by Bräutigam, even some portion of assistance hypothetically meeting ODA's requirement of at least 25-percent-grant-element would not qualify as the ODA.<sup>49</sup> For example, the DAC would not allow counting military aid "loans in support of some joint venture investments" by companies from donor-countries.<sup>50</sup> Moreover, the role closest to that of MDBs (i.e. granting concessional loans) has been assigned to the Export-

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*Official Development Flows by Country and Region*, OECD STAT., available at <http://stats.oecd.org/Index.aspx?ThemeTreeID=3&lang=en> (last visited Apr. 16, 2017).

44. See Deborah Bräutigam, *Aid 'With Chinese Characteristics': Chinese Foreign Aid and Development Finance Meet the OECD-DAC Aid Regime*, 23 J. OF INT'L DEV. 752, 753 (2011).

45. Full Text: *China's Foreign Aid*, XINHUANET.COM (Apr. 21, 2011), available at [http://news.xinhuanet.com/english2010/china/2011-04/21/c\\_13839683.htm](http://news.xinhuanet.com/english2010/china/2011-04/21/c_13839683.htm) (last visited Apr. 16, 2017) [hereinafter *China's Foreign Aid 2014*].

46. Full Text: *China's Foreign Aid*, XINHUANET.COM (July 10, 2014), available at [http://news.xinhuanet.com/english/china/2014-07/10/c\\_133474011.htm](http://news.xinhuanet.com/english/china/2014-07/10/c_133474011.htm) (last visited Feb. 10, 2017) [hereinafter *China's Foreign Aid 2011*].

47. *China's Foreign Aid 2011*, *supra* note 47, § II; see also CHARLES WOLF, JR., XIAO WANG AND ERIC WARNER, *CHINA'S FOREIGN AID AND GOVERNMENT-SPONSORED INVESTMENT ACTIVITIES: SCALE, CONTENT, DESTINATIONS, AND IMPLICATIONS*, at xii. As to concessional loans, the earlier report on Chinese Foreign Aid from 2011 specifies that,

[b]y the end of 2009, China had provided concessional loans to 76 foreign countries, supporting 325 projects, of which 142 had been completed. Of China's concessional loans, 61% are used to help developing countries to construct transportation, communications and electricity infrastructure, and 8.9% are used to support the development of energy and resources such as oil and minerals.

*China's Foreign Aid 2011*, *supra* note 47, § II.

48. See WOLF, WANG & WARNER, *supra* note 48, at xii.

49. See Bräutigam, *supra* note 45, at 756.

50. Bräutigam exemplified such joint ventures with the case of the "Friendship Textile Factory in Tanzania." *Id.*

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Import Bank of China (China EXIM Bank) since 1995;<sup>51</sup> whereas only grants and interest-free loans have been directly financed from China's state budget.<sup>52</sup> The share of grants and interest-free loans in the basket of China's foreign development assistance has steadily diminished.<sup>53</sup> At the same time, the share of concessional loans grew from 28.7 per cent of the aggregate assistance granted by 2009<sup>54</sup> to 55.7 per cent of the aggregate assistance in the 2010-2012 period.<sup>55</sup> And yet, these numbers discount other quasi-commercial state entities like the China-Africa Development Fund, established as a subsidiary of the China Development Bank in 2007, and various forms of quasi-commercial financing such as packages combining loans at commercial and concessional rates.<sup>56</sup>

Furthermore, in spite of improved information about the increasing value of concessional loans and general structure of Chinese foreign development aid, there is still very little known about terms and conditions of specific loans which the China EXIM Bank granted, not to mention

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51. China EXIMBank was founded in 1994 as a 100 per cent state-owned entity directly controlled by China's State Council. *Brief Introduction, CHINA EXIM BANK*, available at [http://english.eximbank.gov.cn/tm/en-TCN/index\\_618.html](http://english.eximbank.gov.cn/tm/en-TCN/index_618.html) (last visited Apr. 16, 2017).

52. See *China's Foreign Aid 2011*, *supra* note 47, § II; see also WOLF, WANG & WARNER, *supra* note 48, at xii. The earlier report on Chinese Foreign Aid from 2011 also further precisely specifies that:

[t]he Ministry of Commerce of the People's Republic of China is the administrative department authorized by the State Council to oversee foreign aid. It is responsible for the formulation of foreign aid policies, regulations, overall and annual plans, examination and approval of foreign aid projects and management of the project execution. The Executive Bureau of International Economic Cooperation, China International Center for Economic and Technical Exchanges, and Academy of International Business Officials affiliated to the Ministry of Commerce are entrusted with tasks of managing the implementation of complete projects and technical cooperation projects, material aid projects and training programs connected with China's foreign aid. The Export-Import Bank of China's responsible for the assessment of projects with concessional loans, and the allocation and recovery of loans. Chinese embassies or consulates abroad are in charge of the direct coordination and management of foreign aid projects in the relevant countries. The local commercial administration departments are required to cooperate with the Ministry of Commerce to deal with affairs related to foreign aid within its jurisdiction.

*China's Foreign Aid 2011*, *supra* note 47, § V.

53. RMB 73.55 billion out of RMB 256.29 billion. *China's Foreign Aid 2011*, *supra* note 47, § II.

54. *Id.*

55. RMB 49.76 billion out of RMB 89.34 billion (USD 14.41 billion). *China's Foreign Aid 2014*, *supra* note 46, § I.

56. See Bräutigam, *infra* note 58, at 757; see also MIKAEL MATTILIN & MATTI NOJONEN, *CONDITIONALITY IN CHINESE BILATERAL LENDING*, 13-14 (2011).

other, even less transparent institutions.<sup>57</sup> Crucially, for the liberalization of government procurement markets, it has been commonly known that China has tied various forms of its development assistance, meaning that it has required that some portion of the aid must be spent on goods, services or contractors originating from the donor-country.<sup>58</sup> According to RAND, China most typically requires that goods purchased for loaned money shall “be at least 50 per cent of Chinese origin;”<sup>59</sup> whereas, as Mattlin and Nojonen noted, it has required that, in the case of infrastructural projects, general contractors be Chinese and even that local subcontractors shall use the Chinese workforce.<sup>60</sup> Yet, the even greater concerns about Chinese foreign development assistance have pertained to the Chinese principle of non-interference with foreign internal/sovereign matters. The main line of Western criticism is that the Chinese foreign development policies have backed leper regimes by not considering corruption in the public sector, protection of human and workers’ rights or the environment, protection against uncompensated expropriations in the case of infrastructural projects, and by mainly focusing on getting Chinese enterprises access to cheap resources.<sup>61</sup> Nonetheless, China, in mentioned reports, did not deny prioritizing backing in the first place its political allies, to start with North Korea and Vietnam since 1954, followed by African countries since 1956.<sup>62</sup> China’s Prime Minister, Zhou Enlai, formulated the principle of non-interference in 1964, among “Eight

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57. See generally Paul Hubbard, *Aiding Transparency: What We Can Learn About China ExIm Bank’s Concessional Loans* (Ctr. for Glob. Dev., Working Paper No. 126, 2007). On the methodology of counting Chinese foreign development assistance prior to the release of the two official reports from 2011 and 2014. See *id.* On state of foreign knowledge in the terms and conditions of such assistance prior to the mentioned reports. See generally Deborah Bräutigam, *China, Africa and the International Aid Architecture* (Afr. Dev. Bank Grp., Working Paper No. 107, 2010) [hereinafter *International Aid Architecture*].

58. See *International Aid Architecture*, *supra* note 58, at 30; Felix Zimmermann & Kimberly Smith, *More Actors, More Money, More Ideas for International Development Co-operation*, 23 J. INT’L DEV. 722, 728 (2011).

59. WOLF, WANG & WARNER, *supra* note 48, at xii.

60. MATTLIN & NOJONEN, *supra* note 57, at 15, 19. The money allotted by Chinese providers of concessional loans for payments toward Chinese enterprise actually never goes to aid recipients. Instead, while loans are typically denominated in USD, the China EXIM bank makes direct payments to Chinese enterprises (contractors of aid recipients) in RMB. See *id.* at 15.

61. Bräutigam, *supra* note 45, at 753; Marcia Don Harpaz, *China’s Coherence in International Economic Governance*, 21 J. CHINESE POL. SCI. 123, 135 (2016); Daniel C. K. Chow, *Why China Established the Asia Infrastructure Investment Bank 4* (Ctr. for Interdisciplinary Law & Policy Studies at the Moritz Coll. of Law, Working Paper No. 333, 2016).

62. *China’s Foreign Aid 2011*, *supra* note 47, §§ I, III.

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Principles for Economic Aid and Technical Assistance to Other Countries” which included:

- (i) equality and mutual benefit, (ii) respect for sovereignty with no conditions attached (i.e. the discussed principle of non-interference), (iii) provision of aid through interest-free or low interest loans, (iv) promotion of self-reliance rather than dependency, (v) quick results, (vi) the use best-quality equipment of Chinese manufacture, (vii) emphasizing technology transfer through technical assistance, and (viii) that Chinese experts shall live at the standard of local experts.<sup>63</sup>

Ever since then, China has continued to adhere to those principles.<sup>64</sup> Governmental reports from 2011 and 2014 identically emphasized that “[w]hen providing foreign assistance, China adheres to the principles of not imposing any political conditions, not interfering in the internal affairs of the recipient countries and fully respecting their right to independently choosing their own paths and models of development,”<sup>65</sup> and “[t]he basic principles China upholds in providing foreign assistance are mutual respect, equality, keeping promise, mutual benefits and win-win.”<sup>66</sup> China has stressed that its will to bring about actual long-term economic effects of individual projects supported with granted aid has driven pragmatism, flexibility and diversity of the forms of foreign development assistance.<sup>67</sup> At the same time, however, sceptics have pointed out very instrumental uses of foreign development assistance. According to RAND, China put a lot of efforts in the 1970s and the 1980s into competing against Taiwan for the diplomatic recognition with aid as the primary bargaining chip.<sup>68</sup> In recent years, the Chinese narrative about non-interference has arguably

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63. Bräutigam, *supra* note 45, at 760; *see also* *China's Foreign Aid 2011*, *supra* note 47, § I.

64. *China's Foreign Aid 2011*, *supra* note 47, § I.

65. *China's Foreign Aid 2011*, *supra* note 47; *China's Foreign Aid 2014*, *supra* note 46.

66. *China's Foreign Aid 2014*, *supra* note 46. The paper from 2011 specifies further. Basic features of China's foreign aid policy are as follows: Unremittingly helping recipient countries build up their self-development capacity. Practice has proved that a country's development depends mainly on its own strength. In providing foreign aid, China does its best to help recipient countries to foster local personnel and technical forces, build infrastructure, and develop and use domestic resources, so as to lay a foundation for future development and embarkation on the road of self-reliance and independent development. Imposing no political conditions. China upholds the Five Principles of Peaceful Coexistence, respects recipient countries' right to independently select their own path and model of development, and believes that every country should explore a development path suitable to its actual conditions. China never uses foreign aid as a means to interfere in recipient countries' internal affairs or seek political privileges for itself.

*China's Foreign Aid 2011*, *supra* note 47, § I.

67. *See* *China's Foreign Aid 2011*, *supra* note 47, § I.

68. *See* WOLF, WANG & WARNER, *supra* note 48, at 17.

been prevailing in the spirit of so-called “South-South cooperation.”<sup>69</sup> Under this paradigm, developing countries (among them China) see themselves as partners, stressing mutual benefits of co-operation such as through the exchange of technical skills, scholarships or training and, in contrast to DAC members, such “partners” have rejected the clear-cut separation of “donors” granting unilateral concessional aid and aid recipients.<sup>70</sup>

Altogether, there is undeniably some merit to the external criticism about some features of China’s foreign development assistance. However, it has also been an open secret that this criticism has largely come from the U.S. as a part of a larger geopolitical game in which new China-led MDBs would undermine current systems dominated by the World Bank and the IMF, and would allow China to impose its own rules of international commerce.<sup>71</sup> In the wake of China’s economic reforms and its accession to the World Bank in 1980 and Asian Development Bank (ADB) in 1986, many believed that China espoused a set of development principles known (since the early 1990s) as the Washington consensus.<sup>72</sup> The Washington Consensus pertains to various aspects of **fiscal discipline**,<sup>73</sup> **public**

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69. The concept of South-South co-operation was recognized and defined in 2010 by the United Nations Conference on Trade and Development (UNCTAD) as the “the processes, institutions and arrangements designed to promote political, economic and technical cooperation among developing countries in pursuit of common development goals.” U.N. Conference on Trade and Development, *Economic Development in Africa Report 2010: South-South Cooperation: Africa and the New Forms of Development Partnership*, 1 UNCTAD/ALDC/AFRICA/2010 (2010).

70. See Zimmermann & Smith, *supra* note 59, at 727; see Bräutigam, *supra* note 45, at 753; Felix Zimmermann & Kimberly Smith, *New Partnerships in Development Co-Operation*, 1 OECD J. 37, 43 (2011).

71. See Khor, *supra* note 33; Chow, *supra* note 62, at 4; see Dan Steinbock, *Beginning of AIB Epoch Benefits All*, CHINA DAILY USA (July 1, 2015), available at [http://usa.chinadaily.com.cn/opinion/2015-07/01/content\\_21147373.htm](http://usa.chinadaily.com.cn/opinion/2015-07/01/content_21147373.htm) (last visited Apr. 16, 2017).

72. See Harpaz, *supra* note 62, at 135.

73. See John Williamson, *Chapter 2: What Washington Means by Policy Reform*, in *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* (John Williamson ed., 1990), reprinted in John Williamson, *What Washington Means by Policy Reform*, PETERSON INST. FOR INT’L ECON. (Nov. 1, 2002), available at <https://piie.com/zh-hans/commentary/speeches-papers/what-washington-means-policy-reform> (last visited Apr. 11, 2017) (“[A] balanced budget (or at least a non-increasing debt-GNP ratio) should be a minimal medium-run norm, but that short-run deficits and surpluses around that norm should be welcomed insofar as they contribute to macroeconomic stabilization”).

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expenditures,<sup>74</sup> tax reform,<sup>75</sup> interest rates,<sup>76</sup> exchange rates,<sup>77</sup> trade policy,<sup>78</sup> foreign direct investment,<sup>79</sup> privatization,<sup>80</sup> deregulation,<sup>81</sup> and property rights.<sup>82</sup> Nonetheless, for decades, the U.S.-led G7 nations (Canada, France, Germany, Italy, Japan, United Kingdom, and United States) downplayed emerging economies' criticism about these "Bretton Woods" institutions, pertaining to problems such as voting rights and staffing policies, which did not reflect emerging economies' increasing share in the global economy.<sup>83</sup>

Meanwhile, China has, in recent years, contributed to the gradual dismantlement of such system. Firstly, along with mentioned cheap commercial credit available to developing countries,<sup>84</sup> China has challenged the World Bank's share in the market of development aid. It

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74. See *id.* (stating that public expenditure priorities shall lead to "reducing expenditures rather than increasing tax revenues").

75. See *id.* "Despite this contrast in attitudes toward the merits of increasing tax revenue, there is a very wide consensus about the most desirable method of raising whatever level of tax revenue is judged to be needed. The principle is that the tax base should be broad and marginal tax rates should be moderate." *Id.*

76. See *id.* "[I]nterest rates should be market-determined. The objective of this is to avoid the resource misallocation that results from bureaucrats rationing credit according to arbitrary criteria . . ." Williamson, *supra* note 74. "The other principle is that real interest rates should be positive, so as to discourage capital flight and, according to some, increase savings." *Id.*

77. See *id.* In principle "exchange rates may be determined by market forces, or their appropriateness may be judged on the basis of whether their level seems consistent with macroeconomic objectives," and "achieving a "competitive" exchange rate is more important than how the rate is determined." *Id.*

78. See *id.* "Access to imports of intermediate inputs at competitive prices is regarded as important to export promotion, while a policy of protecting domestic industries against foreign competition is viewed as creating costly distortions that end up penalizing exports and impoverishing the domestic economy." Williamson, *supra* note 74.

79. See *id.* "Such investment can bring needed capital, skills, and know-how, either producing goods needed for the domestic market." *Id.*

80. See *id.* "[P]rivatization may help relieve the pressure on the government budget, both in the short run by the revenue produced by the sale of the enterprise and in the longer run inasmuch as investment need no longer be financed by the government." *Id.*

81. Williamson, *supra* note 74. (stating deregulation "was initiated within the United States by the Carter administration and carried forward by the Reagan administration," and "is generally judged to have been successful within the United States, and it is generally assumed that it could bring similar benefits to other countries").

82. *Id.* "In the United States property rights are so well entrenched that their fundamental importance for the satisfactory operation of the capitalist system is easily overlooked," however, "when Washington brings itself to think about the subject, there is general acceptance that property rights do indeed matter." *Id.*

83. See Steinbock, *supra* note 72; see Khor, *supra* note 33; see Jada & Biswas, *supra* note 32.

84. See Pallas & Wood, *supra* note 29, at 220.

has been able to break up the World Bank's *de facto* monopoly by providing bilateral aid with a diversified level of concessionality, which has led to the accusation of undercutting Western aid.<sup>85</sup> Secondly, China has challenged existing institutional order by establishing its own institutions like the aforementioned China African Development Fund in 2007,<sup>86</sup> the PRC Poverty Reduction and Regional Cooperation Fund in 2005,<sup>87</sup> and by joining existing minor MDBs like the Caribbean Development Bank (CBD) in 1998.<sup>88</sup> Yet no other development in Chinese strategy posed a larger challenge to the existing system than the plans to establish the AIIB.<sup>89</sup> Therefore, unsurprisingly, after China and other BRICS countries took actual steps aimed at circumventing the existing system by establishing the NDB and AIIB,<sup>90</sup> the US took unsuccessful steps to discourage its allies from joining the AIIB<sup>91</sup> by raising concerns about the quality and transparency of AIIB's procurement standards.<sup>92</sup>

### B. Chinese Response

China rather capably fended off all mentioned criticism. As far as its practices with granting bilateral development assistance are concerned, it is arguably no co-incidence that the report on Chinese foreign development assistance from 2014 included a whole section about "strengthening environmental protection," which one could not find in the previous report released in 2011.<sup>93</sup> As to particular projects with an environmental impact supported by China, the report mentioned that, "[i]n the three years, China undertook 64 projects in 58 developing

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85. Harpaz, *supra* note 62, at 136.

86. See Mattlin & Nojonen, *supra* note 57, at 14.

87. *China to Set up Fund for Regional Cooperation, Poverty Reduction - Asian Bank*, BBC Monitoring Asia Pacific (Mar. 14, 2005), available at [http://search.proquest.com/easyaccess1.lib.cuhk.edu.hk/docview/460686881?accountid=10371&rfr\\_id=info%3Axri%2Fsid%3Aprimo](http://search.proquest.com/easyaccess1.lib.cuhk.edu.hk/docview/460686881?accountid=10371&rfr_id=info%3Axri%2Fsid%3Aprimo) (last visited Jun. 4, 2017).

88. See *People's Republic of China*, CARIBBEAN DEVELOPMENT BANK, available at <http://www.caribank.org/about-cdb/member-countries/nonregional-members/china> (last visited Apr. 16, 2017).

89. Harpaz, *supra* note 62, at 138.

90. Daniel Epstein, *New Development? The BRICS Bank and the International System*, HARV. INT'L REV. (Jan. 2, 2015), available at <http://hir.harvard.edu/new-development-the-brics-bank-and-the-international-system/> (last visited Apr. 16, 2017); see Khor, *supra* note 33; see Jada & Biswas, *supra* note 32. The very basic premise of the AIIB is that voting powers must reflect AIIB member's current GDP. Zhang Chunyan, *Laying Foundations for a Successful AIIB*, CHINA DAILY USA (APR. 15, 2015), available at [http://usa.chinadaily.com.cn/epaper/2015-04/15/content\\_20440624.htm](http://usa.chinadaily.com.cn/epaper/2015-04/15/content_20440624.htm) (last visited Apr. 16, 2017).

91. See Jada & Biswas, *supra* note 32.

92. See Steinbock, *supra* note 72.

93. *China's Foreign Aid 2014*, *supra* note 46, § III.

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countries on the utilization of renewable energy resources, such as solar streetlamps and solar power generators.”<sup>94</sup> Additionally:

“[f]rom 2010 to 2012, China provided a total of 16 batches of equipment and supplies for environmental protection to 13 developing countries, such as Cambodia, Myanmar, Ethiopia, South Sudan and the Federated States of Micronesia, and the supplies included wind and solar power generators and lighting equipment, portable solar power supply, biogas equipment, garbage collection trucks, and draining and irrigation equipment,”<sup>95</sup>

And,

“China also organized 150 training sessions on environmental protection and addressing climate change for over 120 developing countries, providing training to over 4,000 officials and technical personnel in such areas as low-carbon industry development and energy policies, ecological protection, water resources management and water and soil conservation, renewable energy exploitation and utilization, forestry management and desertification prevention and control, and early warning of meteorological disasters.”<sup>96</sup>

Most importantly, as far as future operations of the AIIB are concerned, China has refuted the above-mentioned claims (see section 0 *in initio*) by indicating that purported shortcomings have not yet happened<sup>97</sup> and that all members will shape AIIB’s operations.<sup>98</sup> Chinese officials also generally hinted that, contrary to all those gloomy predictions, the AIIB would simply emulate procurement rules developed by existing MDBs rather than bring any Copernican revolution. Even the heads of leading existing multilateral financial institutions and some European politicians supported, at an early stage, such a position of the Chinese by expressing the view that the AIIB will become an integral part of the current system.<sup>99</sup>

For example, the IMF’s Christine Lagarde proposed in June 2014 that: “[w]e would say . . . let’s see how we can work even more closely together.”<sup>100</sup> In turn, ADB’s Takehiko Nakao suggested on occasion of signing the AIIB MOU in October 2014 that “[o]nce the AIIB is formally

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94. *Id.*

95. *Id.*

96. *Id.*

97. See Khor, *supra* note 33.

98. See Jada & Biswas, *supra* note 32.

99. See Steinbock, *supra* note 72.

100. *What They Say*, CHINA DAILY USA (Oct. 27, 2014), available at [http://usa.chinadaily.com.cn/epaper/2014-10/27/content\\_18808518.htm](http://usa.chinadaily.com.cn/epaper/2014-10/27/content_18808518.htm) (last visited Apr. 16, 2017).

established, the ADB is prepared to consider appropriate collaboration in areas of common priorities.”<sup>101</sup> European Investment Bank’s (EIB) Werner Hoyer emphasised on the occasion of EIB’s office opening in Beijing in April 2015, that “[w]e have been in touch with the Chinese authorities for a long time,” and “it will not be a bad idea to learn from the experiences of EIB, when it comes to creating the structure and procedures for the new lender,” and “[w]e will have close interactions with the Chinese authorities and the others who want to be AIIB shareholders.”<sup>102</sup> Luxembourg’s finance minister, Pierre Gramegna, claimed in April 2015 that “Europe has a lot of experience in the field of multilateral cooperation and the financing of infrastructure through multilateral banks,” and that “European countries can thus contribute to working with the other members to ensure the [AIIB] will meet the highest and most stringent standards in terms of good governance, transparent lending policies, social and environmental safeguards as well as state-of-the-art procurement guidelines.”<sup>103</sup>

In December 2015, AIIB’s President, Jin Liqin, joined such narratives by stating that (i) “[i]n drafting the AIIB’s Articles of Agreement and policy framework, we have worked with a diverse group of international experts to draw lessons from the existing multilateral institutions,”<sup>104</sup> and “[o]ur operations will be lean, clean and green,”<sup>105</sup> and, as perhaps the most important point, he assured that “there will be no nationality restriction on procurement of goods and services for AIIB-financed operations.”<sup>106</sup> Mr. Jin also emphasized that the role of staff and its recruitment will be conducted “through merit-based competitive processes, without regard to a candidate’s nationality.”<sup>107</sup> Since mid-2015, the AIIB commenced recruitment for its interim secretariat, seeking experts with “practical experience in areas such as environmental protection, public procurement,

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101. *ADB prepared for co-op with AIIB: Takehiko Nakao*, CHINA.ORG (Oct. 24, 2014), available at [http://www.china.org.cn/china/Off\\_the\\_Wire/2014-10/24/content\\_33866882.htm](http://www.china.org.cn/china/Off_the_Wire/2014-10/24/content_33866882.htm) (last visited Apr. 16, 2017).

102. Fu Jing, *EIB Planning to Step up Cooperation with China*, CHINA DAILY USA (Apr. 23, 2015), available at [http://usa.chinadaily.com.cn/epaper/2015-04/23/content\\_20520021.htm](http://usa.chinadaily.com.cn/epaper/2015-04/23/content_20520021.htm) (last visited Apr. 16, 2017).

103. Zhang Chunyan & Ning Hui, *World Banks on Asia’s Future*, CHINA DAILY USA (Apr. 3, 2015), available at [http://europe.chinadaily.com.cn/epaper/2015-04/03/content\\_19987482.htm](http://europe.chinadaily.com.cn/epaper/2015-04/03/content_19987482.htm) (last visited Apr. 16, 2015).

104. Jin Liqin, *AIIB to Benefit Asia and Beyond*, CHINA DAILY USA (Dec. 28, 2015), available at [http://usa.chinadaily.com.cn/opinion/2015-12/28/content\\_22836962.htm](http://usa.chinadaily.com.cn/opinion/2015-12/28/content_22836962.htm) (last visited Apr. 16, 2017).

105. *Id.*

106. *Id.*

107. *Id.*

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law and loan approval.”<sup>108</sup> From words to actions, at the end of the year, the AIIB invited applications for the position of “Senior Procurement Specialist (Operations),” who shall have a “[m]inimum 8-10 years relevant experience of procurement in infrastructure projects financed by multilateral development banks.”<sup>109</sup> This job posting confirmed that the AIIB would likely widely draw upon the approach to procurement of the existing MDBs. And eventually, at the level of general declarations, the AIIB Procurement Policy, released at the beginning of 2016, stated that “good procurement processes” will be achieved, through, amongst others, (i) the “application of global innovation and advances in procurement practice,”<sup>110</sup> and (ii) “close collaboration with other multilateral and bilateral development institutions.”<sup>111</sup>

## II. CONVERGENCE WITH OTHER MBDS’ PROCUREMENT RULES

### A. Co-Financing Projects with Other MDBs

The assurance from the Chinese that the AIIB would cooperate with other MDBs has not been an empty talk. Indeed, the actual alignment of the AIIB’s practices to existing solutions has been chiefly necessitated by the AIIB’s need to co-finance its projects at least in the first few years of its operation. As the *China Daily* itself admitted, the actual reason for the AIIB’s strong engagement in co-financed projects is, in simple terms, that the AIIB would not have enough money to finance projects unilaterally. More specifically, out of USD \$100 billion of the original authorized capital,<sup>112</sup> AIIB members shall pay-in USD \$20 billion (in total) each year, implying that it will take five years to fully cover originally issued shares.<sup>113</sup>

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108. See Zheng Yangpeng, *Infrastructure Bank Searching Globally for Talent*, CHINA DAILY USA (Apr. 8, 2015), available at [http://usa.chinadaily.com.cn/us/2015-04/08/content\\_20032290.htm](http://usa.chinadaily.com.cn/us/2015-04/08/content_20032290.htm) (last visited Apr. 16, 2017).

109. *Job Vacancies*, AIIB (Jan. 24, 2017), available at <https://www.aiib.org/en/opportunities/career/job-vacancies/staff/job-details/job-staff-17073.html> (last visited Apr. 16, 2017).

110. *AIIB Procurement Policy*, *supra* note 3, § 1.2(c).

111. *Id.* § 1.2(d).

112. See Articles of Agreement of the Asian Infrastructure Investment Bank, June 29, 2015, art. 4, GR. BRIT. T.S. NO. 9 (2016) (Cd. 9198) [hereinafter AIIB Articles of Agreement] (stating “[t]he authorized capital stock of the Bank shall be one hundred billion United States dollars (\$100,000,000,000), divided into one million (1,000,000) shares having a par value of 100,000 dollars (\$100,000) each, which shall be available for subscription only by members in accordance with the provisions of Article 5”).

113. See *id.* art. 6.

Such capital constraint, according to *China Daily*, implies that: (i) “the finance that the bank can leverage in its first year of operation is small, compared with its established peers,”<sup>114</sup> (ii) “[b]y partnering with these peers AIIB can maximize its capacity in the early stages,”<sup>115</sup> and (iii) “by initially focusing on projects led by other multilateral development banks, the AIIB can build up an investment portfolio far more quickly than would be possible if it acted on its own.”<sup>116</sup>

Apart from that, *China Daily* also identified further advantages of co-financing, such as that: (i) “[a] prudent and cooperative approach, ... has proved to be an effective way for AIIB to achieve a solid footing on the regional and international arena,”<sup>117</sup> (ii) “[f]or a new financial institution, no asset can be more valuable than prudence and professionalism, just as the Asian Infrastructure Investment Bank is trying to showcase,”<sup>118</sup> and (iii) “AIIB can also draw on other multilateral development banks’ decades of experience and expertise, and demonstrate its willingness to adhere to the same lending standards.”<sup>119</sup>

The harbingered cooperation commenced even prior to the signing of the AIIB’s Articles of Agreement (AOA) in December 2015.<sup>120</sup> Yet in September 2015, AIIB’s Jin Liqun and ADB’s Takehiko Nakao preliminarily agreed during their meeting in Beijing to identify projects for co-financing by the two institutions.<sup>121</sup> On April 13, 2016, the AIIB

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Payment of the amount initially subscribed by each Signatory to this Agreement which becomes a member in accordance with Article 58 to the paid-in capital stock of the Bank shall be made in five (5) installments, of twenty (20) per cent each of such amount, except as provided in paragraph 5 of this Article. The first installment shall be paid by each member within thirty (30) days after entry into force of this Agreement, or on or before the date of deposit on its behalf of its instrument of ratification, acceptance or approval in accordance with paragraph 1 of Article 58, whichever is later. The second installment shall become due one (1) year from the entry into force of this Agreement. The remaining three (3) installments shall become due successively one (1) year from the date on which the preceding installment becomes due.

*Id.*

114. Zheng Yangpeng, *AIIB to Explore Cooperation to Finance New Investment Projects*, CHINA DAILY USA (May 9, 2016), available at [http://usa.chinadaily.com.cn/epaper/2016-05/09/content\\_25161127.htm](http://usa.chinadaily.com.cn/epaper/2016-05/09/content_25161127.htm) (last visited Apr. 16, 2017).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Yangpeng, *supra* note 115.

120. See *supra* text accompanying note 8.

121. See *AIIB Agree to Identify Projects for Cofinancing ADB* (Sept. 21, 2015), available at <https://www.adb.org/news/adb-aiib-agree-identify-projects-cofinancing> (last visited Apr. 16, 2017).

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concluded a co-financing framework agreement with World Bank.<sup>122</sup> On the same day – with regard to the co-operation with the ADB – Jin Liquan also stated that “a huge amount of chemistry has already been nurtured between the AIIB and the World Bank, the AIIB and the ADB,”<sup>123</sup> and that the AIIB is “working with the World Bank and the ADB for co-financing. Maybe in June, we could have couples of projects approved by the World Bank, by the ADB, and by [the AIIB].”<sup>124</sup> The plans for cooperation with the ADB were institutionalized in a memorandum of understanding that “sets the stage for jointly financing projects” on May 2, 2016 in Frankfurt.<sup>125</sup> On May 11, 2016, the AIIB also concluded a similar agreement with the European Bank of Reconstruction and Development (EBRD).<sup>126</sup>

As of December 2016, the approved co-financed project included:

- with the World Bank, (i) the Trans Anatolian Natural Gas Pipeline Project in Azerbaijan, (ii) the Tarbela 5 Hydropower Extension Project in Pakistan, and (iii) the National Slum Upgrading Project in Indonesia,<sup>127</sup>
- with the International Finance Corporation (IFC), the ADB and some commercial lenders: the Myingyan Power Plant Project in Myanmar,<sup>128</sup>

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122. *AIIB Cooperates with World Bank, ADB to Approve First Batch of Projects in June*, XINHUANET (Apr. 15 2016), available at [http://news.xinhuanet.com/english/2016-04/14/c\\_135277902.htm](http://news.xinhuanet.com/english/2016-04/14/c_135277902.htm) (last visited Apr. 16, 2017); Dong Leshuo, *China's Road Out of Poverty Gains Traction*, CHINA DAILY USA (Apr. 18, 2016), available at [http://usa.chinadaily.com.cn/china/2016-04/18/content\\_24645388.htm](http://usa.chinadaily.com.cn/china/2016-04/18/content_24645388.htm) (last visited Apr. 16, 2017); *AIIB and World Bank Sign First Co-Financing Framework Agreement*, AIIB (Apr. 14, 2016), available at [http://www.aiib.org/html/2016/NEWS\\_0414/99.html](http://www.aiib.org/html/2016/NEWS_0414/99.html) (last visited Apr. 16, 2017).

123. *AIIB Cooperates with World Bank, ADB to Approve First Batch of Projects in June*, *supra* note 123.

124. *Id.*

125. *AIIB Sign MOU to Strengthen Cooperation for Sustainable Growth*, ADB (May 2, 2016), available at <https://www.adb.org/news/adb-aiib-sign-mou-strengthen-cooperation-sustainable-growth> (last visited Apr. 16, 2017); see also *ADB Sign MOU to Strengthen Cooperation for Sustainable Growth*, AIIB (May 2, 2016), available at [http://www.aiib.org/html/2016/NEWS\\_0502/102.html](http://www.aiib.org/html/2016/NEWS_0502/102.html) (last visited Apr. 16, 2017).

126. See Anthony Williams, *EBRD to Cooperate with Beijing-Based Asian Infrastructure Investment Bank*, EUR. BANK (May 11, 2016), available at <http://www.ebrd.com/news/2016/ebd-to-cooperate-with-beijingbased-asian-infrastructure-investment-bank.html> (last visited Apr. 16, 2017); see *Asian Infrastructure Investment Bank to Cooperate with European Bank for Reconstruction and Development*, AIIB (May 11, 2016), available at [http://www.aiib.org/html/2016/NEWS\\_0511/109.html](http://www.aiib.org/html/2016/NEWS_0511/109.html) (last visited Apr. 16, 2017).

127. *Approved Projects Overview*, AIIB, available at [http://www.aiib.org/html/2016/PROJECTS\\_1010/161.html](http://www.aiib.org/html/2016/PROJECTS_1010/161.html) (last visited Apr. 16, 2017).

128. *Id.*

- solely with the ADB: the National Motorway M-4 (Shorkot-Khanewal Section) Project in Pakistan,<sup>129</sup>
- with the European Bank for Reconstruction and Development (EIBRD): the Dushanbe-Uzbekistan Border Road Improvement Project in Tajikistan.<sup>130</sup>

Plus the proposed co-financed projects included:

- with the World Bank: (i) the Center South Road Corridor Project in Kazakhstan, (ii) the Andhra Pradesh 24x7 – Power for All Project in India, (iii) the Dam Operation, Rehabilitation, and Safety Improvement Project in Indonesia, and (iv) the Regional Infrastructure Development Fund Project in Indonesia,<sup>131</sup>
- with the ADB: the Natural Gas Infrastructure and Efficiency Improvement Project in Bangladesh,<sup>132</sup>
- with the EBRD: the 40 MW Gulshat PV Solar Power Plant Project in Kazakhstan.

Consequently, it is not surprising that the AIIB Procurement Policy seems to have been designed with co-financing projects with other MDBs in mind. The AIIB's provisions on co-financing are very explicit, in contrast to the World Bank's procurement-specific documents, where the provisions explicitly addressing which rules shall apply to procurement under co-financed projects are not easily found.<sup>133</sup> Specifically, the AIIB Procurement Policy precisely states that the AIIB “seeks to increase its flow of investments to countries by co-financing Projects with other multilateral development banks (MDBs) and with bilateral agencies, export credit agencies, and commercial entities.”<sup>134</sup> This could be a “parallel” co-financing, meaning “an arrangement whereby the Bank and one or more

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129. *Id.*

130. *Id.*

131. *Proposed Projects Overview*, AIIB, available at [http://www.aiib.org/html/2016/PROJECTS\\_1010/162.html](http://www.aiib.org/html/2016/PROJECTS_1010/162.html) (last visited Apr. 16, 2017).

132. *Id.*

133. See WBPR, *supra* note 9, § 2.4(a). Yet, there are always some general safety valves which could accommodate atypical situations. In the case of World Bank, co-financing could, for example, be accommodated under the guise of “alternative procurement arrangements” whereby the bank may agree to rely “rely on and apply the procurement rules and procedures of another multilateral or bilateral agency or organization, and may agree to such a party taking a leading role in providing the implementation support and monitoring of procurement activities.” *Id.*

134. *AIIB Procurement Policy*, *supra* note 3, § 5.11.

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parties other than the Recipient individually finance separate contracts.”<sup>135</sup>

In this case:

[T]he Procurement Policy applies only to the contracts financed by the Bank. The respective procurement policies of each co-financier apply to the contracts it finances. The Bank satisfies itself that the scope and specifications of the goods, works and non-consulting services, and the terms of reference for consulting services financed by the other co-financiers, are appropriate to ensure that the contracts not being financed by the Bank deliver the benefits to the Project as intended.<sup>136</sup>

Alternatively, this could be a “joint” co-financing, meaning “an arrangement whereby the Bank and one or more parties other than the Recipient finance portions of the same contracts.”<sup>137</sup> In this case, the AIIB “normally requires as a condition of its financing that the Procurement Policy apply to all contracts so jointly co-financed.”<sup>138</sup> In addition, in exceptional cases, the AIIB might agree with the other co-financiers on a “common procedure framework” on the condition that the AIIB “has determined that the co-financiers’ procurement policies are consistent with the Bank’s Core Procurement Principles and Procurement Standards.”<sup>139</sup> The IDPIR further clarifies that, when such condition is met, the AIIB might agree with other co-financiers, not only on a general common procurement procedure framework, but also on project-specific procurement related arrangements.<sup>140</sup> The IDPIR also states that normally the rules of the lead co-financer shall apply to a given co-financed project and that it should be the lead co-financer’s responsibility to oversee such project.<sup>141</sup> Furthermore, comprehensive provisions on co-financing can also be found in section 21 of the Environmental and Social Framework (ESF), according to which:

The Bank aims to promote harmonization of policies with multilateral development banks and bilateral development organizations with which it co-finances Projects to reduce the burden of multiple requirements on Clients. When co-financing a Project with these other financial institutions, the Bank seeks to cooperate with them with a view to adopting a common approach to appraisal, environmental and social management requirements, monitoring and reporting regarding the Project. Cooperation may include Projects at the regional and national

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135. *Id.* § 5.11 n.3.

136. *Id.* § 5.11.1.

137. *Id.* § 5.11 n.4.

138. *Id.* § 5.11.2.

139. *AIIB Procurement Policy*, *supra* note 3, § 5.11.3.

140. *See* IDPIR, *supra* note 5, § 6.1.

141. *See id.*

level, including those for the management of trans-boundary environmental and natural resource management issues.<sup>142</sup>

Section 22 of the Environmental Framework further provides:

The Bank recognizes that it is a new development partner and plans to work closely with other multilateral development banks and bilateral development organizations in supporting the strengthening of environmental and social sustainability at the policy and operational level with public- and private-sector Clients. It also intends to work together with other development partners through co-financing Projects, undertaking studies and conducting training for staff and Clients.<sup>143</sup>

#### *B. Harmonization Under World Bank's Leadership*

The nature of AIIB's procurement-related provisions on co-financing is virtually *carte-blanche*, and the scale of actual co-financing is vast. This implies that, at least in the first years of operation, the AIIB will, perforce, augment rather than reinforce the system of the regulation of procurement created by existing MDBs and that any analysis of AIIB's procurement policies cannot be done in isolation from this system. In simple terms, the *status quo* is that the existing MDBs, more or less, formally follow developments in the World Bank, which remains the most influential MDB with the most ample membership. It combines the International Bank for Reconstruction and Development (IBRD), established in 1944<sup>144</sup>, to grant loans to middle-income countries, and the International Development Association (IDA), established in 1960, to grant loans to the lowest-income countries.<sup>145</sup>

The subsequent developments in the World Bank's procurement rules have always been, to some extent, tangled with the problem of international liberalization of procurement markets. In 1951, the introduction of International Competitive Bidding (ICB) broke up the initial *de facto* monopoly of U.S. suppliers, to some extent internationally liberalizing public procurement markets way ahead of the GPA or the European Community's (EC) first procurement directives adopted in the

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142. *Environmental and Social Framework*, AIIB (Feb. 2016), available at [https://www.aiib.org/en/policies-strategies/\\_download/environment-framework/20160226043633542.pdf](https://www.aiib.org/en/policies-strategies/_download/environment-framework/20160226043633542.pdf) (last visited June. 4, 2017) [hereinafter ESF], § 21.

143. *Id.* § 22

144. *The Roles and Resources of IBRD and IDA*, WORLD BANK, available at <http://www.worldbank.org/en/about/annual-report/roles-resources> (last visited Apr. 11, 2017); *History*, WORLD BANK, available at <http://ida.worldbank.org/about/history> (last visited Apr. 11, 2017).

145. *The Roles and Resources of IBRD and IDA*, *supra* note 145; *History*, *supra* note 145.

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1970s.<sup>146</sup> The World Bank has been publishing complex Guidelines on the Procurement of Goods, Works and Non-consulting Services (WBG) <sup>147</sup> since 1964.<sup>148</sup> It has also been separately publishing the Guidelines on Selection and Employment of Consultants (WBCG)<sup>149</sup> since 1966,<sup>150</sup> which were not merged into one document until the adoption of the WBPR.

Other MDBs include the ADB, African Development Bank (AfDB), the Black Sea Trade and Development Bank (BSTDB), the Council of Europe Development Bank (CEDB), European Bank for Reconstruction and Development (EBRD), Inter-American Development Bank (IADB), EIB, and Islamic Development Bank (IDB). These MDBs, along with the World Bank, decided to harmonize their procurement-related activities under the aegis of the DAC in 1999.<sup>151</sup> The purpose of the informal groups was to (i) harmonize MDBs' procurement guidelines and standard bidding documents, (ii) jointly discuss issues like the application of information technology to the procurement process, and (iii) share knowledge and build capacity in the course of joint training and diagnostic work.<sup>152</sup> Subsequent MDBs' co-operation with the DAC has, so far, resulted in the adoption of a number of standard bidding documents,<sup>153</sup>

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146. See Commission Directive 70/32/EEC, 1970 O.J. (L 13) (EC); see also Council Directive 71/304/EEC, O.J. SPEC. ED. 678 (EC); see also Council Directive 71/305/EEC, O.J. SPEC. ED. 682 (EC).

147. See generally WORLD BANK, GUIDELINES: PROCUREMENT OF GOODS, WORKS, AND NON-CONSULTING SERVICES UNDER IBRD LOANS AND IDA CREDITS & GRANTS BY WORLD BANK BORROWERS (2011) [hereinafter WBG].

148. See Hunja, *supra* note 12, at 221.

149. See generally WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS UNDER IBRD LOANS AND IDA CREDITS & GRANTS BY WORLD BANK BORROWERS (2011) [hereinafter WBCG].

150. See Hunja *supra* note 11, at 218.

151. See *Comprehensive Review of the AfDB's Procurement Policies and Procedures: Summary of Literature on Harmonization in Public Procurement*, AFRICAN DEVELOPMENT BANK AND AFRICAN DEVELOPMENT FUND (Mar. 2014), available at [https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Summary\\_of\\_Literature\\_on\\_Harmonization\\_in\\_Public\\_Procurement.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Procurement/Project-related-Procurement/Summary_of_Literature_on_Harmonization_in_Public_Procurement.pdf) (last visited Jun. 6, 2017).

152. See *id.* § 6, § 21.

153. These include: (i) "Standard Request for Proposals" released in October 2011, (ii) "Generic Master Procurement Document" released in July 2008, (iii) "Master Document for Procurement of Small Works" released in July 2008, (iv) "Master Procurement Documents - Prequalification Documents for Procurement of Works and User's Guide" released in May 2003, (v) "Master Document for Procurement of Works" in July 2008 (vi) "Master Document for Procurement of Goods" released in July 2008, and (vii) "Master Document for Procurement of Plant Design, Supply and Installation" released in July 2008. See *Procurement for World Bank Projects - Standard Documents Archive*, WORLD BANK, available at

as well as the acceptance of further commitments on the aligning of procurement rules in documents generally addressing the efficiency of development aid, such as (i) the Rome Declaration on Harmonization of 2003,<sup>154</sup> (ii) the Paris Declaration on Aid Effectiveness of 2005,<sup>155</sup> (iii) the Accra Agenda on Action,<sup>156</sup> and (iv) the Busan Declaration.<sup>157</sup>

This co-operation also produced a number of documents devoted to untying aid released in the wake of the International Conference on Financing for Development held in Monterey in 2002,<sup>158</sup> including: (i) the Helsinki Package also known as Consensus,<sup>159</sup> (ii) the Recommendation of the OECD's Development Assistance Committee on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries,<sup>160</sup> plus the aforementioned (iii) Paris Declaration, and (iv) Accra Agenda.<sup>161</sup> From words to actions, ODA donors commenced untying aid. The direction for other MDBs was delineated by the World Bank, which tied aid in 1956, limiting the eligibility for bidding to business originating from World Bank's member-countries (plus Switzerland which did not join the World Bank until 1992),<sup>162</sup> and untied it in 2004 when both WBG and WBCG ceased to

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<http://www.worldbank.org/en/projects-operations/products-and-services/brief/procurement-standard-documents-archive> (last visited Jun. 6, 2017).

154. See generally OECD, *Rome Declaration on Harmonization*, in OECD, HARMONISING DONOR PRACTICES FOR EFFECTIVE AID DELIVERY 124, 129 (2003) [hereinafter *Rome Declaration*].

155. See generally Org. for Econ. Co-operation & Dev. [OECD], *Paris Declaration on Aid Effectiveness*, at ¶¶ 28-30, OECD Doc. DCD/DAC/EFF(2005)1/FINAL (Mar. 2, 2005) [hereinafter *Paris Declaration*].

156. See generally OECD, THE PARIS DECLARATION ON AID EFFECTIVENESS AND THE ACCRA AGENDA FOR ACTION 15-21 (2008) [hereinafter *ACCRA AGENDA*].

157. See generally OECD, BUSAN PARTNERSHIP FOR EFFECTIVE DEVELOPMENT CO-OPERATION: FOURTH HIGH LEVEL FORUM ON AID EFFECTIVENESS (2011) [hereinafter *BUSAN PARTNERSHIP*].

158. See La Chimia, *supra* note 21, at 398-399.

159. See Org. for Econ. Co-operation & Dev. [OECD], *Arrangement on Guidelines for Officially Supported Export Credits*, at ¶ 34, OECD Doc. TD/CONSENSUS(97)70 (Dec. 19, 1997) (stating "[t]here shall be no tied aid to countries whose per capita GNP would be sufficient to make them ineligible for 17 year loans from the World Bank. The World Bank recalculates the threshold for this category on an annual basis. A country will be reclassified only after its World Bank category has been unchanged for two consecutive years").

160. See OECD, *DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries and Highly Indebted Poor Countries*, OECD Doc. DCD/DAC(2001)12/FINAL (Apr. 25, 2001), amended OECD Doc. DCD/DAC(2006)25 (Mar. 15, 2006), and OECD doc. DCD/DAC(2007)41/REV1 (July 25, 2008).

161. *Paris Declaration on AID Effectiveness*, *supra* note 154; *ACCRA AGENDA*, *supra* note 155, at 14-21.

162. See La Chimia, *supra* note 21, at 397-398.

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include such a limitation.<sup>163</sup> Similar developments also took place with regard to bilateral development assistance, like in the case of the UK in 2002, or to some extent the EU in 2006.<sup>164</sup> Nonetheless, it has also been true that formal declarations on untying aid have not always gone in tandem with the practice of bilateral relations between pairs of low-income and high-income Western countries where extending development assistance might still informally depend on preferring lenders' tenderers by low-income borrowers.<sup>165</sup>

The BRICS countries, including China, have so far only partly subscribed to procurement-related declarations produced under the aegis of the DAC and the World Bank. As mentioned, BRICS countries did not join the DAC<sup>166</sup> and they are not likely to do so,<sup>167</sup> meaning that they reject aid-related reporting and assessment requirements originally stemming from the Rome Declaration.<sup>168</sup> However, all BRICS countries accepted key commitments under the Paris Declaration,<sup>169</sup> which provides that:

- “measures and standards of performance and accountability of partner country systems in public financial management, procurement, fiduciary safeguards and environmental assessments, in line with broadly accepted good practices and their quick and widespread application” shall be defined,<sup>170</sup>

163. Compare WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS § 1.6 (2004), with WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS § 1.11 (2004), and WORLD BANK, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS § 1.6 (1999), and WORLD BANK, GUIDELINES: SELECTION AND EMPLOYMENT OF CONSULTANTS BY WORLD BANK BORROWERS § 1.10 (2002).

164. See La Chimia, *supra* note 21, at 399.

165. See Vinod Rege, *Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries*, 35 J. WORLD TRADE 489, 496 (2001).

166. See *supra* text accompanying note 44.

167. See Chhibber, *supra* note 31, at 6, 20-21.

168. See *Rome Declaration*, *supra* note 155, at 10-11 (stipulating that - “[b]uilding on the work of the DAC-OECD and MDB working groups and on country experience, including the recent country initiatives, we commit to the following activities to enhance harmonisation” and “[r]eviewing and identifying ways to amend, as appropriate, our individual institutions’ and countries’ policies, procedures, and practices to facilitate harmonisation. In addition, we will work to reduce donor missions, reviews, and reporting, streamline conditionalities, and simplify and harmonise documentation”).

169. See *Countries, Territories and Organisations Adhering to the Paris Declaration and AAA*, OECD, [available at](http://www.oecd.org/dac/effectiveness/countriesterritoriesandorganisationsadheringtotheparisdeclarationandaaa.htm) <http://www.oecd.org/dac/effectiveness/countriesterritoriesandorganisationsadheringtotheparisdeclarationandaaa.htm> (last visited Apr. 11, 2017) (listing Country X, Country Y, Country Z, etc. as adherents to the Paris Declaration).

170. Paris Declaration, *supra* note 156, ¶ 3.

- “[d]onors commit to [p]rogressively rely on partner country systems for procurement when the country has implemented mutually agreed standards and processes,”<sup>171</sup> as well as “[a]dopt harmonised approaches when national systems do not meet mutually agreed levels of performance or donors do not use them,”<sup>172</sup> and
- “[u]ntying aid generally increases aid effectiveness by reducing transaction costs for partner countries and improving country ownership and alignment,”<sup>173</sup> as well as “(…)[d]onors will continue to make progress on untying as encouraged by the 2001 DAC Recommendation on Untying Official Development Assistance to the Least Developed Countries.”<sup>174</sup>

Subsequently, BRICS countries also committed to liberalize public procurement financed with development aid as required under documents from Accra<sup>175</sup> and Busan.<sup>176</sup> And this seems to be good circumstantial

171. *Id.* ¶ 30.

172. *Id.*

173. *Id.* ¶ 31.

174. *Id.*

175. See *Procurement Harmonization*, *supra* note 152; see also ACCRA AGENDA, *supra* note 157, ¶ 18 (stipulating that:

Since the Paris Declaration was agreed in 2005, OECD-DAC donors have made progress in untying their aid. A number of donors have already fully untied their aid, and we encourage others to do so. We will pursue, and accelerate, these efforts by taking the following actions: a) OECD-DAC donors will extend coverage of the 2001 DAC Recommendation on Untying Aid to non-LDC HIPC countries and will improve their reporting on the 2001 DAC Recommendation. b) Donors will elaborate individual plans to further untie their aid to the maximum extent. c) Donors will promote the use of local and regional procurement by ensuring that their procurement procedures are transparent and allow local and regional firms to compete. We will build on examples of good practice to help improve local firms’ capacity to compete successfully for aid-funded procurement. d) We will respect our international agreements on corporate social responsibility”).

176. See *Countries, Territories and Organisations Adhering to the Busan Partnership for Effective Development Co-operation*, OECD, available at <http://www.oecd.org/dac/effectiveness/busanadherents.htm> (last visited Apr. 21, 2017) (listing Country X, Country Y, Country Z, etc. as adherents to the Busan Partnership for Effective Development and Co-operation).

Pursuant to the Accra Agenda for Action, we will accelerate our efforts to untie aid. We will, in 2012, review our plans to achieve this. In addition to increasing value for money, untying can present opportunities for local procurement, business development, employment and income generation in developing countries. We will improve the quality, consistency and transparency of reporting on the tying status of aid.

See Busan Partnership, *supra* note 158, ¶ 18(e).

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evidence foretelling that AIIB's and NDB's reluctance to institutionalize co-operation with the DAC will not jeopardize substantial convergence of their procurement rules with existing solutions shaped by the World Bank in co-operation with the DAC.

C. *The World Bank's General Rules*

The World Bank's general procurement rules previously set forth in the WBGG have, for decades, co-existed with other major instruments on the regulation of global procurement markets. Yet, they WBGG have particularly been at odds with the GPA and EU procurement directives with regard to their impact on international liberalization of public procurement markets.<sup>177</sup> Both the GPA and EU's procurement directives originated from the same initial works from the OECD conducted in the 1960s with the sole goal of the regional or international integration of public procurement markets.<sup>178</sup> In very simple terms, both the GPA and EU's procurement directives open high-value procurement (determined by the contract-value thresholds) to international competition or inter-EU competition. They impose requirements of national treatment (NT),<sup>179</sup> most-favoured-nations clause (MFN),<sup>180</sup> the ban of offsets,<sup>181</sup> and the ban on discrimination against foreign-owned local establishments to covered procurement.<sup>182</sup> For covered procurement, both the GPA and EU's directives strongly prefer open tendering and, only under further circumstances, allow a variety of less competitive or negotiated procurement methods, including even direct sourcing, where public procurers might only covertly and *preater legem* prefer domestic goods/services and/or suppliers/contractors.

In contrast, in the case of procurement covered by the World Bank's general rules, procuring agencies are in many instances allowed to overtly discriminate against foreigners. Foremost, under the WBGG, the ban on

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177. See generally Jędrzej Gorski, *The World Bank's New Procurement Regulations*, 4 EUR. PROCUREMENT & PUB. PRIV. PARTNERSHIP L. REV., 301, 302-304 (2016).

178. See Gabrielle Marceau & Annet Blank, *History of the Government Procurement Negotiations Since 1945*, 4 PUB. PROCUREMENT L. REV. 77, 88-89 (1996).

179. See Comm. on Gov't Procurement, *Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement*, art. IV(1), WTO Doc. GPA/113 (Mar. 30, 2012) [hereinafter Revised Agreement on Government Procurement].

180. *Id.*

181. *Id.* art. IV.6.

182. *Id.* art. IV.2. In the case of the EU and internal trade between member states, these rules stem only from the directive but also (and in the first place) from basic freedoms of the EU's internal market. Within the EU's internal context, these rules apply to all procurement, not only high-value covered procurement. See generally Commission Interpretative Communication 179-02, 2006 O.J. L-2 (EC).

discrimination against foreigners, or the lack thereof, was always a built-in feature of specific procurement methods, renamed as “market approach options” (MAOs) under the new WBPR.<sup>183</sup> Previously, the WBGG strongly preferred the ICB as the first-best-choice procurement method,<sup>184</sup> which among others required: (i) international advertising,<sup>185</sup> (ii) application of standard bidding documents approved by the World Bank,<sup>186</sup> (iii) use of at least one of the widely internationally recognized languages,<sup>187</sup> (iv) use of standards determined by the International Standards Organization (ISO),<sup>188</sup> and (v) use of fully convertible currencies.<sup>189</sup> Still, the ICB also allowed domestic preferences, first introduced in 1966,<sup>190</sup> which recently included: (i) price penalties against foreign goods of not more than 15 percent,<sup>191</sup> and (ii) price penalties against foreign contractors of not more than 7.5 percent,<sup>192</sup> only applicable to projects carried out in the least-developed countries.<sup>193</sup>

Along with the ICB, the General Guides also allowed a number of other procurement methods, which included, among others:

- modified ICB for programmes of imports<sup>194</sup> and procurement of commodities,<sup>195</sup>
- limited international bidding (LIB) permissible only under exceptional conditions or if the pool of likely tenderers was limited, whereby procurers could directly invite tenderers without publishing calls for bids,<sup>196</sup>
- national competitive bidding (NCB) permissible for contracts unlikely to attract foreign suppliers/contractors for reasons such as meager procurement value, labour-intensive character of procured works, or lower domestic cost of procured

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183. Compare WBGG, *supra* note 148, with WBPR, *supra* note 9.

184. WBGG, *supra* note 148, § 1.3.

185. See *id.* § 2.7.

186. *Id.* § 2.12.

187. See *id.* § 2.15.

188. *Id.* § 2.19.

189. WBGG, *supra* note 148, § 2.28.

190. See *The World Bank's Procurement Policies and Procedures*, *supra* note 22.

191. WBGG, *supra* note 148, app. 2 § 5.

192. *Id.* app. 2 § 8.

193. See *id.* app. 2 n.82.

194. *Id.* § 2.66.

195. *Id.* § 2.68.

196. WBGG, *supra* note 148, § 3.2.

works/goods/services/ against their cost in international markets,<sup>197</sup>

- “shopping,” referring to procurers’ direct requests for quotations permissible for off-the-shelf products (not more than USD \$100,000) or basic civil-engineering works (not more than USD \$200,000),<sup>198</sup> and
- “direct contracting” or, in other words, direct sourcing - permissible for cases such as extensions of existing contracts, or supplementary procurement from existing suppliers or in emergency.<sup>199</sup>

Importantly, “[i]f foreign firms wish[ed] to participate in NCB they [were] allowed to do so on the prevailing NCB terms and conditions that apply to national bidders,”<sup>200</sup> meaning that procurers allowed by the World Bank to apply the NCB could not expressly discriminate against foreigners. The essence of the NCB was, in light of unlikely international competition, to ease procedural burdens imposed on procurement by borrowers by allowing the application of procurement rules “normally used for public procurement in the country of the Borrower”<sup>201</sup> and the use of only local/national languages, currencies or bidding documents in the procurement process.<sup>202</sup>

The WBPR have brought extensive, yet mostly “editorial,” modifications, but have not brought major substantial changes. Domestic preferences have remained in place (except for industrial plants),<sup>203</sup> but they are decoupled from the ICB. In turn, the ICB ceased to exist because previous procurement methods have been: (i) replaced by new Approved Selection Methods (hereinafter ASMs) and Approved Selection Arrangements (ASAs), which determine details of the procurement process, and (ii) decoupled from approaches to international liberalization of public procurement markets now determined by previously mentioned MAOs.<sup>204</sup> Without going into details, the ASMs now include (i) “[r]equests for [p]roposals,”<sup>205</sup> (ii) “[r]equests for [b]ids,”<sup>206</sup> (iii) “[r]equests for

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197. *Id.* § 3.3.

198. *Id.* § 3.5.

199. *Id.* § 3.7.

200. *Id.* § 3.4.

201. WBG, *supra* note 148, § 3.3.

202. *Id.* § 3.4.

203. See WBPR, *supra* note 9, § 5.3.

204. See *id.* § 7.1 tbl. 1.

205. *Id.* §§ 7.3-7.7.

206. *Id.* §§ 7.8-7.9.

[q]uotations,”<sup>207</sup> and (iv) “[d]irect [s]election.”<sup>208</sup> The ASAs will in turn include: (i) “[c]ompetitive [d]ialogue,”<sup>209</sup> (ii) “[p]ublic [p]rivate [p]artnerships,”<sup>210</sup> (iii) “[c]ommercial [p]ractices,”<sup>211</sup> (iv) “e-auction[s],”<sup>212</sup> (v) “imports,”<sup>213</sup> (vi) “commodities,”<sup>214</sup> and (vii) “[c]ommunity [d]riven [d]evelopment.”<sup>215</sup> Additionally, MAOs include:

- “[o]pen [c]ompetition,” which will now be the World Bank’s preferred MAO whereby other MAOs will have to be justified by the World Bank’s borrowers,<sup>216</sup>
- “[l]imited [c]ompetition,” which will only be allowed if “there are only a limited number of firms or there are other exceptional reasons that justify departure from open competitive procurement approaches,”<sup>217</sup>
- “[i]nternational [c]ompetition” preferred by the World Bank for complex, high-risk and high-value activities according to the threshold set by the World Bank,<sup>218</sup> and
- “[n]ational [c]ompetition” allowed for contracts unlikely to attract foreign competition.<sup>219</sup>

Procurement Regulations now give borrowers way wider leeway in matching specific ASMs and AOA, with specific MAOs. The only caveats are obvious limitations such as, for example, that the direct selection (AOM) can only go in tandem with the limited competition (MAO)<sup>220</sup> or that the community driven development (AOA) cannot go in tandem with the international competition.<sup>221</sup> International competition, along with open competition (now classified as MAOs rather than procurement methods) have replaced the ICB and, analogically, national competition (another MAO) has replaced the NCB. The use of international competitions implies that the procurers need to conform to rules on

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207. *Id.* § 7.10.

208. WBPR, *supra* note 9, §§ 7.11-7.13.

209. *Id.* §§ 7.37-7.39.

210. *Id.* §§ 7.40-7.42.

211. *Id.* § 7.43.

212. *Id.* § 7.48.

213. WBPR, *supra* note 9, § 7.49.

214. *Id.* § 7.50.

215. *Id.* § 7.51.

216. *Id.* § 7.14.

217. *Id.* § 7.15.

218. WBPR, *supra* note 9, §7.16.

219. *Id.* § 7.18.

220. *See id.* § 7.1 tbl. 1.

221. *Id.* § 7.1.

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currencies,<sup>222</sup> languages,<sup>223</sup> advertising,<sup>224</sup> standard procurement documents,<sup>225</sup> or timing of procurement process<sup>226</sup> - which in essence are not unlike requirements previously imposed on the ICB. Likewise, the rule that “[i]f foreign firms wish to participate in open national competitive procurement, they are allowed to do so on the terms and conditions that apply to national firms”<sup>227</sup> repeats an identical solution previously applicable to the NCB.<sup>228</sup> Similarly, domestic preferences still cannot be applied to national competition<sup>229</sup> (just as they could not be previously applied to the NCB), and can only be matched with international-competition-MAO combined with various AOMs/AOAs (just as previously, they could only be matched with the ICB).<sup>230</sup>

Altogether, new general regulations are none the closer to aligning with the procedural provisions of the GPA/EU’s procurement directives and none the closer to removing domestic preferences. The document containing new regulations is highly complicated. At first glance, one could find it overdone, but there might be a method in this madness. Namely, virtually infinite options of how to configure procurement processes might allow the World Bank’s borrowers to find their ways of being compliant with commitments made both to the World Bank and under the GPA or public-procurement-liberalizing RTAs.

#### *D. World Bank’s Consultants Rules*

The World Bank, followed by the Majority of other MDBs (for example, AfDB, the CDB, or the IDB), has imposed significantly different requirements on the procurement of consulting services compared with what it has required in the case of procurement of goods, construction works or non-consulting services, whether that would be under a separate consultant-specific WBCG, or under new unified WBPR still setting forth consultant-specific provisions. The concept of consultants has drawn the line between two dramatically different regimes. Consultants were previously defined under the WBCG as:

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222. *Id.* § 6.6.

223. WBPR, *supra* note 9, § 6.9.

224. *Id.* § 6.17.

225. *Id.* § 6.18.

226. *Id.* § 6.25.

227. *Id.* § 7.19.

228. WBPR, *supra* note 9, § 3.4.

229. *Id.* § 1.1 annex VI.

230. *See id.* § 7.1 tbl. 1.

[A] wide variety of private and public entities, including consulting firms, engineering firms, Construction Managers, management firms, Procurement Agents, inspection service providers, auditors, United Nations (UN) agencies and other multinational organizations, investment and merchant banks, universities, research institutions, government agencies, nongovernmental organizations (NGOs), and individuals. Bank Borrowers use these entities as consultants to help in a wide range of activities, such as policy advice; institutional reforms; management; engineering services; construction supervision; financial services; procurement services; social and environmental studies; and identification, preparation, and implementation of projects to complement Borrowers' capabilities in these areas.<sup>231</sup>

While the WBCG, at least to some extent, followed the logic of the GPA's procedural framework, procurement methods under WBCG mostly ignored this framework. Generally speaking, the WBCG has been tangling various consultants' assessment criteria with specific procurement methods. This has not been the case under the GPA in the case of which specific procurement methods,<sup>232</sup> have not been rigidly linked with specific assessment criteria, including the level of preference for lowest-cost or most advantageous bids.<sup>233</sup> Under the WBCG, the Quality and Cost-Based Selection (QCBS) is used as a default modality of selecting invited short-listed potential consultants.<sup>234</sup> In the QCBS, the evaluation of offers required two steps, and included an initial assessment of the consultants' quality unaffected by the proposed price,<sup>235</sup> and a subsequent assessment of the price<sup>236</sup> where both factors (i.e. quality and price/cost) were weighted equally.<sup>237</sup> Along with the QCBS, the Consultant Guidelines additionally offered, among others:

- “[q]uality-[b]ased [s]election” (QBS), in the case of which the assessment could be made based on consultants' merits only, on condition that tasks assigned to consultants were highly complex such as large infrastructural projects (i.e. engineering design) as well as policy studies of country-wide importance, or studies related to the management of large public sector organization,<sup>238</sup>

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231. WBCG, *supra* note 150, § 1.3.

232. See GPA12, *supra* note 16, art. XIII.

233. *Id.* art. XV.5.

234. WBCG, *supra* note 150, § 2.1.

235. *Id.* § 2.15.

236. *Id.*

237. *Id.* § 2.18, 2.25.

238. *Id.* § 3.2.

- “[s]election [u]nder a [f]ixed [b]udget” (FBS), which could be allowed in uncomplicated and precisely defined consulting tasks,<sup>239</sup> or
- “least cost selection” (LCS) applicable to ordinary simple tasks like non-complex engineering design or audits, and many others.<sup>240</sup>

The WBPR did not bring substantial changes. Consultants are now defined, in a more concise way, as “a firm (acting either in its individual capacity or as part of a joint venture) or an individual that provides specialized advice or services for limited amounts of time without any obligation of permanent employment.”<sup>241</sup> Similar to the general rules, procurers have been granted much more procedural flexibility as a result of the replacement of previous procurement methods with (i) MAOs, (ii) ASMs, and (iii) AOAs - where “[f]or each procurement, the Borrower will identify from the Approved Selection Methods the selection method that best fits the requirements and enables the Borrower to achieve V[alue] f[or] M[oney].”<sup>242</sup> The new ASMs, in essence, substituted previous more important selection methods and now include: (i) the QCBS,<sup>243</sup> (ii) the FBS,<sup>244</sup> (iii) the LCS,<sup>245</sup> (iv) the QBS,<sup>246</sup> (v) consultant’s qualification based selection,<sup>247</sup> and (vi) direct selection.<sup>248</sup> In turn, the AOAs now, among others, include special provisions for (i) commercial practices, and (ii) non-profit organizations.<sup>249</sup> Finally, market approaches now include (i) open,<sup>250</sup> (ii) limited,<sup>251</sup> (iii) international,<sup>252</sup> and (iv) national approach.<sup>253</sup> “Limited” market approach needs to go in tandem with direct selection (one of ASMs), whereas other MAOs can be almost freely matched with the other ASMs and AOAs.<sup>254</sup> As far as international liberalization of consulting

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239. WBCG, *supra* note 150, § 3.5.

240. *Id.* § 3.6.

241. WBPR, *supra* note 9, acronyms and glossary ¶ 15.

242. *Id.* annex XII, § 2.1.

243. *Id.* § 8.8.

244. *Id.* §§ 8.9-8.10.

245. *Id.* §§ 8.11-8.12.

246. WBPR, *supra* note 9, §§ 8.13-8.15.

247. *Id.* §§ 8.16-8.17.

248. *Id.* §§ 8.18-8.20.

249. *Id.* §§ 8.25, 8.27-8.28.

250. *Id.* §§ 8.21.

251. WBPR, *supra* note 9, § 8.22.

252. *Id.* § 8.23.

253. *Id.* § 8.24.

254. *See id.* § 8.1 tbl. 2.

services is concerned, similar to WBCG, the consultant-specific rules under WBPR do not allow imposing any price penalties on foreigners.<sup>255</sup> However, the distinctions between international and national market approaches are new to consulting services and, to some extent, might adversely affect unhindered international competition among consultants. Foreigner consultants could still compete for contracts awarded under the national market approach.<sup>256</sup> Nonetheless, relaxed provisions allowing the use of local languages<sup>257</sup> or advertising on local media only<sup>258</sup> are likely to put foreigners at a significant disadvantage.

#### *E. Approach to Sustainability*

The major point where subsequent versions of the World Bank procurement rules have met the GPA and EU's procurement directives has been the trend toward greater recognition of procurers' rights to integrate non-commercial (in other words non-value-for-money oriented) considerations at various stages of the procurement process.<sup>259</sup> Previously, the quest for achieving the lowest cost or best value for money was a priority in the case of all international instruments regulating procurement markets. In the course of the negotiations on the GPA79, the prevailing majority of negotiators agreed with the idea that "the aim of government purchasing should be to obtain the best value for public funds spent and not to pursue various socio-economic objectives, e.g. the protection of infant industries, etc. Exceptions and derogations taken together could undermine the whole purpose of negotiating rules of government procurement;"<sup>260</sup> and subsequently, the GPA parties' representatives in the GATT Committee on Government Procurement adopted such view. For example, in 1984, the U.S. representative noticed that "[w]hile there seemed to be general recognition of the fact that certain environmental factors affected procurement of services, some delegations had felt that the proposed work went beyond procurement matters and the Committee's competence."<sup>261</sup>

Similarly, the first EC's procurement directives were initially meant to help the integration of EC Members States' public procurement market

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255. See generally *id.* Annex IV.

256. See generally WBPR, *supra* note 9, annex IV.

257. See *id.* § 6.11.

258. See *id.* § 6.17.

259. Gorski, *supra* note 178, at 307.

260. GATT Secretariat, *Checklist of Points Summarizing Views on Specific Issues in the Area of Government Procurement*, at 14, GATT Doc. MTN/NTM/W/96 (Apr. 22, 1977).

261. Committee on Government Procurement, *Minutes of Meeting Held on 1 - 2 February 1984*, at 10, GATT Doc GPR/Spec/33 (Mar. 9, 1984).

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and were prepared in the moment when transitional provisions under the Treaty of Rome (still allowing even custom duties between Member States until December 1969) were about to expire.<sup>262</sup> The three earliest generations of the directives did not expressly allow procurers to use non-commercial considerations. Incidental actions of the EC/EU institutions eventually led to the major shift with regard to that matter, starting from (i) the sui generis Commission's Communication stating that "[t]he best value for money objective in public procurement [did] not exclude taking environmental, social and consumer protection considerations into account" published in 1998,<sup>263</sup> and (ii) the *Concordia* case decided in 2002, whereby the European Court of Justice confirmed that procurers within the EU can follow this Communication.<sup>264</sup> Subsequently, fourth generation directives<sup>265</sup> referred to *Concordia* in their preambles emphasising that "Directive[s] [had been] based on Court of Justice case-law, in particular case-law on award criteria, which [had] clarifies[d] the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area."<sup>266</sup> Fourth generation directives also laid down more precise conditions of the incorporation of non-commercial considerations, by allowing employment of public procurement, among others to support sheltered employment,<sup>267</sup> as well as to protect environment and labour rights.<sup>268</sup>

Meanwhile, the negotiations on the revisions of the GPA94 were on the way. Although all details of negotiations are not yet declassified by the WTO, it is clear that, in 2001, only the EU submitted proposals regarding

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262. See Treaty Establishing the European Economic Community art. 8(7), Mar. 25, 1957, 298 U.N.T.S. 311 (articles 13-15 of the Treaty of Rome provided a highly complex algorithm of the reduction of customs between Member States during that transitional period).

263. *Communication from the Commission on the Public Procurement in the European Union*, at 25, COM (1998) 143 final (Mar. 11, 1998).

264. See Case C-513/99, *Concordia Bus Finland Oy Ab v. Helsingin kaupunki*, 2002 E.C.R. I-0751; see also Case C-513/99, Opinion of Mr. Advocate General Mischo, 2001 E.C.R. I-7215.

265. See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. (L 134) 114-240; Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, 2004 O.J. (L 134), 1-113.

266. Directive 2004/18, *supra* note 266, preamble ¶ 1; Directive 2004/17, *supra* note 266, preamble ¶ 1.

267. Directive 2004/18, *supra* note 266, preamble ¶ 29, art. 19, art. 23 ¶ 6, annex VII; Directive 2004/17, *supra* note 266, preamble ¶ 29, art. 34 ¶ 6, annex XXI.

268. Directive 2004/18, *supra* note 266, art. 27.

the GPA's provisions on technical specification.<sup>269</sup> As a result, the WTO Committee on Government Procurement soon followed the developments in the EU by agreeing in December 2006 (in the first complete version of the GPA's 94's proposed revision) to allow procurers to incorporate environmental considerations in technical specifications<sup>270</sup> and in evaluation criteria.<sup>271</sup> Those changes were eventually accepted in 2012 after another 6 years of negotiations on the coverage of the revised agreement.<sup>272</sup>

Parallel to those developments, a similar initial stance of the World Bank's approach to social and environmental considerations underwent an analogical change of paradigm, despite the fact that the World Bank's personnel in charge of procurement regulation was traditionally strongly opposed to any non-commercial consideration in projects financed by this bank.<sup>273</sup> The World Bank's "Initiating Discussion Paper" of March 2012, covering future necessary amendments to procurement guidelines,<sup>274</sup> widely addressed the postulate of the recognition of public procurement as a tool of public policy,<sup>275</sup> including social<sup>276</sup> and environmental<sup>277</sup> goals. However, after the revised GPA was accepted, subsequent discussion-documents of the World Bank did not go that far.<sup>278</sup> A recognition of non-

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269. See WTO Committee on Government Procurement, *Minutes of the Meeting Held on 21 February 2002*, ¶ 65, WTO Doc. GPA/M/17 11 (May 2, 2002).

270. "For greater certainty, a Party, including its procuring entities, may, in accordance with this Article, prepare, adopt, or apply technical specifications to promote the conservation of natural resources or protect the environment." See WTO Committee on Government Procurement, *Prepared by the Secretariat, Revision of the Agreement on Government Procurement as at 8 December 2006*, art. X.6 WTO Doc. GPA/W/297 (Dec. 11, 2006).

271. "The evaluation criteria set out in the notice or tender documentation may include, among others, price and other cost factors, quality, technical merit, environmental characteristics, and terms of delivery." See *id.* art. X.9.

272. See WTO Committee on Government Procurement, *Adoption of the Results of the Negotiations Under Article XXIV:7 of the Agreement on Government Procurement, following their verification and review, as required by the Ministerial Decision of 15 December 2011 (GPA/112)*, paragraph 5, WTO Doc. GPA/113 (Apr. 2, 2012).

273. See Tim Tucker, *A Critical Analysis of the Procurement Procedures of The World Bank*, in *PUBLIC PROCUREMENT: GLOBAL REVOLUTION 153* (Sue Arrowsmith & Arwel Davies eds. 1998).

274. See generally *World Bank's Procurement Policies*, *supra* note 24.

275. See *id.* ¶ 53, at 24.

276. See *id.*

277. See *id.* ¶ 54, at 24, 25.

278. "The current policy and procedures are neutral with respect to social and environmental sustainability. The guidelines do not prevent such concerns being taken into account in life cycle costs and benefits, but this flexibility is rarely used. The proposed new framework provides opportunities to advance and accommodate borrower sustainable procurement policies and approaches (including green sustainable procurement), quality evaluation, corporate and social responsibility provisions, as well as integrity issues. Phase II, in

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commercial considerations in the course of the WBGs' revision of 2014 was eventually – similar to the GPA12<sup>279</sup> – confined to the green light for including environmental considerations in technical specifications.<sup>280</sup>

A major change had to wait until the adoption of the WBPR, in which the problem of “sustainable procurement” has been widely addressed. The WPRR widely embraced the problem of non-commercial considerations, in the way that “[i]f agreed with the Bank, Borrowers may include sustainability requirements in the Procurement Process, including their own sustainable procurement policy requirements where they are applied in ways that are consistent with the Bank’s Core Procurement Principles.”<sup>281</sup> A wordy Annex VII to the WBPR specifically addressing sustainable procurement further clarified that sustainability-related criteria can be applied at procurement stages such as, (i) pre-qualification of firms, (ii) functional and/or detailed technical specifications, (iii) evaluation criteria, or (iv) contract terms and conditions.<sup>282</sup> Annex VII also clarifies, for example, that “[s]ustainable procurement requirements may specify materials to be used in production and/or the method of production or service delivery. However, all technical specifications should bear a link to the subject matter of the contract, and can only include those requirements that are related to the production of the goods, works, general or consulting services being procured.”<sup>283</sup> Interestingly enough, it might also be no coincidence that Annex VII also indicates that “[t]he Borrower may adopt international sustainability standards covering a wide range of product and service groups”<sup>284</sup> which is in line with major sustainability-

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coordination with the parallel review of safeguards policies, will elaborate this area further. It is proposed to promote the benefits of sustainable procurement to the borrowers at both a systemic policy level and at a project level identifying key projects with sustainability impacts. More support will be provided to borrowers to assess value for money, including such issues as guaranteed lifespan, consumables, energy consumption, disposal costs etc. – so that better procurement decisions can be taken. The Bank will include sustainable procurement as part of its own internal procurement capacity development, ensuring internal skills remain contemporary.” See World Bank, *Procurement in World Bank Investment Project Finance Phase I: A Proposed New Framework - Revised. The Vision: “Procurement in Bank Operations Supports Clients to Achieve Value for Money with Integrity in Delivering Sustainable Development* (Oct. 18, 2013), available [at http://siteresources.worldbank.org/PROCUREMENT/Resources/ProcurementProposedNewFrameworkOctober2013Final.pdf](http://siteresources.worldbank.org/PROCUREMENT/Resources/ProcurementProposedNewFrameworkOctober2013Final.pdf) (last visited Apr. 28, 2017).

279. See generally GPA12, *supra* note 16.

280. WBG, *supra* note 148, § 2.52.

281. WBPR, *supra* note 9, § 5.9.

282. *Id.* annex VII, § 3.2.

283. *Id.* annex VII, § 3.7.

284. *Id.* annex VII, § 3.5.

related development in the EU's fifth generation directives<sup>285</sup> (to be implemented from 2016-2018) listing a number of almost universally accepted agreements, to which suppliers/contractors have to conform to regardless of the place of their operations.<sup>286</sup>

#### F. Conflict Rules

Finally, with regard to the existing system, it should not be overlooked that procurement-related requirements imposed by the MDBs on financed projects have always been given precedence over the instruments of the international regulation of government procurement markets. As mentioned, there has been an unwritten division of labour between the MDBs on the one hand and the GPA and RTAs covering procurement on the other.<sup>287</sup> Nonetheless, subsequent versions of the GPA have always allowed the non-application of liberalizing commitments of this agreement in the case of conflict. The penultimate GPA94 provided that “[h]aving regard to general policy considerations relating to tied aid, including the objective of developing countries with respect to the untying of such aid, this Agreement does not apply to procurement made in furtherance of tied aid to developing countries so long as it is practised by Parties.”<sup>288</sup> The most recent GPA12 stipulates that the agreement should not apply “under the particular procedure or condition of an international organization, or funded by international grants, loans or other assistance where the applicable procedure or condition would be inconsistent with this Agreement.”<sup>289</sup> Likewise, the EU's fifth-generation directives also stipulate that they:

shall not apply to public contracts and design contests which the contracting authority awards or organises in accordance with procurement rules provided by an international organisation or international financing institution, where the public contracts and design contests concerned are fully financed by that organisation or institution; in the case of public contracts and design contests co-financed for the most part by an international organisation or

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285. See Council Directive 2014/24/EU 2014 O.J. (L 94) 65-242; Council Directive 2014/25/EU 2014 O.J. (L 94) 243-374; Council Directive 2014/23/EU 2014 O.J. (L 94), 1-64.

286. See Council Directive 2014/24/EU, *supra* note 286, annex X; Directive 2014/25/EU, *supra* note 286, annex XIV.

287. See Reich, *supra* note 19, at 994.

288. GPA12, *supra* note 16, art. XVI.2.

289. *Id.* art. II (3) (e) (iii).

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international financing institution the parties shall agree on applicable procurement procedures.<sup>290</sup>

The nature of possible discrepancies between the GPA procurement regime and the consultant specific rules is very different. At first glance, the use of predominantly qualitative criteria while selecting consultants under the WBCG could appear as inherently incompatible with the GPA regime. However, services, in principle, are still not satisfactorily covered with the annexes to the GPA or the RTAs. Further, some consultancy projects are anyway exempted from the GPA, for example, services related to research and development<sup>291</sup> or contests for architectural works.<sup>292</sup> In addition, over recent decades, some authors noticed a strong tendency in the MDBs' operations toward financing undertakings, which do not attract international competition or multinational corporations. According to Tucker, in the 1990s, the World Bank's financing underwent a transformation from a focus on largest infrastructural and industrial projects (which clearly prevailed in the World Bank's operations from 1950s to 1970s) to the lower-value projects, often related to farming.<sup>293</sup> Analogically, Hunja made a claim that – as a result of the evolving character of the supported undertakings – the focus of the MDBs shifted from complex technical advice to advising in fields more related to legal transformation, privatisation process in transition economies, schooling or healthcare.<sup>294</sup>

Even in the case of the strict EU public procurement regime, the kind of projects in which existing MDBs have a growing interest, and to which Hunja or Tucker referred, has largely overlapped with procurement subjected to limited regulation. Specifically, until the fifth generation directives, in the case of so-called “non-priority” or “Annex II.B” services – covering among others legal advice, and services related to education (vocational education included) recreation, culture and sport<sup>295</sup> – procurers were merely obliged to properly publish calls for competition and prepare non-discriminatory technical specifications.<sup>296</sup> More recently, along with the adoption of the fifth generation directives, the distinction between priority and non-priority services had been abolished. Still, however, very

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290. Council Directive 2014/24, *supra* note 286, art. 9.2.

291. GPA12, *supra* note 16, art. XIII.1.f.

292. *Id.* art. XIII.1.h.

293. See Tucker, *supra* note 274, at 141.

294. See Hunja, *supra* note 12, at 222.

295. Council Directive 2004/18, *supra* note 266, annex II.B.

296. *Id.*

limited regulation (confined to proper publicity,<sup>297</sup> as well as transparency and equal treatment of bidders<sup>298</sup>) remains in place for health-related, social and education services.<sup>299</sup>

For existing MDBs gradually withdrawing from financing infrastructure or industrial plants, such trends pretty clearly mitigate the risk of actual conflicts with international procurement-related liberalizing commitments binding their borrowers. However, one can reasonably predict that this will not be the case with the AIIB because of the “traditional” (infrastructure-related) nature of its projects, also implying a similar (technical) nature of related necessary consulting projects adding to challenges faced by experts drafting AIIB’s final procurement rules.

### III. INTERIM OPERATIONAL DIRECTIVE

#### A. Structure and Relations with other Documents

The release of IDPIR in June 2016 answered many questions about the details of AIIB’s procurement regime that still remained after the release of the Procurement Policy in February 2016. The most general decision that AIIB’s procurement experts had to make was purely technical, i.e. whether to follow the new WBPR and combine general and consultant-specific-rules in one document or to keep the separate structure of previous WBG and WBCG. A more significant and substantial issue for the AIIB experts, regardless of the answer to the first question, was whether to still model the detailed solutions of the IDPIR after the WBG/WBCG or draw upon the WBPR. On one hand, the IDPIR was eventually released as one unified document with a structure rather than following the WBPR and have included many further discussed solutions brought about by the WBPR. For the record, the IDPIR has been divided into four section including (i) “Introduction” covering IDPIR’s purpose, vision, scope of application and definitions,<sup>300</sup> (ii) the core section titled “Procurement of Goods, Works and Services by Public Entities,”<sup>301</sup> (iii) “Procurement by Private Entities,”<sup>302</sup> and (iv) “Prohibited Practices.”<sup>303</sup> Similar to the WBPR regulations, and unlike previous WBG/WBCG, the IDPIR is accompanied by a number of Annexes, including (i) value for

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297. Council Directive 2014/24, *supra* note 286, art. 92.

298. *Id.* art. 93.1.

299. However, provisions of fifth generation directives related to such services apply above way higher value thresholds than prior to the fifth generation. See *id.* annex XIV.

300. Compare IDPIR, *supra* note 5, § 1-2, with WBPR, *supra* note 9, §§ I.A, I.B.

301. Compare IDPIR, *supra* note 5, § 3-13, with WBPR, *supra* note 9, §§ III-VIII.

302. Compare IDPIR, *supra* note 5, § 14, with WBPR, *supra* note 9, § 7.43.

303. IDPIR, *supra* note 5, § 15. Analogical provisions cannot be found in the WBPR.

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money (VfM),<sup>304</sup> (ii) project delivery strategy (PDS),<sup>305</sup> (iii) public private partnerships (PPPs) and concessions,<sup>306</sup> (iv) complaint monitoring,<sup>307</sup> and (v) development of domestic industry.<sup>308</sup>

On the other hand, however, the IDPIR significantly differs from the WBPR. Most crucially, unlike the WBPR, the IDPIR has not dismantled various approaches to international liberalization of procurement markets and specific procurement methods into separate MAOs. On one hand and APMs/APAs on other hand which, without a doubt, has been WBPR's greatest substantial novelty (*compare* section II.C on the WBPR; section III.B on the IDPIR). Moreover, the IDPIR is a much shorter and more concise document than the WPPR (49 pages against 128), arguably because procurement-related matters have also been regulated in a number of other AIIB's documents, whereas the WBPR aspire to be the World Bank's self-standing external procurement-related document.<sup>309</sup> As listed in article 8 of the Procurement Policy, such procurement-relevant documents, apart from the IDRIP and AIIB's internal documents, include (i) 'Environmental and Social Policy,'<sup>310</sup> (ii) 'Directive: Environmental and Social Procedures,'<sup>311</sup> (iii) 'Policy on Prohibited Practices,'<sup>312</sup> (iv)

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304. *Compare* IDPIR, *supra* note 5, annex I, with WBPR, *supra* note 9, annex I.

305. *Compare* IDPIR, *supra* note 5, annex II, with WBPR, *supra* note 9, annex II.

306. *Compare* IDPIR, *supra* note 5, annex III, with WBPR, *supra* note 9, annex XIV.

307. *Compare* IDPIR, *supra* note 5, annex IV, with WBPR, *supra* note 9, annex III.

308. *Compare* IDPIR, *supra* note 5, annex V, with WBPR, *supra* note 9, annexes V, VI.

309. Admittedly, in the case of the World Bank, the WBPR as the core document are accompanied with a more general document titled "Bank Policy Procurement in IPF and Other Operational Procurement Matters," similar to the AIIB Procurement policies. See World Bank, *Bank Policy Procurement in IPF and Other Operational Procurement Matters*, World Bank Doc. OPSVP5.05-POL.144 (issued June 28, 2016, effective July 1, 2016). Plus, both the WBRP and the IDPIR are meant to be accompanied with additional internal documents addressed to their staff. In the case of the AIIB World Bank, as of late December 2016, the document titled "Directive: Procurement Instructions for Staff" listed by article 8 of the AIIB Procurement Policy had not been released. For the current World Bank's procurement-related instructions for the staff, see *Bank Procedure: Procurement in IPF and Other Operational Procurement Matters*, World Bank Doc. OPSVP5.05-PROC108 (issued June 28, 2016, effective July 1 2016). For the previous World Bank instructions applicable along with WBG/BCG, see World Bank, *Operational Policies: Procurement*, World Bank Doc. OP 11.00 (Jan. 2011, revised 1 July 2014); World Bank, *Bank Procedures: Procurement*, World Bank Doc. BP 11.00 (Jan. 2011, revised July 2014).

310. ESF, *supra* note 143; see also *infra* § V.

311. See *id.*

312. *Policy on Prohibited Practices*, AIIB (Dec. 8 2016), available at [https://www.aiib.org/en/policies-strategies/\\_download/policy-on-prohibited-practices/policy\\_on\\_prohibited\\_practices.pdf](https://www.aiib.org/en/policies-strategies/_download/policy-on-prohibited-practices/policy_on_prohibited_practices.pdf) (last visited Apr. 12, 2017); see also *infra* § V.

'Operational Policy on Financing,'<sup>313</sup> (v) 'Operational Directive on Sovereign-backed Financing,' (vi) 'Public Information Interim Policy,'<sup>314</sup> and (vii) 'General Conditions applicable to Sovereign-backed Loans.'<sup>315</sup>

There are positives and negatives to such structure of AIIB's documents. The upside is that, the IDPIR is much more readable compared with the long-winded and repetitive WBPR (*see section Error! Reference source not found. in fine*). The downside is that not all procurement-related provisions can be found in the IDPIR and some IDRIP's provisions overlap with provisions of other documents. For example, while the WBPR include a procurement specific annex related to sustainability,<sup>316</sup> both the Procurement Policy and the IDPIR very generally refer to bank's "environmental and social policy."<sup>317</sup> The requirement that the AIIB "shall place no restriction upon the procurement of goods and services from any country from the proceeds of any financing undertaken in the ordinary or special operations of the Bank"<sup>318</sup> has been repeated in the AOA, Procurement Policy, the IDPIR and in the Operational Policy on Financing verbatim.<sup>319</sup> Provisions on the publication of procurement notices are repeated in both the IDPIR and the Public Information Interim Policy.<sup>320</sup>

### B. Scope of Application

The scope of the IDPIR's application is, in principle, not unlike in the case of other MDBs. The AIIB Procurement Policy specifies that the

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313. *Operational Policy on Financing*, AIIB (Jan. 2016), available at [https://www.aiib.org/en/policies-strategies/\\_download/operation-policy/policy\\_operational\\_financing.pdf](https://www.aiib.org/en/policies-strategies/_download/operation-policy/policy_operational_financing.pdf) (last visited Apr. 12, 2017).

314. *Public Information Interim Policy*, AIIB (Jan. 2016) available at [https://www.aiib.org/en/about-aiib/.content/index/\\_pdf/20160226052345422.pdf](https://www.aiib.org/en/about-aiib/.content/index/_pdf/20160226052345422.pdf) (last visited Apr. 12, 2017).

315. *Sovereign-Backed Loan and Guarantee Pricing*, AIIB (Jan. 2016), available at [https://www.aiib.org/en/policies-strategies/\\_download/sovereign-backed/policy\\_sovereign\\_backed\\_loan\\_and\\_guarantee\\_pricing.pdf](https://www.aiib.org/en/policies-strategies/_download/sovereign-backed/policy_sovereign_backed_loan_and_guarantee_pricing.pdf) (last visited Apr. 12, 2017); *General Conditions for Sovereign-Backed Loans*, AIIB (May 1, 2016) available at [https://www.aiib.org/en/policies-strategies/\\_download/general-conditions/policy\\_general\\_conditions\\_sovereign\\_backed\\_loans.pdf](https://www.aiib.org/en/policies-strategies/_download/general-conditions/policy_general_conditions_sovereign_backed_loans.pdf) (last visited Apr. 12, 2017).

316. WBPR, *supra* note 9, § 5.9, annex VII.

317. AIIB Procurement Policy, *supra* note 3, § 1.2 (f); the IDPIR, *supra* note 5, § 11.4.

318. AIIB Articles of Agreement, *supra* note 113, art. 13.8.

319. Compare AIIB Articles of Agreement, *supra* note 113, art. 13.8, and AIIB Procurement Policy, *supra* note 3, § 4.1, with IDPIR, *supra* note 5, § 1.1, and Operational Policy on Financing, *supra* note 314, § 3.1.3 (g), and WBPR, *supra* note 9, § 3.26.

320. See IDPIR, *supra* note 5, §§ 9, 10.1.1; *Public Information Interim Policy*, *supra* note 315, § 7 (c).

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IDPIR applies to “the procurement of goods, works, non-consulting services and consulting services required for a Project that are to be financed by the Bank,”<sup>321</sup> where the project has been defined as “the specific set of activities defined in the agreement between the Bank and the Recipient providing for Bank financing of said activities, regardless of the financing instrument or the source of such financing or whether the Project is financed in whole or in part by the Bank.”<sup>322</sup> Arguably, because of the discussed scale of co-financing, IDPIR also precisely provides that it applies to (i) projects “financed in whole or in part by the Bank,” and (ii) projects financed from “funds provided by other financiers and administered by the Bank where the procurement is carried out by the Recipient and the agreement establishing such funds stipulates the use of the Bank’s Procurement Policy.”<sup>323</sup>

Like the WBPR, the IDPIR does not apply to contracts related to projects financed under the loans only guaranteed by the AIIB,<sup>324</sup> where the contracts related to projects financed under the loans are only guaranteed by the AIIB, it only requires that such contracts (i) “are procured in a manner so as to enable the Recipient to carry out the Project diligently and efficiently,”<sup>325</sup> (ii) “are of satisfactory quality and compatible with the other parts of the Project,”<sup>326</sup> (iii) “are delivered or completed in timely fashion,”<sup>327</sup> and (iv) “are priced so as not to affect adversely the economic and financial viability of the Project.”<sup>328</sup> While the WBPR clarified and their application to leased assets<sup>329</sup> and second-hand goods,<sup>330</sup> no such provisions can be found in the IDPIR.

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321. Compare AIIB Procurement Policy, *supra* note 3, § 3.1, with WBPR, *supra* note 9, § II (A).

322. AIIB Procurement Policy, *supra* note 3, § 2.1 (a).

323. *Id.* at § 3.2.

324. IDPIR, *supra* note 5, § 1.2.2.

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. WBPR, *supra* note 9, § 5.8. Under the WBPR, leasing can be used if (i) “agreed with the Bank and specified in the Procurement Plan, including any risk mitigation measures to be applied” and (ii) “there are economic and/or operational benefits to the lessee (e.g., lower financing costs, tax benefits, assets used for a temporary period, reducing risks of obsolescence).” *Id.*

330. See WBPR, *supra* note 9, § 5.11. Under the WBPR, second-hand goods might be procured if “doing so would provide the most economic and efficient means of satisfying the project’s development objectives.” See WBPR, *supra* note 9, § 5.11. However, this is subject to several conditions, namely that (i) “[p]rocurement for second-hand goods shall be separate from the procurement of new goods” (see *id.* § 5.11.a), (ii) “[t]he technical requirements/specifications

*C. Core Principles*

The IDPIR has closely followed the WBPR general rules. To start with, it has built the entire procurement regime around the concept of core procurement principles, including economy, efficiency, effectiveness, fairness, VfM, fitness-for-purpose,<sup>331</sup> and transparency. These might look like bold slogans at the first glance, however, these serve their purpose well, which is to form a set guiding principles for the AIIB with regard to whether to allow borrowers to use other procurement solutions than the default provisions prescribed in the IDPIR. The WBPR took a similar approach, under which the consistency with World Bank's core procurement principles is a prerequisite, allowing (by the World Bank staff) borrowers to apply refer to the APAs<sup>332</sup> (*see* section **Error! Reference source not found.**), impose sustainability requirements<sup>333</sup> (*see* section II.D), or use commercial practices instead of any specific formalized procurement method.<sup>334</sup> Under the IDPIR, the consistency with AIIB's core procurement principles is set up as a precondition for many more deviations from AIIB's default procurement rules. On condition of such consistency, the AIIB staff may allow borrowers to use country procurement systems<sup>335</sup> (*see further* section **Error! Reference source not found.**), apply procurement methods other than international competitive bidding such as national competitive bidding,<sup>336</sup> as well as to pursue policies aimed at the development of domestic industries.<sup>337</sup> Moreover, the AIIB staff needs to take such consistency into consideration while approving projects engaging PPPs or concessions,<sup>338</sup> or while entering into mentioned co-financing related common-procurement-procedure frameworks concluded with other MDBs.<sup>339</sup>

The majority of the core principles state the obvious: the principle of economy pretty enigmatically requires that the total price of the contract

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shall describe the minimum characteristics of the second hand goods, including the age and condition," and (iii) "[t]he warranty provisions shall be specified." *See id.* § 5.11 (c).

331. Compare IDPIR, *supra* note 5, § 3.1.6, with AIIB Procurement Policy, *supra* note 3, § 5.1.6 and WBPR, *supra* note 9, § 1.3 (d).

332. *See* WBPR, *supra* note 9, art. 2.4(a).

333. *Id.* § 5.9, annex VII, § 1.1.

334. *See* WBPR, *supra* note 9.

335. IDPIR, *supra* note 5, § 7.

336. *Id.* §§ 10, 10.4, 13.2.

337. *Id.* § 11.5, annex V, ¶ 2 (c).

338. *Id.* § 10.7, annex III, ¶ 2.

339. *Id.* § 6.1; *see also infra* § 0.

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should not have negative impact on a given project.<sup>340</sup> The principle of efficiency mandates that the arrangements related to procurement implementation should be proportional to the required outcomes and be cost effective.<sup>341</sup> The principle of effectiveness (which in the WBPR has been included in the principle of economy and does not form a separate principle) adds that the procurement process should facilitate not only the achievement of goals of given project but also the achievement of borrowers' socio-economic and other development objectives.<sup>342</sup> The principle of fairness calls for conducting procurement in an open, fair, non-discriminatory manner and for providing equitable opportunities and treatment of tenderers.<sup>343</sup> The principle transparency demands that sufficient and relevant information should be made available in an open manner and to all interested parties.<sup>344</sup>

The principle of VfM and the principle, that procurement process shall be fit-for-purpose, are much more complex. At the outset, the VfM basically means that borrowers should seek to obtain optimal benefits with the resources utilized, among others including initial and life-cycle costs of procured item, output quality, timeliness, and the pursuit of non-commercial socio-economic and environmental objectives of the borrowers.<sup>345</sup> Like in the case of the WBPR, the meaning of VfM has been specified in a separate and dense annex.<sup>346</sup> It advises that the VfM can be achieved, among others, through proportionality of the procurement approach, value, context and strategic importance of specific procurement.<sup>347</sup> It also encourages precise determination of cost-related and non-cost-related requirements where possible on life cycle basis,<sup>348</sup> precise determination of evaluation criteria and aligning criteria,<sup>349</sup> and effective contract management.<sup>350</sup> In turn, the fit-for-purpose paradigm,

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340. Compare IDPIR, *supra* note 5, § 3.1.1, with AIIB Procurement Policy, *supra* note 3, § 5.1.1, and WBPR, *supra* note 9, § 1.3 (b).

341. Compare IDPIR, *supra* note 5, § 3.1.2, with AIIB Procurement Policy, *supra* note 3, § 5.1.2, and WBPR, *supra* note 9, art. 1.3 (e).

342. IDPIR, *supra* note 5, § 3.1.3; AIIB Procurement Policy, *supra* note 3, § 5.1.3.

343. Compare IDPIR, *supra* note 5, § 3.1.4, with AIIB Procurement Policy, *supra* note 3, § 5.1.4, and WBPR, *supra* note 9, § 1.3 (g).

344. Compare IDPIR, *supra* note 5, § 3.1.7, with AIIB Procurement Policy, *supra* note 3, § 5.1.7, and WBPR, *supra* note 9, § 1.3 (f).

345. Compare IDPIR, *supra* note 5, § 3.1.5, with AIIB Procurement Policy, *supra* note 3, § 5.1.5, and WBPR, *supra* note 9, § 1.3 (a).

346. Compare IDPIR, *supra* note 5, annex I, with WBPR, *supra* note 9, annex I.

347. IDPIR, *supra* note 5, annex I, § 3 (b).

348. *Id.* annex I, § 3 (c).

349. *Id.* annex I, § 3 (e).

350. *Id.* annex I, § 3 (f).

which is complementary with the VfM, means that (i) “[s]tandardized approaches may be used for low-value, low-risk or low-complexity procurement,”<sup>351</sup> and (ii) “[w]here procurement complexity, risk and impact are high, a customized approach with transaction-specific documentation and method may be the most efficient and effective approach.”<sup>352</sup>

Interestingly, when the AIIB first revealed the Procurement policy in January 2016, AIIB’s take on procurement’s fitness-for-purpose could seem somewhat staggering. The concept of customized approach was not explained in that document so it could *prima facie* be associated with very flexible procurement process loosely based on rules. The idea that a procurement system offered more flexibility in the case of high-value rather than low-value contracts would defy the common logic of regulating public procurement which has always been the higher the public contract value, the stricter the regulation. The customization of procurement process would not be left to the discretion of AIIB’s borrowers/procurers, but rather it would be hand-operated by the AIIB staff. Nonetheless, prior to the release of the IDPIR six months later, one could fear that such discretion of the AIIB staff might mean virtually anything, including for example the pursuit of AIIB’ largest shareholders’ covert agendas.

#### D. General Provisions

The IDPIR has also partially mimicked other general provisions of the WBPR, which in principle could not be found in or were not clear enough under previous WBG/WBCG. First, while various international instruments regulating procurement markets have always been strongly biased against interactions between procurers and potential tenderers, the IDPIR has followed the WBPR in clarifying that a diligent market research must precede the preparation of a project delivery strategy (PDS) along with procurement plan, in order to (i) “develop a thorough understanding of the relevant sectors and potential tenderers and consultants; how the market works and how this may impact the approach to the market and methods used to procure,”<sup>353</sup> and (ii) assess “issues that affect the risks and VfM of the project.”<sup>354</sup> The PDS is a simplified

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351. *Id.* § 3.1.6; AIIB Procurement Policy, *supra* note 3, § 5.1.6.

352. *Id.*

353. Compare IDPIR, *supra* note 5, § 3.3, with WBPR, *supra* note 9, annex V, §§ 3.1, 3.5-3.6. The WBG did not include provisions related to market research or similar preliminary activities preceding the preparation of procurement plan or the commencement of actual procurement process. See generally WBG, *supra* note 148.

354. *Id.*

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equivalent of World Bank's Project Procurement Strategy for Development; The PDS needs to justify the choice of specific procurement methods as well as explain, among others, how the procurement under a specific project will support such project's developmental goals, or how will it deliver the best VfM.<sup>355</sup> In turn, the procurement plan needs to include information about chosen procurement methods, types of contracts to be concluded and a predicted timeline.<sup>356</sup> Both the PDS and the procurement plan in principle need to be approved by the AIIB staff before the completion of loan negotiations.<sup>357</sup> However, in special cases, the AIIB may also agree to the retroactive financing of contracts concluded by borrowers prior to signing loan agreements.<sup>358</sup> Identically with the WBPR, the pre-procurement phase concludes with the release of a General Procurement Notice (GNP - in essence summarising the PDS and procurement plan) that must precede a publication of any Specific Procurement Notice (SPN) which, in turn determines details of particular contract.<sup>359</sup>

The competition for contracts is hedged with a number of conditions to start with that borrowers, in the case of large and complex contract, may require tenderers to participate in a prequalification process, in which borrowers can assess tenderers' past-performance with similar contracts, technical and personnel-related capability or their financial standing.<sup>360</sup> At their discretion, borrowers can also require tenderers to provide tender security or, alternatively, to sign a declaration that a given tenderer will be suspended from being eligible for competing for contract for a specified period of time if such tenderer withdraws or modifies submitted tender or fails to sign an awarded contract.<sup>361</sup> The core principle of participation is that, for one contract, a tenderer can submit only tender regardless of whether individually or as partner of a joint venture or a member of a consortium.<sup>362</sup> Yet, in contrast to the WBPR, the IDPIR fails to clarify

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355. Compare IDPIR, *supra* note 5, § 8.1, with WBPR, *supra* note 9, § 4.1, annex V. The WBGG only referred to procurement plan and did not require a preparation of a more general document similar to the Procurement Strategy for Development required by the WBPR. See WBGG, *supra* note 148, § 1.18.

356. Compare IDPIR, *supra* note 5, annex II, ¶ 6, with WBPR, *supra* note 9, § 4.1.4.3.

357. Compare IDPIR, *supra* note 5, § 8.1, with WBPR, *supra* note 9, § 4.3.

358. Compare IDPIR, *supra* note 5, § 8.2, with WBPR, *supra* note 9, § 5.1, and WBGG, *supra* note 148, § 1.11.

359. Compare IDPIR, *supra* note 5, §§ 9, 10.1.1, with WBPR, *supra* note 9, § 6.16.

360. Compare IDPIR, *supra* note 5, § 10.1.2, with WBPR, *supra* note 9, §§ 7.21-7.24.

361. Compare IDPIR, *supra* note 5, § 11.12, with WBPR, *supra* note 9, §§ 6.22-6.24.

362. Compare IDPIR, *supra* note 5, § 4.10, with WBPR, *supra* note 9, § 3.24.

that this rule does not apply where multiple tenders have been permitted.<sup>363</sup>

Affiliates of borrowers are not eligible for bidding unless a given borrower can prove to the AIIB that the degree of common ownership, influence or control between such borrower and its affiliate is insignificant.<sup>364</sup> Likewise, the state-owned enterprises (SOEs) shall not participate in tendering unless borrowers can prove to the AIIB that such SOEs do not operate under supervision of procurers and qualify as private entities.<sup>365</sup> Moreover, borrowers and tenderers shall not have various form of the conflict of interest, the existence of which also precludes them from bidding. These conflicts of interest include close business or family relationships between tenderers and borrowers, including any persons who are directly or indirectly involved in the procurement process or would be involved in the implementation or supervision of the awarded contract.<sup>366</sup> A conflict of interest also arises when bids are directly related to consulting services provided by the same entities or persons acting as consultants, or their affiliates.<sup>367</sup> In such cases, bids for providing goods, works, non-consulting services must be rejected.<sup>368</sup> In turn, in the case of proposal for the provision of consulting services, borrowers must provide all short-listed consultants with all relevant information that could give a competitive advantage to the consultant who did have the information (as a result of having previously provided consulting services) if such information was not shared with all consultants.<sup>369</sup>

As to the procurement process itself, IDPIR does not set specific minimum submission time limits and only advises that they must be adequate for allowing all tenderers to prepare and submit bids.<sup>370</sup> This is in contrast to the WBPR requirement of a minimum of 30 and 20 days in

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363. IDPIR, *supra* note 5. This does not mean that, under the IDPIR, borrowers are banned from permitting multiple tenders, as such possibility is mentioned in IDPIR § 12.1, relating to tender opening. IDPIR, *supra* note 5, § 12.1.

364. IDPIR, *supra* note 5, § 4.10.1. Similar provision cannot be found in the WBPR. See generally WBPR, *supra* note 9.

365. Compare IDPIR, *supra* note 5, § 4.10.2, with WBPR, *supra* note 9, § 3.28 (b). However, at the discretion of the AIIB, state-owned enterprises, universities, or research centers may be allowed to compete for contracts if the solutions they offer are unique and exceptional in nature, and there is an absence of appropriate alternatives available in the public sectors. Compare IDPIR, *supra* note 5, § 4.10.2, with WBPR, *supra* note 9, § 3.28(c).

366. Compare IDPIR, *supra* note 5, § 4.4.1 (b), with and WBPR, *supra* note 9, § 3.21 (b).

367. Compare IDPIR, *supra* note 5, §§ 4.4.1 (a), 4.4.2 (a), with WBPR, *supra* note 9, §§ 3.21 (a), 3.22 (a).

368. *Id.*

369. Compare IDPIR, *supra* note 5, § 4.4.3, with WBPR, *supra* note 9, § 3.23.

370. IDPIR, *supra* note 5, § 11.7.

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the case of international and national competition, respectively.<sup>371</sup> Likewise, the IDPIR very vaguely regulates the use of standardized bidding documents which normally lie at the core of regulation of procurement by MDBs. The temporary nature of the IDPIR is seen in that it make a virtually blanket reference to “Multilateral Development Bank Harmonized Standard Tender Documents” and acknowledges in a footnote that “[u]ntil such time as the Bank has developed its own standard tendering documents, Recipients may, where appropriate, chose to use STDs provided by other MDBs to draft their own tender documents.”<sup>372</sup> Further diverting from the WBPR, the IDPR does not specify in which particular procurement methods the use of the STDs shall be mandatory and in which the requirement could be waived by the AIIB staff,<sup>373</sup> and only very generally advises that:

[t]he detail and complexity of the documentation vary according to the size and nature of the contract, but generally they include an invitation to tender, instructions to tenderers, the form of tender, tender security requirements, the conditions of contract, advance payment guarantees, performance security requirements, technical specifications and drawings, a schedule or requirements for the goods, works or services, and the form of contract.<sup>374</sup>

Bidding processes in principle must be conducted in one stage. However, multi-stage tendering could be allowed under the IDPIR only when it would be inefficient to ask tenderers to provide complete technical specifications in advance, such as in the case of turnkey contracts or contracts for large complex plants or works of a specialized nature.<sup>375</sup> Under the multi-stage tendering, tenderers first submit un-priced technical proposals, and more precise tendering documents like final technical proposals along with priced tenders only in subsequent stages of the procurement process.<sup>376</sup> In all cases, tenders must be scrutinized as to whether they are abnormally low-priced, meaning that “the price in relation to the scope, methodology, technical solution and schedule, appears so unreasonably low that it raises concerns on the part of the Recipient regarding the tenderer’s capability to perform the contract

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371. WBPR, *supra* note 9, § 6.25.

372. Compare IDPIR, *supra* note 5, § 11.1 n.9, with WBPR, *supra* note 9, § 6.19.

373. The WBPR specifies that the World Bank’s standardized procurement documents must be used in international competitive procurement, whereas, in the case of national competitive procurement, the World Bank staff may accept borrowers’ own national procurement documents. See WBPR, *supra* note 9, § 6.18.

374. IDPIR, *supra* note 5, § 11.1.

375. Compare IDPIR, *supra* note 5, § 10.1.3, with WBPR, *supra* note 9, § 7.28.

376. *Id.*

successfully.”<sup>377</sup> In such cases, after receiving written clarifications from the tenderer that submitted such abnormally low-priced tender, the procurer has several options such as to accept this tender, reject it, or require such tenderer to provide higher performance security in case such tenderer wins the contract.<sup>378</sup>

Next, the evaluation of tenders under the IDPIR can also be made by the procurer using, in addition to the price criterion, factors such as (i) the costs of inland transport to the project site, (ii) the payment schedule, (iii) the time of completion of construction or delivery, (iv) the operating and maintenance costs, (v) the efficiency and compatibility of the equipment, (vi) performance, quality, and environmental benefits, (vii) and the availability of service and spare parts.<sup>379</sup> What happens after a potentially successful tenderer has been identified by the procurer, similar to the WBPR depends on whether a specific procurement process is subjected to AIIB’s prior review of procurement decisions, or has been classified as a procurement process with regard to which the AIIB can only optionally and *ex post* determine the compliance with the loan agreement.<sup>380</sup> Namely, at the AIIB’s discretion, the prior review is conducted in the case of high-value or high-risk contracts and this requirement is included in the procurement plan.<sup>381</sup> If this is the case, the borrower must provide the

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377. Compare IDPIR, *supra* note 5, § 12.4, with WBPR, *supra* note 9, § 6.42.

378. Compare IDPIR, *supra* note 5, § 12.4, with WBPR, *supra* note 9, §§ 6.43, 6.44.

379. See *id.* annex X, § 2.5 (e); IDPIR, *supra* note 5, § 12.6. The WBPR are much more complex with regard to evaluation criteria and devotes the entire annex X to this topic. Under annex X, the World Bank’s evaluation criteria include, (i) cost, which means either bid price or “bid price plus the running/recurrent cost over the useful life time of the asset on net present cost basis (“life-cycle-costs”)” (see WBPR, *supra* note 9, annex X, § 2.5 (a)), (ii) quality, defined as “the degree to which the characteristics of the goods, works, non-consulting services or consulting services meet the stated requirements in the bidding/request for proposals document” (see *id.* annex X, § 2.5.b), (iii) risk, which is included among evaluation criteria in order “to ensure that procurement can reasonably and efficiently adjust to unforeseen changes in design, capacity, technical, business or economic circumstances” (see *id.* annex X, § 2.5 (c)), (iv) sustainable procurement, meaning that procurers can take into account “stated economic, social, and environmental benefits in support of the project objectives, and may include the flexibility of the proposal to adapt to possible changes over the lifecycle” (see *id.* annex X, § 2.5 (d)), and (v) innovation, the purpose of which is “to give bidders the opportunity to include, when appropriate, in their bid/proposals, solutions that exceed the requirements in the bidding/request for proposals document that will benefit the Borrower in attaining VfM” (see *id.* annex X, § 2.5 (e)).

380. Compare IDPIR, *supra* note 5, §§ 4.2.1, 4.2.2, with WBPR, *supra* note 9, §§ 3.7, 3.8.

381. Compare IDPIR, *supra* note 5, § 4.2, with WBPR, *supra* note 9, §§ 3.9, 3.10. In the case of the IDPIR, additional requirements imposed on procurement/contracts subjected to prior review are scattered in the document and, apart from the standstill period and the tender evaluation report further discussed in this section, also include (i) providing the AIIB with any amendment to the PDS (see IDPIR, *supra* note 5, § 8.1.), and (ii) a requirement to obtain a no-

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AIIB with the tender evaluation report in order to receive AIIB's no-objection,<sup>382</sup> and also the standstill period applies, meaning that a borrower cannot enter into a contract earlier than ten days after the notification of intention to award this contract.<sup>383</sup> If any complaint is lodged by any tenderer within such period, the procurer needs to prepare a response to the bidder in writing.<sup>384</sup> The procurer should also seek to receive another clearance by the AIIB if the procurer wants to change the outcome of the tendering procedure previously indicated in the notification of the intent to award the contract.<sup>385</sup>

In addition, regardless of whether a specific contract is subjected to prior review or not, tenderers have the right to file complaints to the attention of the borrower or the AIIB at any stage of the procurement process, and the IDPIR generally mandates that the borrower shall make "every effort to address them objectively and in a timely manner, with transparency and fairness."<sup>386</sup> However, with regard to the contracts subjected to prior review, the IDPIR specifies that, in the case of complaints received not later than 10 days before tender submission deadline, the procurer shall (i) take "all action regarding complaint that it determines appropriate following review of the complaint, such as amending the tender" and inform the AIIB along with providing the AIIB with a draft response for review,<sup>387</sup> and (ii) if the tender has been modified as a result of a submitted complaint, publish an addendum of the SPN and extend the tender submission deadline if necessary.<sup>388</sup> Plus, in the case of complaints received after the tender submission deadline, the IDPIR

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objection letter from the AIIB with regard to handling the abnormally low-priced bids (*see id.*, § 12.4). In contrast, the WBPR offer a very precise list of actions required under a prior review which included providing the AIIB, among others, with (i) draft general and specific procurement notices, (ii) if prequalification is used by the procurer, the invitation to prequalify, the prequalification document, and the prequalification evaluation report, (iii) the bidding/request for proposals document such as the request of bids and/or requests for proposals, (iv) all requests for cancellation of a procurement process and/or rebidding/re-invitation of proposals, (v) if the procurement process involves negotiations between the borrower and tenderer, the minutes of negotiations and the draft contract, or (vi) the copy of the contract, and of the advance payment security and the performance security if they were requested, to be furnished to the bank promptly after its signing and prior to the making of the first payment. WBPR, *supra* note 9, § 2.11.

382. Compare IDPIR, *supra* note 5, § 12.4, with WBPR, *supra* note 9, § 2.11 (e).

383. Compare IDPIR, *supra* note 5, § 4.6.1, with WBPR, *supra* note 9, § 6.46.

384. Compare IDPIR, *supra* note 5, § 4.6.1, with WBPR, *supra* note 9, § 6.52.

385. *Id.*

386. Compare IDPIR, *supra* note 5, § 4.6, with WBPR, *supra* note 9, § 3.31.

387. Compare IDPIR, *supra* note 5, annex IV, § 5.1, with WBPR, *supra* note 9, annex III, § 2.4 (a).

388. *Id.*

requires that such complaints shall be examined in consultation with the AIIB.<sup>389</sup> The award of contract can only be notified once all complaints have been duly handled or the time for lodging such complaints has lapsed.<sup>390</sup> The award of contract must also be followed with a debriefing by the procurer of those unsuccessful tenders who lodged complaints,<sup>391</sup> and may be followed with the debriefing by the AIIB in the form of a meeting if the debriefing by the procurer was unsatisfactory.<sup>392</sup>

Finally, the IDPIR is much less detailed than the WBPR in relation to the terms and provisions of an awarded contract. While the WBPR devotes two annexes to contractual conditions,<sup>393</sup> the IDPIR simply suggests borrowers apply harmonized STDs used by existing MDBs, and only additionally use “appropriate alternative international standard model forms of contract incorporating internationally recognized terms and conditions”<sup>394</sup> in line with a document called “Non mandatory

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389. Compare IDPIR, *supra* note 5, annex IV, § 5.2, with WBPR, *supra* note 9, annex III, § 2.4 (b).

390. Compare IDPIR, *supra* note 5, § 4.6.1, with WBPR, *supra* note 9, § 6.53.

391. IDPIR, *supra* note 5, § 4.7. The WBPR is much more precise in this regard. It does not tangle the right to be debriefed with lodging a complaint, but rather (i) gives each unsuccessful tenderer a right to submit a motion for debriefing within 3 days from the notice of the intention to award the contract (*see* WBPR, *supra* note 9, § 6.57), (ii) sets the time limit for the procurer's response at 5 days (*see id.* § 6.58), (iii) allows debriefing to occur not only in writing, but also verbally (*see id.* § 6.59), and (iv) very precisely itemizes information which the procurer must provide (*see id.* § 6.60).

392. Compare IDPIR, *supra* note 5, § 4.8, with WBPR, *supra* note 9, § 6.64.

393. WBPR, *supra* note 9, annex VIII (Contract Types), and annex IX (Contract Conditions in International Competitive Procurement). The WBPR, at annex VIII, offers a non-exclusive list of contract types which can be used in contracts financed by the bank, which include (i) lump sum contracts denominating contract where “the contractor/consultant agrees to perform the scope of services for a fixed contract amount,” and “[p]ayment percentages or amounts may be linked to the completion of contractual milestones or determined as a percent of the value of the work to be done” (*see id.*, annex VIII, § 2.1), (ii) performance based contracts denominating contracts where “the payments are made for measured outputs instead of inputs. The outputs aim at satisfying functional needs in terms of quality, quantity and reliability” (*see id.* annex VIII, § 2.4), (iii) contract based on unit prices, denominating contracts which are “based on estimated quantities of items and contractual unit prices for each of these items, is paid on the actual quantities and contractual unit prices” (*see id.* annex VIII, § 2.6), (iv) time based contracts denominating contracts, where “the payment is made based on agreed rates and time spent plus reasonable incurred reimbursable expenses” (*see id.* annex VIII, § 2.9), (v) reimbursable cost contracts, which “require that payments be made on a reimbursable basis for all actual costs plus an agreed fee to cover overhead and profit” (*see id.* § 2.11), (vi) framework agreements, denominating “contractual arrangements for fixed or variable volumes of products or services over a fixed period” (*see* WBPR, *supra* note 9, annex VIII, § 3.1, annex XV), and (vii) PPPs (*see id.* annex VIII, ¶ 3.2 and annex XIV). *See infra* section III.E (discussing WBPR annex IX).

394. IDPIR, *supra* note 5, § 11.3.

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guidance for Recipients on international standard model forms of contracts” which, as of late December 2016,<sup>395</sup> still has not been published by the AIIB. Apart from that, the IDPIR only generally advises that contracts financed by the AIIB shall, among others:

- “allocate the risks associated with the contract fairly, with the primary aim of achieving the most economic price and efficient performance of the contract,”<sup>396</sup> and
- defines “the scope of goods, works or services to be supplied or performed, the rights and obligations of the purchaser and of the supplier, contractor or service provider and include, inter alia, appropriate provisions for guarantees of performance and warranties, liability and insurance, acceptance, payment terms and procedures, price adjustment, liquidated damages and bonuses, handling of changes and claims, force majeure, termination, dispute resolution and governing law.”<sup>397</sup>

#### *E. Specific Procurement Methods*

As mentioned, specific procurement methods offered by the IDPIR resemble the World Bank’s previous catalogue of procurement methods included in the WBG (see section III.A). The principal procurement methods include (i) international open competitive tender (IOCT),<sup>398</sup> (ii) selective tendering,<sup>399</sup> (iii) direct contracting,<sup>400</sup> (iv) national competitive

395. *Id.* § 11.3, n.13.

396. *Id.* § 11.3.

397. *Id.* For comparison, with regard to performance security, the WBPR very precisely states that contracts for works and plant (i) “shall require security in an amount sufficient to protect the borrower in the case of breach of contract by the contractor” (see WBPR, *supra* note 9, § 2.4), (ii) “[n]ormally, the amount for bank guarantees should not exceed ten percent (10%) of the contract price unless the commercial practice for the industry recommends a different percentage” (see *id.*), (iii) “[a] portion of this security shall extend sufficiently beyond the date of completion of the works or facilities to cover the defects liability or maintenance period up to final acceptance by the Borrower” (see *id.*). In addition, in the case of contracts for the supply of goods, the IDPIR states that (i) “the need for performance security depends on the market conditions and commercial practice for the particular kind of goods” (see *id.* § 2.5), (ii) “[t]o protect against non-performance of the contract, firms may be required to provide a security in an appropriate and reasonable amount, as specified by the Borrower in the bidding/request for proposals document” (see *id.*).

398. Compare IDPIR, *supra* note 5, § 10.1, with WBPR, *supra* note 9, § 7.17, and WBG, *supra* note 148, §§ 1.3, 1.4.

399. Compare IDPIR, *supra* note 5, § 10.2, with WBPR, *supra* note 9, § 7.15, and WBG, *supra* note 148, § 3.2.

400. Compare IDPIR, *supra* note 5, § 10.3, with WBPR, *supra* note 9, § 7.11, and WBG, *supra* note 148, § 3.7.

tendering (NCT),<sup>401</sup> (v) Request for Quotations (RFQ),<sup>402</sup> (vi) E-procurement,<sup>403</sup> and (vii) PPPs and Concessions<sup>404</sup> (*compare with* section II.C). The IDPIR clearly states that the IOCT shall be the AIIB's preferred procurement method and that other methods could only be applied subject to AIIB's determination that other proposed procurement methods meet the requirements of core procurement principles.<sup>405</sup>

The IOCT can be perceived as a straightforward equivalent of the ICB. The IOCT's basic premise is that "all interested suppliers, contractors or non-consulting service providers are given adequate notification of contract requirements and all such tenderers are given an equal opportunity to submit a tender" and, like the ICB, it comes along with requirements as to the language of the procurement process and of contracts,<sup>406</sup> publications of notices in official and international gazettes like the United Nations Development Business,<sup>407</sup> and the use and conversion of multiple currencies.<sup>408</sup> One major difference between the AIIB and the World Bank is the fact that discussions in the IOCT can only be conducted in English, whereas the previous ICB and current procurement conducted under international-competition-MAO<sup>409</sup> also allow the use of French or Spanish.<sup>410</sup> The other difference is that the World Bank requires that the tenders in internationally competitive procurement shall, in principle, be submitted in fully convertible currencies,<sup>411</sup> whereas the IDPIR does not impose such a requirement, and

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401. *Compare* IDPIR, *supra* note 5, § 10.4, with WBPR, *supra* note 9, § 7.18, and WBG, *supra* note 148, § 3.3.

402. *Compare* IDPIR, *supra* note 5, § 10.5, with WBPR, *supra* note 9, § 7.10, and WBG, *supra* note 148, § 3.5.

403. *Compare* IDPIR, *supra* note 5, § 10.6, with WBPR, *supra* note 9, § 5.5, and WBG, *supra* note 148, § 2.44.

404. *Compare* IDPIR, *supra* note 5, § 10.7, with WBPR, *supra* note 9, § 7.40, annex XIV, and WBG, *supra* note 148, § 3.14.

405. *Compare* IDPIR, *supra* note 5, § 10, with WBPR, *supra* note 9, §§ 7.14, 7.17, and WBG, *supra* note 148, §§ 1.3, 1.4.

406. *Compare* IDPIR, *supra* note 5, §§ 5.1-5.4, with WBPR, *supra* note 9, § 6.9, and WBG, *supra* note 148, § 2.15.

407. *Compare* IDPIR, *supra* note 5, § 10.1.1, with WBPR, *supra* note 9, § 6.16, and WBG, *supra* note 148, § 2.7.

408. *Compare* IDPIR, *supra* note 5, § 10.10, with WBPR, *supra* note 9, §§ 6.9-6.10, and WBG, *supra* note 148, §§ 2.29-2.30.

409. *See* WBPR, *supra* note 9, § 7.16.

410. *Compare* IDPIR, *supra* note 5, § 5.1-5.4, with WBPR, *supra* note 9, § 6.9, and WBG, *supra* note 148, § 2.15.

411. Under the WBG, this principle could only be inferred *a contractio* because the literal meaning of currency related provisions was self-contradictory. On the one hand, the WBG states that "[b]idding documents shall state that the bidder may express the bid price in any

only requires that the AIIB's borrower "with the prior agreement of the Bank, determines the currency or currencies in which the tender prices are quoted."<sup>412</sup> There are also some flaws of keeping approaches to liberalization not dismantled from specific procurement methods unlike in the case where the World Bank's MAO's were dismantled from ASMs/ASAs (see section II.C). For example, the IDPIR rather clumsily and vaguely opens the door for applying various other procurement methods to internationally competitive procurement in place of the standard rules of the OICT. Specifically, for some reason in provisions related to multi-stage tendering, the IDPIR stipulates that "[o]ther forms of multi-stage tendering include, *inter alia* competitive dialogue, negotiated procedures and best and final offer (BAFO), may be used under open international competitive tendering"<sup>413</sup> and does not provide any detail of such significantly different procedures, leaving that to some additional guidelines which were unpublished as of December 2016.<sup>414</sup>

In turn, selective tendering is an equivalent of the LIB under the WBG, <sup>415</sup> and can also be compared with the combination of international-competition-MAO and limited-competition MAO<sup>416</sup> under the WBPR. Selective tendering is analogous to the IOCT, except that only firms first pre-selected by the procurer can submit invited tenders.<sup>417</sup> Importantly, from the perspective of international liberalization, the IDPIR advises that the list of invited tenders shall include international firms whenever possible and secures a non-discriminatory selection of invited tenderers by subjecting such list to the AIIB's prior approval.<sup>418</sup> Selective tendering can only exceptionally be applied when (i) the required

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currency." See WBG, *supra* note 148, § 2.29. On the other hand, they state that, by way of exception, (i) "the Borrower may require bidders to state the portion of the bid price representing local costs incurred in the currency<sup>45</sup> of the country of the Borrower," (see *id.* § 2.29), and (ii) "[i]n bidding documents for works, the Borrower may require bidders to state the bid price entirely in the local currency, along with the requirements for payments in up to three foreign currencies of their choice for expected inputs from outside the Borrower's country, expressed as a percentage of the bid price, together with the exchange rates used in such calculations" (see *id.* § 2.30). The WBPR clarified this discrepancy by stating, as a general currency-related principle, that "[i]n international competitive procurement, bidding/request for proposals document shall state that a bidder/consultant may express the bid/proposal price in any fully convertible currency." WBPR, *supra* note 9, § 6.6.

412. Compare IDPIR, *supra* note 5, § 10.10, with WBPR, *supra* note 9, §§ 6.9-6.10; WBG, *supra* note 148, §§ 2.29-2.30.

413. IDPIR, *supra* note 5, § 10.1.3.

414. *Id.* § 10.1.3, n.6.

415. See World Bank's Procurement Policies, *supra* note 24, § 3.2.

416. See WBPR, *supra* note 9, § 7.15.

417. IDPIR, *supra* note 5, § 10.2.

418. *Id.*

goods or services are highly complex or specialized,<sup>419</sup> (ii) there are only a limited number of suppliers of the particular goods or services needed,<sup>420</sup> or (iii) other reasons limit the number of firms that are capable of meeting the procurer's requirements.<sup>421</sup>

Next comes direct contracting, which is similar to direct contracting under the WBG<sup>422</sup> and to direct-selection under the WBPR.<sup>423</sup> It can only be used in the case of (i) necessary extension of existing contracts for supplementary goods, works or services,<sup>424</sup> (ii) an unsatisfactory response to international open competitive tender or selective tender,<sup>425</sup> (iii) when goods can only be provided by a single supplier because of exclusive capabilities or rights,<sup>426</sup> (iv) standardization of equipment or spare parts which need to be compatible with existing equipment,<sup>427</sup> or (v) extreme urgency.<sup>428</sup> It is noteworthy that, in the case of the World Bank, the grounds for using direct contracting are slightly wider and include situations when purchase of specific goods is necessary to achieve required performance or functional guarantee of an equipment/plant/facility.<sup>429</sup>

The NCT, being an equivalent of the NCB or national-competition-MAO, can be allowed when (i) the contract value is small according to a threshold provided in a project specific PDS,<sup>430</sup> (ii) works are scattered geographically or spread over time,<sup>431</sup> (iii) the goods, works or non-consulting services are available locally at the same quality but at lower prices than are available in the international market,<sup>432</sup> or (iv) the contract,

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419. *Id.* § 10.2 (a).

420. *Id.* § 10.2 (b).

421. *Id.* § 10.2 (c).

422. See WBG, *supra* note 148, § 3.7.

423. See WBPR, *supra* note 9, §§ 7.11-7.13.

424. Compare IDPIR, *supra* note 5, § 10.3 (a), with WBPR, *supra* note 9, § 7.1 (a) (i), and WBG, *supra* note 148, § 3.7 (a).

425. IDPIR, *supra* note 5, § 10.3 (b).

426. Compare IDPIR, *supra* note 5, § 10.3 (c), with WBPR, *supra* note 9, § 7.1 (b) (ii), and WBG, *supra* note 148, § 3.7 (c).

427. Compare IDPIR, *supra* note 5, § 10.3 (d), with WBPR, *supra* note 9, § 7.1 (b) (i), and WBG, *supra* note 148, § 3.7 (b).

428. Compare WBPR, *supra* note 9, § 7.1 (a) (iv), with WBG, *supra* note 148, § 3.7 (c).

429. Compare IDPIR, *supra* note 5, § 10.3 (e), with WBPR, *supra* note 9, § 7.1 (b) (iii), and WBG, *supra* note 148, § 3.7 (d).

430. Compare IDPIR, *supra* note 5, § 10.4 (a), with WBPR, *supra* note 9, § 7.18 (b), and WBG, *supra* note 148, § 3.3 (a).

431. Compare IDPIR, *supra* note 5, § 10.4 (b), with WBPR, *supra* note 9, § 7.18 (c), and WBG, *supra* note 148, § 3.3 (b).

432. Compare IDPIR, *supra* note 5, § 10.4 (c), with WBPR, *supra* note 9, § 7.18 (a), and WBG, *supra* note 148, § 3.3 (d).

by its nature or scope, is unlikely to attract foreign competition.<sup>433</sup> The application of the NCT, like the use of the NCB under the WBG, <sup>434</sup> or the use of the national-competition-MAO<sup>435</sup> under the WBPR, does not imply that discrimination against foreign tenderers is permissible.<sup>436</sup> NCT's application rather means that the procurement process does not need to be conducted in English,<sup>437</sup> and that it can be conducted in accordance with national procurement procedures (instead of default procurement rules sketched under the IDPIR primarily for the IOCT) on the condition that under such national procedures: (i) adequate notifications and competition are secured in order to ensure reasonable prices,<sup>438</sup> (ii) evaluation criteria are made known to all tenderers and applied fairly,<sup>439</sup> and (iii) conditions of contract are fair and appropriate to specific projects.<sup>440</sup> Other than that, the use of the NCT virtually comes down to the further discussed institution of the use of country systems (see section III.G).<sup>441</sup>

The RFQ is similar to shopping under the WBG<sup>442</sup> and the RFQ-ASM under the WBPR.<sup>443</sup> It consists of comparing price quotations obtained from firms by procurers.<sup>444</sup> This method, with the AIIB's prior

433. Compare IDPIR, *supra* note 5, § 10.4 (c), with WBPR, *supra* note 9, § 7.18, and WBG, *supra* note 148, § 3.3.

434. See WBG, *supra* note 148.

435. See WBPR *supra* note 9, tbl. 1- § 7.1.

436. "If foreign firms wish to participate in the tendering, they are allowed to do so on the same terms and conditions that apply to national firms." See IDPIR, *supra* note 5, § 10.4. With regard to the WBG/WBPR, see WBG, *supra* note 148; WBPR, *supra* note 9. In addition, the AIIB's general provisions on eligibility of firms "from all countries" to compete for contract apply here. See AIIB Articles of Agreement, *supra* note 113, § 13.1; AIIB Procurement Policy, *supra* note 3, § 3.2; IDPIR, *supra* note 5, § 4.9.1; see also *infra* section 0 (discussing the international liberalization of procurement markets).

437. Compare IDPIR, *supra* note 5, § 5.3, with WBPR, *supra* note 9, § 6.11, and WBG, *supra* note 148, § 3.4.

438. Compare IDPIR, *supra* note 5, § 10.4 (a), with WBPR, *supra* note 9, § 7.20 (a), and WBG, *supra* note 148, § 3.4.

439. Compare IDPIR, *supra* note 5, § 10.4 (b), with WBG, *supra* note 148, § 3.4.

440. Compare IDPIR, *supra* note 5, § 10.4 (c), with WBG, *supra* note 148, § 3.4.

441. Only some very minor further procedural requirements can be found with regard to the AIIB's NCT and the World Bank's NCB or national-competition-MAO. For example, the IDPIR includes integrity-related provisions with regard to the process of tender opening which expressly apply not only to the ICT but also to NCT, (see IDPIR, *supra* note 5, § 12.1), and the WBPR includes requirements that the minimum period allowed for preparation of bids in the case of national competition shall be twenty days (see WBPR, *supra* note 9).

442. See WBG, *supra* note 148, § 3.5.

443. See WBPR, *supra* note 9, § 7.10.

444. Compare IDPIR, *supra* note 5, § 10.5, with WBPR, *supra* note 9, § 7.10, annex XII, §§ 3.6-3.8, and WBG, *supra* note 148, § 3.5.

approval, can be used for purchasing small quantities of readily available, off-the-shelf goods, or standard specification commodities, or simple civil works, of low value, the threshold of which shall be specified in the PDS.<sup>445</sup> Next, E-procurement defies easy comparison with the World Bank's documents as it merely encourages the optimization of the application of electronic systems for purposes such as "distributing procurement documents, issuing amendments, receiving tenders or proposals and for other procurement actions."<sup>446</sup> E-procurement under the IDPIR neither constitutes a specific procurement nor offers an automated variation of other procurement methods like, for example, e-reverse auctions introduced in the WBPR as a particular variation of RFQ-ASM.<sup>447</sup>

Finally, the IDPIR also provides for "PPPs and Concessions" similar to "PPP Arrangements" under the WBG<sup>448</sup> and to PPP-ASA under the WBPR.<sup>449</sup> PPPs and Concessions can be structured as (i) build, own and operate agreements (BOO), (ii) build, operate and transfer agreements (BOT), (iii) build, own, operate and transfer agreements (BOOT), and (iv) concessions or similar types of arrangement.<sup>450</sup> The general position of the AIIB with regard to PPPs and Concessions is that:

The Bank avoids rigid prescriptions in this area because there are cases in which it may not be feasible for the contracting authority to formulate its requirements in sufficiently detailed and precise Project specifications or performance indicators to permit proposals to be formulated, evaluated and compared uniformly on the basis of those specifications and indicators. In such cases, the Recipient may wish to divide the selection proceedings into two or more stages and allow a certain degree of flexibility for discussions with tenderers . . . The above implies that there is nearly always some element of negotiation before a competitive tender can lead to a binding contract between the Recipient and the concessionaire.<sup>451</sup>

Nonetheless, IDPIR's Annex III, devoted to PPPs and Concessions, still imposes numerous requirements on the process of the selection of the private partner. Specifically, qualified and experienced legal, technical and financial advisers shall be appointed to evaluate proposals submitted by

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445. IDPIR, *supra* note 5, § 10.5, n.8.

446. *Id.* § 10.6.

447. WBPR, *supra* note 9, § 7.48, annex XII, §3.9.

448. WBG, *supra* note 148, § 3.14.

449. *See* WBPR, *supra* note 9, §§ 7.40-7.42.

450. *Compare* IDPIR, *supra* note 5, § 10.7, *with* WBPR, *supra* note 9, § 7.41, *and* WBG, *supra* note 148, § 3.14, n.70.

451. IDPIR, *supra* note 5, annex III.

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potential private partners.<sup>452</sup> The invitation to the pre-selection process shall be public, reach as many potential partners as possible, and contain information stimulating potential partners' interest in competing for PPP/concession contracts.<sup>453</sup> Prequalification criteria shall be clear and designed in such a way as to confine tenderers to those capable of performing planned undertakings seeing that pre-qualifying too many tenderers could adversely affect quality of tenders but, at the same time, to also secure a sufficient level of competition by prequalifying all tenderers with a reasonable chance of success.<sup>454</sup> The request for proposals addressed to prequalified tenderers shall clearly state what is in substance required from tenderers, and specify the selection procedures and evaluation criteria in detail.<sup>455</sup> And finally, key terms of the awarded contract along with any other important elements of the proposal shall be publicly disclosed subject to reasonable confidentiality concerns.<sup>456</sup>

*F. Consultants Rules*

Just like in the case of the World Bank and other MDBs, the AIIB's rules on procurement of consulting services are a different kettle of fish compared with the rules governing procurement of goods, works and non-consulting services (*see* section II.D). The Procurement Policy foretold that the AIIB, also in this regard, will largely align with the World Bank's approach by stating that consultants will be selected "through competition among qualified short-listed firms and individuals in which the selection is based on the quality of the proposal and, where the Bank deems appropriate, on the cost of the services to be provided."<sup>457</sup> Nonetheless, when only the Procurement Policy was released, one could still ask the questions and express doubts similar to those about AIIB's general procurement rules. In other words, one could still wonder whether the AIIB would follow new flexible, yet untested, WBPR or previous less flexible but tested General Guidelines and Consultant Guidelines, and particularly whether the AIIB would allow confining competition to local consultants (*see* section 0).

The overall result achieved in the IDPIR seems to be closer to the WBPR than to the WBCG for a number of reasons. In the first place, consultant-specific rules have been included along with general rules in one

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452. *Id.*

453. *Id.*

454. IDPIR, *supra* note 5, annex III, § 2.

455. *Id.*

456. *Id.*

457. AIIB Procurement Policy, *supra* note 3, annex III, § 5.14.

document. Some further discussed forms of local competition similar to national-competition-MAO under the WBPR<sup>458</sup> have also been added to the consultant-specific regime. Some shortcomings of consultant-specific provisions reveal the temporary nature of the IDPIR to a much greater extent than in the case of general rules. Surprisingly, neither the Procurement Policy nor the IDPIR define “consultant” or “consulting services.”<sup>459</sup> Therefore, the notion of consulting services can only be inferred *a contrario*. Namely, services falling within the scope of the IDPIR’s pretty precise definition of non-consulting services<sup>460</sup> must then be treated as consulting services. Discussed general rules of procurement processes (*see* section III.D) in principle equally apply to procurement of goods, works, non-consulting and consulting services. However, there are some minor differences. For example, no tender or performance-guarantees can be required from the consultants.<sup>461</sup> In addition, a list of conflict-of-interest scenarios also includes a situation when “the consultant . . . is proposed to be engaged for an assignment that, by its nature, creates a conflict of interest with another assignment of the consultant.”<sup>462</sup> Moreover, the clause on unfair competitive advantage included in the IDPIR’s general part only applies to consulting services and requires that the procurer “make[] available to all the short-listed consultants, together with the RFPs, all information that, if not shared with all, would give a competitive advantage to the consultant who did have the information.”<sup>463</sup>

Consultant-specific procurement methods are classified into (i) selection methods for firms, (ii) particular selection methods for firms, and (iii) selection procedures for individual consultants.<sup>464</sup> Selection methods

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458. *See* WBPR, *supra* note 9, §§ 6.11, 6.17, 8.24.

459. *See generally* IDPIR, *supra* note 5; AIIB Procurement Policy, *supra* note 2.

460. IDPIR defines non-consulting services as “activities for which the physical aspects of the activity predominate, which are bid and contracted on the basis of performance of a measurable physical output, and for which performance standards can be clearly identified and consistently applied, such as drilling, aerial photography, satellite imagery, mapping, and similar operations.” *Compare* IDPIR, *supra* note 5, § 2 (g), *with* WBPR, *supra* note 9, Acronyms & Glossary, § 23.

461. With regard to tender security, *compare* IDPIR, *supra* note 5, § 11.12, *with* WBPR, *supra* note 9, §§ 6.22-6.24. In the case of performance security, such instrument is only mentioned in provisions related to the procurement of goods, works and non-consulting services but do not appear in the context of consulting services. *Compare* IDPIR, *supra* note 5, §§ 11.1, 11.2, 12.4 (b), *with* WBPR, *supra* note 9, §§ 6.24, 6.40 (b), 6.44 (b), annex II § 2.11 (i), annex IX §§ 2.4-2.6.

462. *Compare* IDPIR, *supra* note 5, § 4.4.2 (b), *with* WBPR, *supra* note 9, § 3.22 (c), and WBCG, *supra* note 150, § 1.9 (c).

463. *Compare* IDPIR, *supra* note 5, § 4.42, *with* WBPR, *supra* note 9, § 3.23, and WBCG, *supra* note 150, § 1.10.

464. *See* IDPIR, *supra* note 5, §§ 13.2, 13.3, 13.5.

largely resemble WBPR's list of consultant-specific MAOs,<sup>465</sup> and include: (i) international open competitive selection (IOCS),<sup>466</sup> limited competition,<sup>467</sup> (ii) national competitive selection (NCS),<sup>468</sup> and (iii) direct selection.<sup>469</sup> In turn, particular selection methods for firms largely resemble WBPR's list of consultant-specific ASMs.<sup>470</sup> Specifically, in the case of the QCBS, (i) the selection process "takes into account the quality of the proposal and the cost of the services,"<sup>471</sup> and (ii) "[t]he relative weight to be given to the quality and cost is determined for each assignment and depends on the nature of the assignment."<sup>472</sup> In the case of the FBS, (i) the procurer "requests the firms to provide their technical and financial proposals in separate envelopes,"<sup>473</sup> and (ii) "[t]echnical proposals are opened and evaluated first; financial proposals are opened second, and the firm with the highest ranked technical proposal and whose financial proposal is within the indicated budget is selected."<sup>474</sup> In the case of the LCS, (i) the procurer "specifies a minimum qualifying mark for quality and requests the firms to submit their technical and financial proposals in separate envelopes,"<sup>475</sup> and (ii) "only the financial proposals of those firms with at least the minimum qualifying mark are evaluated, and the evaluation is based exclusively on cost."<sup>476</sup> In the case of the QBS (i) "only the technical proposal is evaluated,"<sup>477</sup> (ii) "the firm with the best technical proposal is invited to negotiate the financial terms."<sup>478</sup> And, in the case of the consultant's qualifications based selection (CQS), procurer obtains

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465. See WBPR, *supra* note 9, §§ 8.21, 8.23-8.24, 8.27.

466. Compare IDPIR, *supra* note 5, § 13.2.1, with WBPR, *supra* note 9, § 8.23.

467. Compare IDPIR, *supra* note 5, § 13.2.2, with WBPR, *supra* note 9, § 8.22.

468. Compare IDPIR, *supra* note 5, § 13.2.3, with WBPR, *supra* note 9, § 8.24.

469. Compare IDPIR, *supra* note 5, § 13.2.4, with WBPR, *supra* note 9, §§ 8.18-8.20.

470. See WBPR, *supra* note 9, §§ 8.7-8.20.

471. Compare IDPIR, *supra* note 5, § 13.3 (a), with WBPR, *supra* note 9, § 8.8, annex X §§ 4.7.4.9, and WBCG, *supra* note 150, §§ 2.1, 2.15, 2.18, 2.25.

472. Compare IDPIR, *supra* note 5, § 13.3 (a), with WBPR, *supra* note 9, § 8.8, annex X §§ 4.7.4.9, and WBCG, *supra* note 150, §§ 2.1, 2.15, 2.18, 2.25.

473. Compare IDPIR, *supra* note 5, § 13.3 (b), with WBPR, *supra* note 9, § 8.9, and WBCG, *supra* note 150, § 3.5.

474. Compare IDPIR, *supra* note 5, § 13.3 (b), with WBPR, *supra* note 9, § 8.9, and WBCG, *supra* note 150, § 3.5.

475. Compare IDPIR, *supra* note 5, § 13.3 (c), with WBPR, *supra* note 9, § 8.11-8.12, and WBCG, *supra* note 150, § 3.6.

476. Compare IDPIR, *supra* note 5, § 13.3 (c), with WBPR, *supra* note 9, § 8.11-8.12, and WBCG, *supra* note 150, § 3.6.

477. Compare IDPIR, *supra* note 5, § 13.3 (d), with WBPR, *supra* note 9, § 8.13, and WBCG, *supra* note 150, § 3.2.

478. Compare IDPIR, *supra* note 5, § 13.3 (d), with WBPR, *supra* note 9, § 8.13, and WBCG, *supra* note 150, § 3.2.

expression of interests “from at least three firms and selects the best qualified and experienced firm to submit a combined technical and financial proposal.”<sup>479</sup>

All particular selections methods (QCBS, FBS, LCS, QBS, and CQS) can be freely combined with all sections methods except for direct selection just like WBPR’s consultant specific ASMs can be freely combined with various MAOs.<sup>480</sup> Similar to the IOCT for non-consulting rules, the IOCS is AIIB’s preferred methods for consults’ selection and comes along with requirements related to international advertising and the use of English.<sup>481</sup> Conditions of the use of limited competition, the NCS and of direct selection are analogous with the conditions of the use of, respectively, selective tendering,<sup>482</sup> the NCT,<sup>483</sup> and direct contracting.<sup>484</sup>

### G. Use of Country Systems

The IDPIR particularly proves to be a product of a work in progress and leaves many questions unanswered when it comes to the regulation of the use of country procurement systems. The procurement rules prescribed by the AIIB have been, perhaps, the most controversial topic in the general discourse about the regulation of procurement by the MDBs in the last decade. As necessary background information, the World Bank introduced the idea of the use of country systems in 2008,<sup>485</sup> and relabelled this institution in the WPBR as the alternative procurement arrangements (APAs) under which the World Bank can agree to “rely on and apply the procurement rules and procedures of an agency or entity of the

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479. Compare IDPIR, *supra* note 5, § 13.3 (e), with WBPR, *supra* note 9, § 8.16-8.17.

480. Compare IDPIR, *supra* note 5, § 13.3, with WBPR, *supra* note 9, § 8.1, tbl. 2.

481. Compare IDPIR, *supra* note 5, §§ 5.1, 13.2.1, with WBPR, *supra* note 9, §§ 6.9, 8.23.

482. Compare IDPIR, *supra* note 5, § 13.2.2, with WBPR, *supra* note 9, § 10.2.

483. Compare IDPIR, *supra* note 5, § 13.2.3, with WBPR, *supra* note 9, § 10.4.

484. Compare IDPIR, *supra* note 5, § 13.2.4, with WBPR, *supra* note 9, § 10.3. However, only direct selection, compared with other consulting and non-consulting procurement methods, particularly direct contracting, accommodates the IDPIR’s exception for state-owned enterprises, universities or research centers to the general rule of not awarding contracts to such institutions. See IDPIR, *supra* note 5. Direct selection can be applied when “consulting services are to be provided in the Recipient’s country by a SOE, university or research center of the recipient’s country, and the services are of a unique and exceptional nature due to the absence of suitable private sector alternatives, or as a consequence of the regulatory framework, or because the consultant’s participation is critical to project implementation.” See IDPIR, *supra* note 5, § 13.2.4 (b) (ii). Interestingly, a similar clause is found in the WBPR’s provision direct-selection-ASMs in the case of both consultants and non-consultants specific provisions. See WBPR, *supra* note 9, § 7.12 (b) (iv), 8.19 (b) (ii).

485. See generally Pallas & Wood, *supra* note 29; ASHA A. YOUNG ET AL., USE OF PROCUREMENT COUNTRY SYSTEMS 15 (2013).

Borrower.”<sup>486</sup> Under the WBG, the use of country systems was defined as “the use of the procurement procedures and methods contemplated in the public procurement system in place in the country of the Borrower that have been determined to be consistent with these Guidelines and acceptable to the Bank of the Bank’s Use of Country Systems Piloting Program.”<sup>487</sup> The piloting program of 2008<sup>488</sup> employed DAC’s benchmarking tools developed by the OECD in the wake of the Paris Declaration as the primary tool of country systems’ evaluation and justified the case for the use of country systems with a number of reasons. Among others, the use of country systems was needed to help improve the efficiency of not only procurement financed by the World Bank but also of other borrowers’ procurement and more generally borrowers’ public expenditures.<sup>489</sup> It could also increase borrowers’ “ownership of procurement” systems seeing that, in the World Bank’s view, borrowers have more incentive to improve procurement systems which they own rather than those which are externally imposed.<sup>490</sup> Moreover, the use of country systems could also reduce the burden of “development bureaucracy” in the sense that the harmonization of developing countries’ procurement systems with international standards could be achieved more efficiently by tuning systems already functioning that to adjust World Bank’s rules to existing conditions.<sup>491</sup>

However, upon the approval of the piloting program, Christopher Pallas and Jonathan Wood claimed that the World Bank’s actual motivation for the introduction of country systems was related to factors already mentioned as drivers of World Bank’s procurement reform, Namely, cheap commercial credit had been flooding emerging markets, and the World Bank had feared losing market share as a result of strict environmental and social conditions encouraging potential borrowers to look for sources of financing elsewhere.<sup>492</sup> According to Pallas’s and Wood’s rather outspoken opinion based on their contacts with insiders, the World Bank was simply ready to take part in the race to the bottom in

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486. WBPR, *supra* note 9, § 2.3 (b). The other discussed application of the APA could be the use of other MDBs’ procurement rules in the course of co-financing. See WBPR, *supra* note 9, § 2.4 (a).

487. WBG, *supra* note 146, § 3.20.

488. WORLD BANK, USE OF COUNTRY SYSTEMS IN BANK-SUPPORTED OPERATIONS: PROPOSED PILOTING PROGRAM (2008) (approved by the Bank’s Board of Executive Directors on Apr. 24, 2009, revealed June 19, 2008).

489. *Id.* § 3 (a).

490. *Id.* § 3 (b).

491. *Id.* § 3 (c).

492. See Pallas & Wood, *supra* note 29, at 220.

terms of standards, only in order to “stay relevant,” and the use of country systems was meant to help achieve that goal.<sup>493</sup> Thus, at the very early stage of the discussions about AIIB’s potential procurement rules, if one believed Pallas’s and Wood’s claims, one could speculate that the AIIB would not want to join the World Bank in this race to the bottom and would not allow the use of country systems. Moreover, even if the AIIB wanted to follow the World Bank on that matter, one could alternatively speculate that the AIIB would likely have to work on its own benchmarking tools other than DAC’s tools, given BRICS’ previous reluctance to cooperate with the DAC.

However, surprisingly, in January 2016 the AIIB seemed to completely surrender to the DAC’s benchmarking system. Specifically, the Procurement Policy foretold that: “[t]he Bank may agree to the use by the Recipient, of its applicable procurement system for certain Bank-financed contracts, if the Bank determines that the procurement system for these contracts is consistent with the Core Procurement Principles and Procurement Standards.”<sup>494</sup> It clarified that “[t]he Bank may rely on an assessment of the Recipient’s system made by another development partner, provided the Bank is satisfied with the quality of such assessment.”<sup>495</sup> It also added that “[t]he Bank’s determination will be based on a review of the outcome of an assessment conducted in accordance with the OECD’s Methodology for Assessing Procurement Systems.”<sup>496</sup>

Interestingly enough, the IDPIR quietly backtracked from expressly embracing DAC’s benchmarking by omitting the third point above<sup>497</sup> and it only cursorily added the first two points, that the “[p]roposed use of the Recipient’s country procurement system (CPS) is addressed in the PDS.”<sup>498</sup> Only time will tell the direction in which AIIB will go while relying on borrowers’ procurement rules instead of its own. There are indeed good arguments for allowing regulatory competition among borrowers. Such arguments include that less harmonization could, for example, catalyze the borrowers’ quest for procedural innovation and most efficient procurement methods. Nonetheless, all remarks about the risk of the race to the bottom by the borrowing institutions also apply to the AIIB, which will in principle lend money to developing and least developed countries, the procurement systems of which indeed cannot always be trusted.

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493. *Id.*

494. AIIB Procurement Policy, *supra* note 3, § 5.4.

495. *Id.*

496. *Id.* § 5.4, n.2.

497. See IDPIR, *supra* note 5, § 7.

498. *Id.*

## IV. LIBERALIZATION OF PUBLIC PROCUREMENT MARKETS

The problem of the impact of AIIBs procurement regime on the liberalization of borrower's procurement markets is not limited to mentioned indirect discrimination potentially stemming from the application of NCT and NCS (which mimic World Bank's national-competition-MAO).<sup>499</sup> It also covers issues such as mentioned tied aid,<sup>500</sup> trade sanctions, taxation of the provision of goods and services to AIIB's borrowers and the use of domestic preferences by borrowers. Among such trade-related issues, early Western speculations about tying aid by the AIIB were first cut short by the Chinese side in the AIIB AOA, which ruled out placing any restrictions on the origin of goods or services financed by the AIIB,<sup>501</sup> following Jin Liqin's similar press statements foretelling such solution (*see section: 0 in fine*). The Procurement Policy reaffirmed this position by additionally stating "[t]he Bank permits firms and individuals from all countries to offer goods, works and services for a Bank-financed contract, regardless of whether the country is a member of the Bank."<sup>502</sup> The exceptions to such universal eligibility were largely aligned with a similar list of exceptions under the WBPR. Specifically, the Procurement Policy allowed for the exclusion of firms and individuals originating from countries on which AIIB's borrowers imposed general trade embargos.<sup>503</sup> And the IDPIR subsequently also added exclusions of particular countries, persons or entities resulting from sanctions imposed by AIIB's borrowers in compliance with the sanctions imposed by the Security Council of the United Nations.<sup>504</sup>

499. With regard to NCT *see supra* text accompanying notes 430-440 (regarding NCT); *see supra* text accompanying notes 468, 481, 483 (regarding NCS); *see supra* text accompanying notes 222, 227, 252, 256-258 (regarding national-competition-MAO).

500. *See* WOLF, WANG & WARNER, *supra* note 48, at xii; Mattlin & Nojonen, *supra* note 57, at 15, 19; Jing, *supra* note 103 (for an early discussion about potential tying aid by the AIIB); *see supra* text accompanying notes 152-158 (regarding efforts of existing MDBs and Western country to untie aid).

501. *See supra* text accompanying n. 327.

502. AIIB Procurement Policy, *supra* note 3, § 5.8.1; *see also* IDPIR, *supra* note 5, § 4.9.1.

503. AIIB Procurement Policy, *supra* note 3, § 5.8.2 (b) (i.e. when, "as a matter of law or official regulation, the Recipient's country prohibits commercial relations with the firm or individual's country; provided that the Bank is satisfied that such exclusion does not preclude effective competition for the supply of goods or works required"). AIIB Procurement Policy, *supra* note 3, § 5.8.2 (b). *Compare* IDPIR, *supra* note 5, § 4.9.1 (b), *with* WBPR, *supra* note 9, § 3.28 (a) (i), *and* WBG, *supra* note 148, § 1.10 (a).

504. IDPIR, *supra* note 4, § 4.9.2 (stating "[t]he proceeds of the Bank's financing may not be used for payment to persons or entities or for any import of goods, if such payment or import is prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations. Thus, firms of a country or goods manufactured in a country may be excluded from the procurement process if, by an act of compliance with a

The problem of the imposition of tariffs and other taxes on economic operations carried out in performance of contracts financed by the AIIB has, similar to the World Bank, been addressed in a rather nontransparent way. Specifically, identical to the World Bank's General Conditions for Loans, the AIIB's General Conditions for Sovereign-backed Loans made a reservation that:

The use of any proceeds of the Loan to pay for Taxes levied by, or in the territory of, the Member on or in respect of Eligible Expenditures, or on their importation, manufacture, procurement or supply, if permitted by the Legal Agreements, is subject to the Bank's policy of requiring economy and efficiency in the use of the proceeds of its loans. To that end, if the Bank at any time determines that the amount of any such Tax is excessive, or that such Tax is discriminatory or otherwise unreasonable, the Bank may, by notice to the Recipient, adjust the percentage of such Eligible Expenditures to be financed out of the proceeds of the Loan specified in the Loan Agreement, as required to ensure consistency with such policy of the Bank.<sup>505</sup>

This implies that the tariff and tax-related issues have been left for individual loan agreements<sup>506</sup> between the AIIB and its borrowers, which will remain largely confidential. The IDPIR, in provisions on the evaluation of tenders, provides for only some indirect suggestion with regard to situations in which the AIIB would, or would not, likely allow spending proceeds of loans for tariffs or taxes. On the one hand, the IDPIR seems to suggest that imports of goods used in AIIB-financed projects shall, in principle, be tariff free. Namely, tenders for the provisions of goods shall be submitted "exclusive of import duties and taxes payable on imported goods, and of taxes payable on directly imported components to be incorporated in locally supplied goods,"<sup>507</sup> with the

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decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations, the Recipient's country prohibits any import of goods from, or payments to, a particular country, person, or entity. Where the Recipient's country prohibits payments to a particular firm or for particular goods by such an act of compliance, that firm may be excluded"); compare IDPIR, *supra* note 5, § 4.9.2, with WBPR, *supra* note 9, § 3.28 (a) (ii), and WBGG, *supra* note 148, § 1.10 (a).

505. Compare *General Conditions for Sovereign-backed Loans*, *supra* note 316, § 2.06, with World Bank, *General Conditions for Loans* § 2.06 (Mar. 12, 2012), available at [http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/IBRD\\_GC\\_English\\_12.pdf](http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/IBRD_GC_English_12.pdf) (last visited APR. 10, 2017).

506. Some explanation of the lack of standardized approach to tariffs and taxation can be found the Operational Policy on Financing, where the "structure and incidence of taxes and tariffs" has been identified as one of elements of borrower's "local environment" which is assessed by the AIIB prior to approval of every project. AIIB Operational Policy on Financing, *supra* note 314, § 3.3 (e) (iv).

507. IDPIR, *supra* note 5, § 11.9.

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exception of sub-sovereign public entities in the case of which such taxes can be taken into considerations.<sup>508</sup> On the other hand, the IDPIR seems to give a green light to the regular taxation of works and non-consulting services, to be substantially executed in the borrower's country, in the case of which (i) tenders "may be requested inclusive of all duties, taxes and other levies,"<sup>509</sup> and (ii) "[i]n such cases, the evaluation and comparison of tenders are made on this basis, and the selected contractor is then responsible for all duties, taxes and levies in the performance of the contract."<sup>510</sup>

In any case, the general perception about World Bank's MDBs' tariffs and tax-related policy has been that the MDBs generally insisted on, and their borrowers generally agreed to, special exemptions related to World-Bank-financed projects for tariffs as well as for corporate and individual income taxes.<sup>511</sup> This, according to K.V.S.K. Nathan, for example, has led to a significant increase of trade flows only in one direction, i.e. from mostly developed to developing countries.<sup>512</sup> It is so far a toss-up whether AIIB's tariffs and tax-related policies will have a similar effect as only time will tell if individual conditions of loans will (i) be crafted under the influence of AIIB's Western Members, and aligned to other MDB's prevailing practice, or (ii) rather be designed more in the spirit of

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508. *See id.* Interestingly enough, this is the only provision in the IDPIR which differentiates between sovereign and sub-sovereign procuring entities. *See id.* For comparison, the WBPR does not make such distinctions and only regulates inclusion or non-inclusion of taxes in tenders/proposal (still only for comparison/evaluation purposes, being tacit as to whether these taxes shall eventually be paid or not) in provisions related to comparing tenders when domestic preferences are applied. *See infra* section IV; *see also* WBPR, *supra* note 9, annex VI, §§ 2.2 (c), 2.3. Specifically, tenders including "goods manufactured abroad that have been already imported or that will be directly imported" shall be "exclusive of customs duties and other import taxes already paid or to be paid." *See* WBPR, *supra* note 9, annex VI, § 2.2 (c), 2.3. In turn, the WBGG *a contrario*, suggested the same by providing, with regard to the NCB, that "[t]he comparison of all bids and the award of contract may be based on the total cost at destination including all taxes and duties." *See* WBGG, *supra* note 148, § 3.4.

509. IDPIR, *supra* note 5, § 11.9.

510. *Id.* For comparison, similar provisions could only be found in previous WBGG where "under works and turnkey contracts, contractors are responsible for all duties, taxes, and other levies, and bidders shall take these factors into account in preparing their bids." *See* WBGG, *supra* note 148, § 2.53. In turn, the WBPR seem to suggest tax exemptions for consulting services by providing that "[f]or the purpose of evaluation, the offered prices shall exclude local identifiable indirect taxes (such as sales tax, value added, excise taxes and similar taxes and levies) on the contract and income tax payable to the country of the Borrower on the remuneration of services rendered in the country of the Borrower by non-resident experts and other personnel of the consulting firm." *See* WBPR, *supra* note 9, annex X, § 4.6.

511. *See* K.V.S.K. Nathan, *World Bank Procurement Sacred Cow or Case of Mad Cow Disease*, 2 J. WORLD INVEST. TRADE 713, 727 (2001).

512. *See id.*

mentioned South-South cooperation, which is meant to blur the lines between developed donors and developing borrowers.<sup>513</sup>

The AIIB did not step out of line with regard to domestic preference either. It followed the lead of the World Bank, which kept domestic preferences despite the fact that even World Bank's internal documents proved the case for ditching domestic preferences all along, because those were "rarely used and only in isolated instances"<sup>514</sup> and "[e]ven when applied, it did not likely have any material effect on changing the outcomes of the bidding."<sup>515</sup> Both the Procurement Policy and the IDPIR very generally indicate that the AIIB "may, under special circumstances and conditions, accept the application of provisions of the relevant Bank member country's procurement rules that promote or encourage the development of domestic industry through preference margins, 'offsets', preference schemes or similar innovative approaches."<sup>516</sup>

The use of such protectionist measures is restricted to the IOCT, similar to the WBPR restricting potential use of domestic preferences to the international-competition-MAO.<sup>517</sup> Notably, the IDPIR could also potentially allow for a much wider catalogue of discriminatory measures than the World Bank's list confined to the 15 per cent margin preference for goods and 7.5 per cent for works.<sup>518</sup> However, so far, the IDPIR is more specific only with regard to margins of preference. True, it does not set up any specific maximum thresholds. Instead, it hints at consenting to domestic preferences in the case of co-financing with MDBs, which allow preferences, by stipulating that "[w]here domestic preference margins are permitted by other MDB's in Bank Member countries the Bank may

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513. See *supra* text accompanying notes 69-70.

514. See CHARLES FLETCHER & ALEXANDER MYRNA, BACKGROUND PAPER: REVIEW OF THE WORLD BANK'S PROCUREMENT POLICIES AND PROCEDURES, THE USE AND IMPACT OF THE BANK'S POLICY OF DOMESTIC PREFERENCES 5 (July 2012).

515. See *id.*

516. AIIB Procurement Policy, *supra* note 3, § 5.7; IDPIR, *supra* note 5, § 11.5.

517. Compare IDPIR, *supra* note 5, annex V, § 2 (c), with WBPR, *supra* note 9, annex VI, § 1.1.

518. With regard to World Bank's margins of preference, see *supra* text accompanying notes 192, 193-203. One could wonder, why should the AIIB even consider allowing more complicated discriminatory measures seeing that simple margins of preference proved to be a flop? Perhaps, the designers of the IDPIR wanted to align it with the provisions of the GPA12 related to transitional measures for developing countries, which might include price preference programs, offsets, phased-in additions of specific entities or sectors, and different (higher) thresholds, on the off chance that some developing countries simultaneously joined the GPA along with securing some of such transitional measures, and borrowed the money from the AIIB. See GPA12, *supra* note 16, § V.3. Nonetheless, such scenario seems to be a matter for the very distant future.

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permit the application of the same preference margins in accordance with the requirements of other MDB's procurement policies."<sup>519</sup>

## V. SUSTAINABILITY

As publicly promised in response to discussed premature criticism about AIIB's future conduct (*see* section I.B), the AIIB, since the beginning of its operations, has paid a lot of attention to producing documents related to socio-economic and environmental standards. To this end, the AIIB *de facto* approved the ESF, along with "Environmental and Social Policy" during the first meeting of its board of directors held in January 2016.<sup>520</sup> The ESF does not include any public-procurement-specific provisions, except that "[t]o ensure that contractors appropriately implement the agreed measures, the Client includes the relevant environmental and social requirements in the tendering documents and contracts for goods and services required for the Project."<sup>521</sup> Rather, it has been designed as a document generally addressing issues like public consulting, and assessing and managing social and environmental risks by both the AIIB staff and the AIIB's borrowers.<sup>522</sup>

At the same time, AIIB's procurement-specific documents do not include their own precise sustainability-related provisions similar to Annex VII to the WBPR (*see* section II.E).<sup>523</sup> Rather, the Procurement Policy merely states with regard to social and environmental concerns that good procurement processes will be achieved through the "*inclusion of sustainable socio-economic and environmental objectives in the Project's procurement,*"<sup>524</sup> and refers to the "Environmental and Social Policy of the Bank."<sup>525</sup> The IDPIR merely adds that (i) the "tender documents include, to the extent required, provisions designed to ensure compliance with the Bank's Environmental

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519. IDPIR, *supra* note 5, annex V, § 2 (d).

520. During the meeting, "[t]he Board of Directors accepted the President's proposal to circulate, by mid-February, a revised version of the proposed environmental and social policy for approval on an absence of objection basis." AIIB, *Minutes of the Meeting of the Board of Directors of the Asian Infrastructure Investment Bank* (Jan. 17, 2016), available at <http://www.aiib.org/uploadfile/2016/0314/20160314022136165.pdf> (last visited Apr. 11, 2017).

521. *Id.* §68.

522. *Id.* § 5. Additionally, the AIIB Operational Policy on Financing clarifies that "the AIIB will 'screen, categorize and undertake an environmental and social due diligence' of financed projects in accordance with Environmental and Social Policy." AIIB Operational Policy on Financing, *supra* note 314, § 3.1.1 (d).

523. *See supra* text accompanying notes 282-284.

524. AIIB Procurement Policy, *supra* note 3, § 1.2 (f).

525. *Id.* § 1.2.f, n.1.

and Social Policy,”<sup>526</sup> (ii) evaluation criteria might include “environmental benefits,”<sup>527</sup> (iii) “sustainable issues” should be among factors to be taken into account while specific procurement VfM,<sup>528</sup> and (iv) the determination of “procurement arrangements” in the PDS shall include “sustainable procurement requirements.”<sup>529</sup> Such scarcity of procurement-specific provisions related to sustainability implies that the provisions of the ESF directly apply not only to the evaluation, approval and supervision of projects by the AIIB’s staff by also to the procurement process carried out by AIIB’s borrowers.

Although the ESF has widely defines “sustainable development” as a concept embracing not only social and environmental but also economic dimension,<sup>530</sup> ESF’s detailed provisions in fact come down to green and social concerns. First, the Environmental and Social Framework includes “Environmental and Social Policy” which “sets forth mandatory environmental and social requirements for each Project.”<sup>531</sup> Second, it includes ‘Environmental and Social Standards’ which “set out more detailed mandatory environmental and social requirements”<sup>532</sup> such as (i) “Environmental and Social Assessment and Management,” (ii) Involuntary Resettlement, and (iii) “Indigenous Peoples.”<sup>533</sup> And third, it includes the “Environmental and Social Exclusion List” which specifies projects that the AIIB “will not knowingly finance.”<sup>534</sup>

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526. IDPIR, *supra* note 5, § 11.4.

527. *Id.* §11.6.

528. *Id.* annex I, §§ 2, 3.1.5.

529. *Id.* annex II, § 5 (c).

530. “Consistent with the Sustainable Development Goals (SDGs), the Bank recognizes the need to address the three dimensions of sustainable development – economic, social and environmental – in a balanced and integrated manner.” ESF, *supra* note 143, § 7.

531. *Id.* § 2.

532. *Id.*

533. *Id.*

534. *Id.* at 46. Environmental and Social Exclusion List, at 46. The list includes: “(i) Forced labor or harmful or exploitative forms of child labor, (ii) the production of, or trade in, any product or activity deemed illegal under national laws or regulations of the country in which the [p]roject is located, or international conventions and agreements, or subject to international phase out or bans, such as [p]roduction of, or trade in, products containing polychlorinated biphenyl (PCBs), [p]roduction of, or trade in, pharmaceuticals, pesticides/herbicides and other hazardous substances subject to international phase-outs or bans (Rotterdam Convention, Stockholm Convention), [p]roduction of, or trade in, ozone depleting substances subject to international phase out (Montreal Protocol),] (iii) [t]rade in wildlife or production of, or trade in, wildlife products regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (iv) [t]rans-boundary movements of waste prohibited under international law (Basel Convention),] (v) [p]roduction of, or trade in, weapons and munitions, including paramilitary materials[,] (vi) [p]roduction of, or trade in, alcoholic beverages, excluding beer and wine[,] (vii) [p]roduction of, or trade in, tobacco[,] (viii)

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Among these three elements, Project-specific Environmental and Social Standards will be based on “Environmental, Health, and Safety Guidelines” defined as “technical reference documents with general and industry-specific statements of Good International Industry Practice.”<sup>535</sup>

And these guidelines, to quote the ESF, will:

- “contain the performance levels and measures that are generally considered to be achievable in new facilities by existing technology at reasonable cost,”<sup>536</sup> and
- draw upon World Bank Group Environmental, Health, and Safety Guidelines,<sup>537</sup> which provide specific standards in the field of (i) environment,<sup>538</sup> (ii) occupational health and safety,

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[g]ambling, casinos and equivalent enterprises[,] (ix) [p]roduction of, trade in, or use of unbonded asbestos fibers[,] (x) [a]ctivities prohibited by legislation of the country in which the Project is located or by international conventions relating to the protection of biodiversity resources or cultural resources, such as, Bonn Convention, Ramsar Convention, World Heritage Convention and Convention on Biological Diversity[,] (xi) [c]ommercial logging operations or the purchase of logging equipment for use in primary tropical moist forests or old-growth forests[,] (xii) [p]roduction or trade in wood or other forestry products other than from sustainably managed forests[,] (xiii) [m]arine and coastal fishing practices, such as large-scale pelagic drift net fishing and fine mesh net fishing, harmful to vulnerable and protected species in large numbers and damaging to marine biodiversity and habitats[,] (xiv) [s]hipment of oil or other hazardous substances in tankers that do not comply with IMO requirements (IMO, MARPOL, SOLAS and Paris MOU).” ESF, *supra* note 143, at 46-47.

535. *Id.* glossary.

536. *Id.* The good international practice means “the exercise of professional skill, diligence, prudence, and foresight that would reasonably be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances globally or regionally. The outcome of such exercise should be that the Project employs the most appropriate technologies in the Project-specific circumstances.” *Id.*

537. *Id.*

538. World Bank, *Environmental, Health, and Safety (EHS) Guidelines* (Apr. 30, 2007), available at <https://www.ifc.org/wps/wcm/connect/554e8d80488658e4b76af76a6515bb18/Final+-+General+EHS+Guidelines.pdf?MOD=AJPERES> (last visited June 6, 2017) (including, (i) air emissions and ambient air quality, (ii) energy Conservation, (iii) wastewater and ambient water quality, (iv) water conservation, (v) hazardous materials management, (vi) waste management, (vii) noise, and (viii) contaminated land).

<sup>539</sup> (iii) community health and safety,<sup>540</sup> and (iv) construction and decommissioning.<sup>541</sup>

For example, in the field of labour rights, the AIIB borrowers will be required to “[i]mplement measures designed to ensure Project workers have safe and healthy working conditions, and put in place measures to prevent accidents, injuries, and disease caused by the Project,”<sup>542</sup> including (i) “persons engaged directly by the Client [AIIB’s borrower] (whether full-time, part-time, temporary, seasonal or migrant), to work specifically on the Project,”<sup>543</sup> and (ii) “personnel of contractors engaged by the Client [AIIB’s borrower] to work on the Project and of subcontractors hired by these contractors to work on the Project.”<sup>544</sup> In fact, such provisions should be addressed to borrowers’ particular procuring agencies, or directly to general and sub-contractors rather than to borrowers. And, therefore, one could argue that, for the sake of clarity, the ESF still needs to be supplemented with procurement-specific provisions, which will likely come out in the final procurement directive, which will replace the IDPIR. Similar to, or perhaps even more precisely than Annex VII of the WBPR, more detailed provisions clarify to what extent the procurers financed by the AIIB could incorporate some social or environmental considerations at specific stages of the procurement process such as (i) pre-qualification of suppliers/contractors, (ii) technical specifications, (iii) evaluation criteria, or (iv) contract-specific terms and conditions. And similar to the EU’s fifth generation of public procurement directives (*see* section II.E), such provisions could also list specific socio-economic standards by making reference to widely recognised sustainability-related international agreements/conventions.<sup>545</sup>

What remains to be seen in the AIIB’s procurement and sustainability-related practice is whether procurement-specific socio-environmental requirements will be confined to the performance of

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539. *Id.* (including, (i) general facility design and operation, (ii) communication and training, (iii) physical hazards, (iv) chemical hazards, (v) biological hazards, (vi) radiological hazards, (vii) personal protective equipment, (viii) special hazard environments, and (ix) monitoring).

540. *Id.* (including, (i) community health and safety, (ii) water quality and availability, (iii) structural safety of project infrastructure, (iv) life and fire safety, (v) traffic safety, (vi) transport of hazardous materials, (vii) disease prevention, and (viii) emergency preparedness and response).

541. *Id.* (including, (i) environment, (ii) occupational health and safety, and (iii) community health and safety).

542. ESF, *supra* note 143, § D.

543. *Id.*

544. *Id.*

545. *See* Council Directive 2014/24 *supra* text accompanying notes 285-286.

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contracts financed by the AIIB, and could also go beyond contract performance which could be achieved through excluding potential tenderers for previous socio-environmental misconduct or by imposing process-related requirements on goods/services used in the realisation of projects financed by the AIIB. For example, as far as labour rights are concerned, as mentioned, the Environmental and Social Policy imposes some health and safety standards on employment of persons working on AIIB-financed projects,<sup>546</sup> and the Environmental and Social Exclusion List forbids financing projects which would engage forced or child labour.<sup>547</sup> So far, no provision of the IDPIR would allow AIIB borrowers to disqualify potential contractors because of grave violations of labour safety standards because of the use of forced or child labour elsewhere (in projects not financed by the AIIB).<sup>548</sup> Thus, what remains to be seen is whether the AIIB would really intervene should its borrowers want to disqualify some contractors for such reasons. Similarly, in the case of concerns about protection of forests also known as sustainable timber policies, the exclusion list forbids financing “production or trade in wood or other forestry products other than from sustainably managed forests.”<sup>549</sup> However, so far, no specific provisions would allow AIIB-financed procurers to disqualify general contracts which, for example, supply sustainable timber for the realization of infrastructural projects financed by the AIIB but, for the purposes of other projects, source timber from unsustainably managed forests.<sup>550</sup> If need be, the AIIB’s stance on such matters will all have to come out in the wash.

## CONCLUSION

This article has shown that the public should not be as concerned about AIIB’s procurement standards as it was at the early discussions about this institution. As the time passed since the commencement of the operations by the AIIB in January 2016, subsequent official statements and documents like the Procurement Policy and the IDPIR have shed more and more light on the likely final shape of the rules of procurement of goods, services and construction services related to the realization of

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546. See ESF, *supra* note 143.

547. *Id.*

548. See AIIB Procurement Policy, *supra* note 3, § 5.8.2; IDPIR, *supra* note 5, § 4.9.1. The general principle of eligibility for tendering is that procurers “may not exclude a firm or individual from competition for a Bank-financed contract for reasons unrelated to the firm’s or individual’s capability to perform the contract in question.” See AIIB Procurement Policy, *supra* note 3, § 5.8.2; IDPIR, *supra* note 5, § 4.9.1.

549. See ESF, *supra* note 143, § XII.

550. See WBPR, *supra* note 9.

projects financed by this institution. Yet, even prior to such developments, the multilateral nature of the AIIB (along with commitments toward untying development aid and toward assuring aid's sustainability already individually made by the BRICS countries,) had clearly indicated that the AIIB would largely follow other MDB's procurement-related substantial solutions, even if it will not be prone to institutionalizing its co-operation with the existing MDBs. Soon after the commencement of operations, the AIIB confirmed such predictions by releasing information on the possible use of DAC benchmarking tools in the assessment of country systems in the Procurement Policy, as well as on the use of the World Bank Group Environmental, Health, and Safety Guidelines in the determination of socio-economic and environmental standards in the procurement process. Subsequently, information emerged about co-financing of projects along with information about the conclusion of framework agreements or preliminary memoranda on cooperation with, among others, the World Bank, the ADB or EBRD around April and May 2016. Then, nobody could speculate anymore on how the AIIB's procurement rules would significantly deviate from prevailing existing solutions.

Nonetheless, the outcome of the AIIB's works on detailed procurement rules still could not be precisely predicted. The period preceding establishment of the AIIB coincided with the final phases of the World Bank's largest ever procurement reform; the first months of the AIIB's operations coincided with the entry into force of a completely new WBPR. Thus, after the publication of the rather cursory Procurement Policy in January 2016, one could still wonder how quickly other MDBs would replicate the World Bank's new provisions and whether the AIIB would lean more toward an old or a new model. Particularly, one could wonder what (i) the "customized approach" to high value projects foretold in the procurement policy would mean,<sup>551</sup> (ii) what catalogue of domestic preferences, if any, the detailed rules would offer,<sup>552</sup> or (iii) what the scope of the use of country systems would be.<sup>553</sup> As this article has shown, the AIIB handled this transitional situation with a wait-and-see approach by issuing a temporary IDPIR in June 2016. The IDPIR, as it is, seems to strike a balance between the new, yet untested, WBPR and the previous WBGG/WBCG. Although, the IDPIR's general rules seem to lean more toward the previous WBGG, the IDPIR's consultants-specific rules seem to lean more toward new WBPR's consultants-specific section.

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551. AIIB Procurement Policy, *supra* notes 3.

552. IDPIR, *supra* note 5.

553. See generally section III.G.

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In any case, the outcome of the works on the IDPIR does not seem to be very distant from the outcome of the World Bank's reforms. The WBPR now offers virtually infinite options of how to configure the procurement process, arguably so that the World Bank's borrowers could find their ways of being compliant with commitments made toward the World Bank and under the potential procurement-related trade commitments. The IDPIR comes close. Where the IDPIR does not yet offer full answers to all questions, it does make up for it with complex provisions on co-financing and with references to rules of other MDBs, like in the case of domestic preferences' margins. This implies, however, that the AIIB's procurement regime, at least in the medium-term perspective (five to ten years), will be completely locked-in by the inter-MDB harmonization process led by the World Bank. The most crucial question which arises in this context for the future is whether the AIIB will break with this reality once its initial capital constraints, which so far forces co-operation with other MDBs, are overcome.