

COMMENTS ON IDB INVEST'S DRAFT ACCESS TO INFORMATION POLICY

September 2018

We, the undersigned organizations, welcome the opportunity to provide comments on the draft Access to Information Policy (the “Policy” or the “draft Policy”) proposed by the private sector arm of the Inter-American Development Bank, IDB Invest (“the Bank” or formerly “IIC”). Our organizations are civil society organizations, people’s movements and labor groups that have worked to support communities impacted by projects financed by development institutions, including by IDB Invest. This document builds on the comments contained in a previous submission, dated 28 September 2017, which elaborated on our experiences supporting communities to advance their own development priorities, and on our engagement in policy reform at numerous international financial institutions.¹

We urge IDB Invest to facilitate an open and inclusive consultation process for the Policy, ensuring the presence of vulnerable groups and people who have been affected by IDB Group projects, amongst others. We were pleased to see that the consultation period involved in-person consultations in Panama, Argentina, Brazil, Costa Rica, Colombia and Jamaica, in addition to Washington DC. However, we note that some of these in-person consultations occurred right before the official end of the consultation period, limiting the ability for these in-person consultations to feed into written comments. Additionally, some of the consultations were held with very limited prior notice, preventing broad and informed participation from civil society.

INTRODUCTORY REMARKS AND CONTEXT

Fulfilling the right to access to information is the beginning and foundation of true development that respects the rights of all people. Access to information goes hand-in-hand with meaningful consultation and stakeholder engagement to ensure that projects and policies actually better the lives of those they affect. We welcome IDB Invest’s commitment to enhancing transparency and accountability in its activities and practices, but urge it to consider its Access to Information Policy as the basis for early, ongoing and serious engagement with communities to improve the outcomes of its projects.

While we recognize and appreciate the progress made by the draft Policy, such as the steps taken to comply with the principle of maximum disclosure, we believe the document and IDB Invest’s disclosure practices could be further improved to facilitate and encourage the participation of communities in projects which affect them. In the following section, we provide comments tracking the provisions of the draft Policy.

¹ See our previous submission available at: <http://rightsindevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf>

Specifically, **the draft Policy should be further strengthened to recognize and mitigate the substantial barriers in accessing information and meaningful consultation that often exist for communities, and for marginalized groups.** Our experience working with communities and marginalized groups shows that when provided with safe, timely, and accessible information early in the project cycle, they are enabled to meaningfully engage with a proposed project to mitigate, if not avoid, adverse impacts and advance their development priorities.² Conversely, the absence of timely, accessible information and adequate consultation with project-affected communities and marginalized groups can result in conflicts and poorly designed projects.³ It should come as no surprise that allegations of lack of consultation, participation, and/or disclosure are cited with high frequency in complaints to the independent accountability mechanisms of development finance institutions.⁴ A dataset of complaints filed at international accountability mechanisms through the end of 2015 shows that consultation and disclosure issues are explicitly raised in nearly half of all eligible complaints – the most commonly raised issue by a significant margin.⁵

Throughout, the policy should take into account that different people face different barriers and utilize different methods to access information – be they rural communities, marginalized groups, women, persons with disabilities, the poor, elders, illiterate persons, or linguistic minorities. Too often, marginalized individuals and groups do not have access to information and their views are not heard. Therefore, **any approach or plan on access to information must include a differentiated analysis of the various rights-holders, and apply appropriate and specific measures to ensure their access.**

² See generally, the World Bank Inspection Panel's *Emerging Lessons Series No.4: Consultation, Participation & Information Disclosure* (Oct. 2017). The report states on p. 24 that:

The Panel's almost 25 years of experience has shown that consultation can serve as a tool to empower affected persons and communities to participate in the development process and to integrate their voice in development projects affecting their lives. Under the right circumstances, consultations help projects achieve improved development results and deliver benefits. . . .

The full report is available at: <http://ewebapps.worldbank.org/apps/ip/Pages/Emerging-Lessons.aspx>.

³ See *idem*, at p. 24, noting in part that::

Through its investigations, the [Inspection] Panel has encountered the adverse impacts brought about by inadequate public participation processes, as well as the benefits provided by positive ones. Ensuring adequate consultation from the very beginning of the project cycle and maintaining continuous communication with relevant stakeholders can enhance project design, prevent conflicts, avoid delays and improve development outcomes. . . .

⁴ For instance, in its recent report on consultation, participation, and disclosure, the World Bank's independent complaint mechanism, the Inspection Panel, found a high frequency of consultation and access to information issues in their subset of 30 complaints, spanning 23 years and covering 22 countries. See *idem*, at p. 4, providing a table of the frequency of consultation issues in complaints and noting that "the issues most identified by the Panel as issues in projects were culturally appropriate, timely and accessible consultations (27 cases) and stakeholder assessment and engagement (25 cases)." Similarly, the IFC's accountability mechanism, the Compliance Advisor/Ombudsman, has also stated that concerns about stakeholder engagement, including consultation, is often found in its complaint caseload.

⁵ This dataset will be publicly available in Fall/Winter 2018.

Further compounding these barriers, people increasingly face risks and retaliations for simply requesting information. Regrettably, the draft Policy lacks any provisions designed to prevent and address any reprisals or threats to individuals, communities or groups who might request or share information. Similarly, the draft Policy lacks provisions that would protect IDB Invest staff from detrimental sanctions, reprisals, and personal or professional consequences for publishing or otherwise sharing information. Despite global trends consolidating access to internet and social media, the space for civil society is rapidly shrinking and becoming increasingly dangerous and restrictive – particularly in relation to projects promoted by development institutions.⁶ The omission of any provision addressing the risks faced by communities and whistleblowers indicates that despite visible progress in this Policy, clients’ interests remain the clear priority and take precedence over the interests of persons affected by client actions. **As a Policy that deals with a fundamental human right, its focus should instead be people-centered, and based on international norms and established best practice.**⁷

In this regard, we note that **IDB Invest’s commitment to the principle of maximum disclosure could be better reinforced with the addition of clear, time bound requirements for minimum disclosure of environmental and social documents.** As we convey below, by reducing the number of days of mandatory disclosure for information on Category A projects from 120 to 60 days, the draft policy only confirms the lack of a people-centered focus and a failure to align with international best practice across multilateral development banks.⁸ A people-centered approach would have the Policy determine the opposite: that **information from all projects, regardless of category, should be disclosed at least 120 days before Board consideration, thus prioritizing communities’ access to information. Similarly, the draft Policy should provide additional guidance on the appropriate means of ensuring that information reaches those most affected by projects proposed.** It is important that this draft Policy recognize that many of those affected by the investments of financial institutions do not have ready access to technological means of communication, such as a computer or the internet. Similarly, the Policy should also address the situation of the many communities affected by IDB Invest financing for whom neither English, nor the official languages of the project country, are necessarily accessible.

⁶ Global Witness documents that in 2017, 207 people were murdered defending their land and homes - 60% of these murders were from Latin America. See Global Witness, *At What Cost? Irresponsible business and the murder of land and environmental defenders in 2017*, available at: <https://www.globalwitness.org/en-gb/campaigns/environmental-activists/at-what-cost/>

⁷ Many of these international norms and best practice have been in place and in development since freedom of information was recognized as a cornerstone to the realization of all other human rights by United Nation’s first General Assembly meeting through [resolution n. 59](#). Most recently, access to information and participation have been the principal subject of the successful negotiation of the [Escazú treaty](#) for the realization of Principle 10 of the 1992 Rio Declaration on Environment and Development. These processes of recognition only solidify the understanding that real development is only possible through the appropriate participation of those affected by it, as made clear by articles 1 and 2 of the 1986 UN [Declaration on the Right to Development.]

⁸ The Pelosi Amendment (22 U.S.C. 262m-7) in United States law requires public disclosure of environmental impact assessments of individual multilateral development bank projects that pose significant potential impacts on the environment 120 days before the U.S. Executive Director of any multilateral development bank can vote to support a proposed project that is presented to the board.

As discussed below, the section on positive override also demonstrates that the logic of the policy remains inverted, framing information disclosure as a liberality for the Bank, and not as a right of requesters. This is taken to an extreme when the draft Policy includes the client in the decision-making process of override possibilities, something considered inconceivable when seen through a human rights lens.

The undersigned appreciate the IDB Invest's commitment made in the São Paulo consultation meeting on 13th August 2018 in relation to **writing a document that tracks and refers to all civil society's recommendations that are not incorporated in the final Policy, providing the reasons for the dismissal of these recommendations**. Such feedback to those that contributed to the current consultation process would be taken as another step forward in the establishment of true dialogue and participation.

ANALYSIS OF DRAFT POLICY

Section I - Introduction

In Paragraph 1, the description of IDB Invest should explicitly state that the institution is not only dedicated to the economic development of its member countries, but also to substantive development of people and communities affected by its investments. As IDB Invest's website itself states, the Bank is committed to both economic growth *and* social inclusion.⁹

We welcome the acknowledgement in Paragraph 3 of "*the right to access information as a fundamental human right*". However, contextualizing this right as a recently growing demand for transparency and information based on increasing access to the internet and social media is misleading. Best practices and standards demonstrate that the solid recognition of the right and its importance for the realization of all other human rights precedes the access of citizens to current communication systems.¹⁰ These systems, such as computers and the internet, only assist citizens in acquiring and sharing information, improving the possibilities of participation and accountability. We recommend that the Policy's introductory remarks integrate these facts and refrain from introducing the discussion with a misleading paradigm. Concretely, the Bank should plainly acknowledge that access to information has been internationally recognized as a human right for a long time and not state that it "recognizes solid developments in recent years to advance the recognition of the right to access information as a fundamental human right".

The current draft continues to follow the pattern of the old policy, establishing that any advancement made by the future Policy in complying with the right to access information will be limited to the documents produced after the adoption of said Policy. We reaffirm that it is

⁹ IDB Invest website, available at: <https://www.idbinvest.org/en/about-us>

¹⁰ See footnote 7 above.

unreasonable for IDB Invest to only apply its updated understanding of access to information as a fundamental human right to documents produced after the adoption of this Policy – the respect necessitated to fulfill this human right should have effects *ex tunc*. Therefore, **the future Policy should apply to all documents possessed and produced by IDB Invest, regardless of date of creation.**

Additionally, the introductory remarks should recognize that even if IDB Invest’s immunity is not being waived, this Policy should comply with international norms and best practices on the right to access information.

Section II – The Policy

A. Scope

We recommend that the Policy refrain from using the term “*interested*” party when referring to someone requesting access to information. This term could have an exclusionary interpretation, resulting in some requesters being deemed uninterested, irrelevant, or not fit to request and receive information. Access to information should be available to all those that request it from IDB Invest, regardless of citizenship or stakeholding. “*Requester*,” as is utilized elsewhere in the Policy (see Paragraph 69), might be a more appropriate term.

B. Nature of the Information the IDB Invest Produces and Receives

We understand the importance of IDB Invest affirming its responsibility towards its member countries and private clients when disclosing information about the management of its public funds. However, it is critical that the rationale for producing information on IDB Invest’s activities and operations also includes ensuring that communities affected by projects have the necessary information to meaningfully participate in consultations and project planning, and that they remain meaningfully informed throughout the duration of the Bank’s activities. The impact of IDB Invest’s activities in local communities demands a proactive responsibility towards them as distinct stakeholders, as recognized by IDB Invest’s Environmental and Social Sustainability Policy.¹¹

We recommend that this section recognize affected communities and individuals as legitimate parties that are due the attention and consideration of the Bank when striking a balance between the rights of other stakeholders and human rights of affected people. The emphasis should not be on economic development of member countries, to the exclusion of substantive local, participatory and sustainable community development.

C. Principles

¹¹ See, among other provisions, paras. 2 and 7 of the Policy detailing IDB Invest’s commitment to compliance with good international practice in the context of all social aspects of the projects it finances including meaningful community consultation standards.

We commend the draft Policy for excluding principles that are present in the previous policy which have no relation to the theme, and that jeopardize the full realization of the principles to which the Bank is now committed. The draft should also be praised for proposing compliance with key principles on access to information that form a part of international best practice, and are endorsed by UN and OAS Special Rapporteurs on the theme, including maximum disclosure, limited scope of exceptions, and processes to facilitate access. Similarly, we appreciate that the draft also proposes compliance with the principles of appeals promoted by the Global Transparency Initiative Charter for International Financial Institutions.¹²

Nonetheless, the draft Policy fails to commit to a number of principles that complement those in the current document. These principles form a part of a whole, and seeking coherence with all of them is an important step in pursuit of a system that guarantees proper access to information in line with best standards and practice. Therefore, as in the previous submission of 28 September 2017, **we continue to call on the Bank to adopt the full suite of access to information principles, namely: obligation to publish; promotion of open environment; costs; open meetings; disclosure takes precedent; protection of whistleblowers; the right to access; automatic and routine disclosure; access to decision-making; the right to request information; promotion of freedom of information; and regular review.**¹³ In order to proactively foster an environment that enables safe access to and publication of essential information, **we strongly recommend that IDB Invest institute measures to ensure the safety and security of any requesters, including communities, groups and individuals, in accessing information. IDB Invest should take all necessary measures to assess, prevent, and address any risk of sanction, reprisal, or professional or personal detriment, as a result of disclosing or accessing information. These measures include ensuring the anonymity of requesters, assessing the enabling environment for public participation, monitoring clients' track records in relation to reprisals, and instituting protocols for responding to threats or attacks against requesters.**

On the principle of maximum disclosure, the Policy should not state that “[T]o maximize access to information, the [IDB Invest] commits to proactively disclose **as much public information as possible** regarding its governance and activities in accordance with this Policy,” as stated in Paragraph 10. This phrasing is vague and contradicts the principle of maximizing access to information and the presumption in favor of disclosure. The Bank should proactively disclose all public information it produces, and all information it receives from clients, unless such information falls within one of the well-defined exceptions clearly delineated in the Policy. The same should apply for Paragraph 51 of the Policy.

Although it is important that IDB Invest is seeking to maximize access to information, to truly be effective, **the principle should clearly state that at minimum, the Bank commits to proactively disclose key planning documents including environmental and social impact assessments,**

¹² See http://www.ifitransparency.org/doc/charter_en.pdf

¹³ For a description of the meaning of these principles, see our previous contribution to the policy review process available at; <http://rightsinddevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf>, p. 4.

indigenous peoples or resettlement action plans, and stakeholder engagement plans no less than 120 days before Board decision.

We appreciate that the draft Policy commits, in principle, to “Simple and Broad Access to Information” (Paragraph 12) and “Explanation of Decisions and Right to Review” (Paragraph 13). Below, our submission provides detailed suggestions for improvement on both points.

Section III – Information Routinely Made Available

A. Institutional Information

a) Governance Information

Paragraph 18 of the draft Policy clarifies that the Board has the option of conducting a public consultation on policies that might have a broad impact on the Bank’s operations, or a direct impact on communities affected by the Bank’s investments. As a development institution, IDB Invest should strive to comply with best standards and practices on access to information. Therefore, **it is essential that the draft Policy make it a requirement for the Board to open such a public consultation process, with ample time and means of participation, whenever a policy that might have broad or direct social impacts is being considered.**

e) Good Practice Reporting

We welcome the practice of disclosing reports on good practices or lessons learned from IDB Invest’s investment and advisory services projects. **We strongly recommend that the findings in these reports include community voices, and consult those impacted by the projects in question.**

B. Investment-related information

B.1. Pre-Approval Disclosure

We welcome IDB Invest’s commitment to disclosing information and documents about proposed projects prior to Board consideration. Providing access to information about proposed projects is of the utmost importance; not solely for the sake of transparency and accountability, but to ensure that the beneficiaries and actors of development - communities - are well-informed and equipped to engage meaningfully in the design of a project. While Board approval constitutes IDB Invest’s commitment to executing a project, pre-approval consultations and proactive information disclosure ensure successful project designs that can mitigate adverse impacts and incorporate the development priorities of those affected.

We strongly recommend that IDB Invest first disclose information about a proposed investment when it is still at the concept stage, ideally at least 120 days before the

investment is considered by the Board, to ensure enough time for stakeholders to meaningfully engage in project design.¹⁴

In addition, as stated earlier, the Policy must recognize and provide for the many people affected by investments in the American continent who do not have access to means of communication such as a computer or access to the internet. **Pre-approval disclosure of information should not be solely available on IDB Invest’s webpage, but also via other means accessible to communities affected by possible investments.** In the spirit of proactive disclosure, IDB Invest should take steps to ensure that local stakeholders who do not have access to internet remain informed throughout the lifecycle of a project, including during the concept stage. For those that do have access to internet, IDB Invest could benefit from doing targeted social media publications in order to reach audiences that do not constantly access its webpage. Additionally, it is also important to note that online guidance on how to access project information by non-electronic means is clearly predicated on the contradictory fact that this guidance must be obtained by stakeholders who have access to internet. Therefore, we recommend that IDB Invest proactively utilize other means of communication without relying on their request by those who could do so only with access to a computer and internet. A non-exhaustive list of such means of communication could include, in local languages: radio transmissions; telephone calls; cell phone messages, public signs or postcards; and community meetings. In client project locations, the bank could also establish “Temporary Information Centers” responsible for proactively and reactively providing information.

a) Investment Summary

In line with the commitment of maximum disclosure, **the Policy should require the disclosure of all available planning documents and information that the Bank has in its possession as soon as possible – at least 120 days before board decisions on the investment – so stakeholders, including communities potentially affected by a project, have the opportunity to be properly informed and meaningfully engage before project approval.**

In addition to publishing the investment summary information proposed by the draft Policy, the Policy should also mandate publishing the following:

- The date(s) when project information was disclosed and updated on the web page and in other locations.
- The current status of the project, clearly indicated to ensure all stakeholders are informed of the project’s stage in IDB Invest’s project cycle.

We reiterate the importance of ensuring this information is available to stakeholders without access to internet, and appreciate the effort made by IDB Invest in improving its disclosure practices over the past year, including disclosing information on the contact information for the

¹⁴ For more on the topic, see section “c) Timing for Disclosure of Investment and Environmental and Social Information” below.

client and guidance on how and where information about the proposed project can be obtained locally.¹⁵ However, we recommend that this information be disclosed for all projects, not only for those “*where there may be affected communities*,” as stated in Paragraph 30. Precisely as stated by the draft Policy, “*in view of the potential risks and impact of investments*” (Paragraph 30), all projects (including those considered financial intermediaries) should have this information available to enable stakeholders to engage and contribute, particularly in cases where key information may have been overlooked.

b) Environmental and Social Information

We appreciate that the disclosure of environmental and social information has been considered a substantive part of the pre-approval disclosure process. Recognizing that it is the responsibility of the client to produce and disclose key environmental and social information, we strongly recommend that IDB Invest extend the principles and above-stated framing of this Access to Information Policy to its clients, ensuring that the aim remains to meaningfully inform stakeholders. The statement that IDB Invest “*requires its clients to engage and communicate with the affected communities*” (Paragraph 31) prior to project approval is insufficient - **clients should be required to meaningfully inform, consult,¹⁶ and incorporate the opinions of affected communities and marginalized groups before the project comes to the Board for consideration, and provide complete documentation of these processes. Additionally, it is the responsibility of IDB Invest to ensure the client is disclosing comprehensive information that is accessible to the communities affected, in the language of the community, in a format that is understood, and in a manner that ensures safety in accessing this information.** In accordance with the principle of maximum disclosure, **we recommend the following:**

- Include a section within the Policy that explicitly addresses the necessary oversight and verification exercised by IDB Invest over its clients’ disclosure practices, and the specific disclosure requirements clients must follow, including the timing of disclosures within the project cycle.
- Publish a comprehensive Stakeholder Engagement Plan prior to consultations being held, with clearly indicated dates and locations for consultations, and explicitly state when and why stakeholder engagement is not required.¹⁷

¹⁵ International Accountability Project (IAP) previously analyzed IDB Invest’s disclosure practices for 96 projects disclosed between the period of March 2015 to April 2017. See:

<https://ews.rightsindevelopment.org/media-category/idb-invest/>

To track the progress made, IAP’s updated analysis monitors the information released for 98 projects disclosed between April 1, 2017 and July 31, 2018. IAP’s updated findings show that contact information for the client or IDB Invest project leads were available for 60 out of 98 projects during this period. See <http://bit.ly/idbinvest> for more information.

¹⁶ This stipulation does not take away the States’ duties to properly consult with indigenous and tribal peoples when these communities are to be impacted by projects.

¹⁷ IAP’s updated analysis of projects proposed between April 1, 2017 and July 31, 2018 reveals that only 4 out of the 98 projects analyzed included a Stakeholder Engagement Plan. 26 of these projects stated that the client was to prepare this for the future, while 2 stated that it was not required.

- Include and update information about the status of consultations and processes of free, prior and informed consent of tribal and traditional peoples, as well as indigenous peoples. The Policy must also specify and guarantee that the findings and agreement resulting from the consultation will also be made available to the public, not only to inform the state or moment in which the query is found.
- Publish all environmental and social evaluations and Environmental Impact Assessments (EIAs) prior to the date of Board consideration, and explicitly state when and why the assessments are not required.
- Clearly indicate which policies are considered applicable for each project, and the reasoning for their applicability. Include a list of relevant safeguards that are likely to be triggered as part of IDB Invest's Environmental and Social Review Summary (ESRS), and explicitly state when and why they are not applicable.¹⁸
- Publish the Environmental and Social Action Plan (ESAP) in advance of the Board date, and explicitly state when it is not required.¹⁹
- Require the Bank and clients to proactively disclose the existence and procedures for the IDB Invest's independent accountability mechanism to project-affected communities through a means and language that is accessible, early on in the project cycle and at project sites (e.g., infographics in local languages and local consultations).²⁰
- Include a list of all trade unions that represent members employed by public or private employers involved in the project.
- Publish all existing collective agreements signed between trade unions and public or private sector employers involved in the project (with digital links where possible) and all labour-related legal processes currently underway.
- Publish all labour-related legal processes that are currently underway that involve public or private sector employers involved in the project and employees that are not represented by a trade union.

For IDB Invest to guarantee a thorough due diligence process and meaningful participation of affected peoples, **documents such as the Stakeholder Engagement Plan and ESAP must be completed and disclosed in their entirety at least 120 days prior to the date of Board consideration.**

¹⁸ IAP's updated analysis of projects proposed between April 1, 2017 and July 31, 2018 reveals that according to current policy and practice, only 34 out of 98 projects proposed clearly listed the applicable safeguards relevant to the project.

¹⁹ IAP's updated analysis of projects proposed between April 1, 2017 and July 31, 2018 shows that 48 out of 98 projects proposed included an ESAP, while 8 stated that they would be prepared in the future, and 7 stated that an ESAP was not required.

²⁰ While IAP's previous analysis noted that information on the MICI was not available for a single project out of the 96 proposed between March 2015 and April 2017, IAP's updated analysis showed an effort made by IDB Invest in including information on the MICI for every project proposed between April 1, 2017 and July 31, 2018. However, we note with disappointment that IDB Invest's new website again fails to include this information on project pages, and hope that this oversight will be rectified with the adoption of the new Policy.

For investments made through financial intermediaries, we welcome IDB Invest’s categorization of FI-1, FI-2, and FI-3 to indicate potential risk, and urge the Bank to ensure this information is complete prior to Board approval, in practice. **Given that a significant portion of the Bank’s portfolio comprises of financial intermediaries,²¹ in addition to all of the above, the following should be required:**

- At minimum, the sectoral breakdown of the financial intermediary’s portfolio of sub-clients must be disclosed.²²
- For financial intermediaries categorized as FI-1 or FI-2, information on the profiles and sub-projects of clients should be made available, in addition to environmental and social impact assessments and evaluations.²³
- Contact information for the financial intermediary should be disclosed.

We urge IDB Invest to uphold the principle of maximum disclosure with regard to financial intermediaries, and ensure that information on sub-projects and sub-clients is disclosed at least 120 days before a decision to invest in them is made.

c) Timing for Disclosure of Investment and Environmental and Social Information

We are disappointed that the draft Policy does not reflect our previous recommendation that project information (including the Investment Summary, ESRS, and EIAs) be disclosed no later than 120 days before the Board date.²⁴

In Paragraphs 35, 36 and 37, the draft Policy assumes that it is sufficient and realistic for communities – regardless of their particularities and traditional differences – to immediately access information on the date that information is released on the Bank’s webpage, translate into local languages when necessary, make sense of the technical terms utilized, assess the potential impacts of the project according to their local knowledge and expertise, organize their community to discuss

²¹ According to IAP’s updated analysis, approximately 38%, or 38 out of 98 projects were assigned a risk rating of either FI, FI-1, FI-2, or FI-3.

²² See, for example, the Equator Principles Association Members’ Reporting <http://equator-principles.com/members-reporting/>.

²³ Disclosure of sub-projects is the emerging standard for financial intermediary lending: see, for example, the Overseas Private Investment Corporation’s Environmental and Social Policy Statement, para. 3.30: “OPIC’s review of Subprojects involves the same screening, assessment, disclosure, compliance and monitoring procedures as all other direct Applicants to OPIC...”

[https://www.opic.gov/sites/default/files/files/final%20revised%20ESPS%2001132017\(1\).pdf](https://www.opic.gov/sites/default/files/files/final%20revised%20ESPS%2001132017(1).pdf); Equator Principles Association, Members’ Reporting; IFC’s Work With Financial Intermediaries: April 2015 Factsheet

https://www.ifc.org/wps/wcm/connect/1c3013804a260251bf70bfe54d141794/IFC_FI_FactSheet_April2015.pdf?MOD=AJPERES.

²⁴ See p. 8 of our previous submission, available at: <http://rightsinddevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf>.

the project and its potential impacts, and then agree upon and share their concerns and recommendations to IDB Invest before the investment decision is made.

This disclosure timeline is unrealistic and places an undue burden on communities already potentially affected by a project. By committing to disclosing the EIAs only 60 days before the Board date for Category A projects, and 30 days for all other project categories,²⁵ the draft Policy precludes the possibility of meaningful dialogue with and response from potentially affected communities. Based on our numerous collective experiences, this is a missed opportunity to ensure the outcomes of IDB Invest's projects actually achieve the development priorities of those affected, and crucially, mitigate or avoid adverse impacts.²⁶ **A people-centered policy would have the Bank release project information at least 120 days before Board consideration of projects, regardless of project categorisation, to allow for meaningful community input into project designs, risks and mitigation plans.**

Paragraph 38 of the draft Policy prioritizes market measures over the human right to access information, and makes it possible for the Bank to limit the time of disclosure even more than indicated in the preceding paragraphs. **We strongly recommend that the right of communities to access information and understand project plans affecting their lives take precedence over market conditions and economic profit.**

d) Commitment with Respect to the Content and Languages in Disclosures

We are pleased to see emphasis placed by IDB Invest on *“allow[ing] affected communities and interested parties to substantively participate in the processes prior to the approval of the investments”* (Paragraph 39), and strongly recommend that this inclination and framing be echoed throughout the Policy. However, the language used in the latter half of this sentence already indicates a presumption towards approval, and does not invite contributions from communities which could alter the result of Board consideration. Instead, we advise the draft Policy to recognize the importance of incorporating community expertise and priorities for development by replacing this language with *“prior to Board or Management making a decision on the proposed investment proposal.”* This consideration should be applied to the entirety of the document, including Paragraphs 35, 36 and 37 which utilize the same language.

²⁵ IAP's updated analysis of projects proposed between April 1, 2017 and July 31, 2018 reveals that only 19 out of 98 projects included links to Environmental Impact Assessments (EIAs), while 3 stated their future preparation.

²⁶ See, for instance, the compliance review report for El Dorado International Airport Project CO-MICI002-2001 where MICI found that “the absence of a meaningful consultation process and of mechanisms to communicate with those affected by the Project created uncertainty in the communities as to the magnitude and characteristics of the impacts they are currently suffering and those that will be felt in the future, thus intensifying the communities' vulnerability”: para 3.10. While this private sector project was headed by the Inter-American Development Bank, MICI explicitly noted that its experience regarding consultation and access to information will be relevant to IDB Invest's current policy review: para 4.10.

For communities to substantively participate in the project design, it is essential that information be disclosed in a language, format, and terminology that is accessible. We commend IDB Invest for committing that *“for projects with high environmental and social risk and where there are affected communities, the client will communicate in the formats and languages accessible to such communities”* (Paragraph 41). Nonetheless, we believe this same principle should apply for all project information and documents, and for any project where an environmental and social safeguard is triggered.

While information will be disclosed in the language produced by the Bank, **at minimum, IDB Invest should commit to producing all project information, including the Investment Summary, in the national language of the country where the project will be implemented.**

The policy should also require that the language utilized by the Bank on its webpage and documents be as accessible as possible for those not familiar with technical terms. Information should also be provided in an open data format, whenever possible.

Finally, **the website should be available not only in English and Spanish but, at least, in all four official languages of the Bank, including Portuguese and French.**

e) Early Disclosure

We commend IDB Invest’s initiative in taking proactive steps to ensure that the EIA is disclosed *“early in the environmental and social evaluation process”* (Paragraph 42) for proposed investments with high environmental or social risk. **To ensure the meaningful contributions of affected communities in project design, we recommend that this practice be applied to all projects where an EIA is required, including those with lower risk categorizations. Additionally, we strongly recommend that more specificity be added to the language of this provision, defining what “early” means, so that communities know when to expect information.**

f) Client’s Factual Review of the Information

While it is important for IDB Invest’s client to be able to check on the accuracy of the information provided to the public in relation to a project, **we recommend the language of the draft Policy clarify that this does not give the client the right to veto disclosure.** Clients should not have the right to determine the opacity of information that should become public, particularly where public funds are involved.²⁷

g) Disclosure of Other Materials Provided by the Client

Again, we commend IDB Invest’s initiative in disclosing explanatory materials produced by the client. In the spirit of maximum disclosure, **we recommend that all information available to IDB Invest pertaining to a project be made available consistently,** and that the draft Policy replace the language of *“may disclose”* (Paragraph 44) to *“will disclose.”*

²⁷ See p. 2 of our previous submission at <http://rightsindevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf>

B.2 Post-Approval Disclosure

a) Investment Summary Update

We strongly recommend that in its update of the Investment Summary post-approval, the IDB Invest should regularly revise the status of the project and include the date of said updates, for transparency and accountability.

b) Environmental and Social Information Update

We recommend that any revisions to ESAPs and “*new or revised relevant environmental or social documents*” (Paragraph 46) be regularly updated for all projects, not only those classified as Category A projects. Additionally, the ESRS should also reflect any new developments for all projects that IDB Invest is engaged in.

Finally, Paragraph 46 should also **explicitly require disclosure of environmental and social monitoring reports. Affected communities have a right to meaningful consultation throughout the project lifecycle.** They can usefully assist IDB Invest and its client during implementation to identify unresolved or emerging environmental and social issues. Disclosure of monitoring reports is essential to facilitate this process of consultation and feedback.

C. Advisory Services-Related Information

a) Advisory Services Project Summary

A significant gap in the draft Policy is that it does not require for pre-approval information in relation to advisory services. It would be advisable that such information be provided following the same requirements as investment projects.

Section IV – Exceptions

In adopting a maximum disclosure approach, it is fundamental that the exceptions in a policy be clearly delineated and restricted, seeking to avoid any ambiguity in its interpretation. Unfortunately, this is not the case with the draft Policy -- **the majority of the exceptions are ambiguous and not well delimited. We strongly recommend revising these exceptions to ensure they are not as numerous, as expansive, and as vague.**

Paragraph 51 correctly affirms that access to information is not an absolute right and that there are legitimate interests that could take precedence over disclosure. However, **it is important for the draft Policy to recognize that an analysis must be undertaken for such interests to take precedence over disclosure, and that no interest is absolute either.** This is the reason why, in our previous contribution, **we advised the Bank to follow the internationally endorsed three-part test, formulating a limited and reasonable hall of exceptions that should relate to a**

legitimate aim.²⁸ When determining to withhold information, the information in question should be taken as a substantial threat to this aim, and the harm to the aim must be greater than the public interest in accessing the information.²⁹

Although somewhat related to the “positive override” section discussed below, this test is different than the solution proposed by the Bank, as it is aligned with human rights concerns, and has been endorsed by international experts and organizations around the globe.³⁰

a) Commercially Sensitive Information

In line with the reasoning above, Paragraph 52 runs the risk of providing for the inclusion of an unlimited and unknown hall of exception when it utilizes the sentence “*or other non-public information about the IIC.*” Such an open-ended formulation could open the door to unreasonable interpretations and put the Policy as a whole in jeopardy. We recommend eliminating such vague language, or providing further specificity.

c) Deliberative Information

In our previous submission, **we recommended that a summary of Board minutes be disclosed.**³¹ As the draft Policy acknowledges in paragraph 8, the IDB Invest is an “*international financial institution to which public funds have been entrusted to promote the economic development of its regional developing member countries*” and as such, it “*is accountable for the use and management of its resources.*” Board discussions are pertinent for citizens to know how their countries are voting in relation to specific investments. The intention is not to prevent the free and candid exchange of ideas, but to make information available for citizens so they know how their own governments are planning for development that affects their lives and environment. Best practice from other international institutions demonstrate that meetings of public organization themselves should be public, and not only their minutes.³² At the very least, other institutions (such as the IFC) disclose Board proceedings at the end of the relevant deliberative process.³³

²⁸ The three-part test a test developed under principle 4 “limited scope of exceptions” of the Principles on Freedom of Information Legislation developed by Article 19 and endorsed by international courts and experts around the world, such as the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression. For details, see <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>, principle 4.

²⁹ See *idem*, pp.5/6.

³⁰ See, e.g., *idem* p. 3 for endorsements.

³¹ See <http://rightsinddevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf> p. 11.

³² See, for example, Article 68 of the OAS Inter-American Commission of Human Rights determines that hearings should be public, unless warranted by exceptional circumstances. See <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>; UN General Assembly meetings are also available live or on demand. See <http://www.un.org/en/ga/meetings/>. Recorded UN Security Council meetings are also available at <http://www.un.org/en/sc/meetings/>.

³³ According to IFC’s Access to Information Policy (Jan. 1, 2012), paragraph 18(a)-(e), detailing information routinely made available by IFC (board proceedings), the following board records are made publicly available by IFC at the end of the deliberative process: minutes of formal meetings of the IFC’s

f) Security and Safety

We recommend that this exception be narrowly defined. As currently drafted, the language is too broad and ambiguous and could be used to exclude a large number of requests. For example, how would the institution determine that some information “*could endanger the national security of a member country*”; or “*could endanger the life, health or safety of any individual or the environment if disclosed*” (Paragraph 57)?

Section V – Disclosure-Related Terms

a) Delayed Disclosure

For the reasons noted throughout this submission, we express serious concern about the inclusion of provisions that would allow delayed public disclosure of documents to communities. **We recommend that this provision be omitted, or that any delay be determined with a clear timeline of no longer than 30 days.** In any case, communities should have ample time, no less than 120 days, to assess documents regarding potential impacts on their lives and environment. **The rights of affected communities to understand plans for their own territories and lives should be prioritized, to ensure that they have access to critical project information at the earliest stages of the project cycle.** We recommend that the Policy reflect this understanding, instead of prioritizing market conditions over the human right to access information, and allowing for further limitations on the timing of disclosure. In the alternative where a delay occurs, the draft Policy should be amended to require notification and the details of and reasons for the delayed disclosure.

d) Positive Override

We commend the IDB Invest for drafting a section that recognizes that there are circumstances in which the public interest overrides the private and market interests of the IDB Invest and its clients. However, this section inverts the logic of the override system as used within the international human rights framework. **We recommend that the override be aligned with and explicitly reference the ‘three part test.’**³⁴ The override should not be considered an institutional right whenever IDB Invest is considering declassifying information. Instead, the override should be considered part of the public’s human right to access information and should always be utilized, via the three-part test, whenever an institution is considering to classify information as secret. In order to successfully align the Policy with the principle of maximum disclosure, the Policy must recognize that overriding what could originally be classified information due to public interest is a human

Board of Directors (other than Executive Sessions): minutes of Board Committee meetings; summings-up of Board Meetings and Committee of the Whole Meetings; Annual Report of Board Committees; and Reports to the Board from its Committees (Green Sheets), with deliberative or confidential information removed (summary portion of Green Sheets), if a subsequent Board discussion is not expected.

³⁴ See analysis of Exceptions section above.

right of those seeking the information, and that the institution holding this information is the responsible party under obligation to disclose.

In addition, we recommend that the language used in the Policy should refrain from limiting the information to be disclosed when subjective terms such as “serious” and “imminent” are considered to be met. Also, limiting the possibilities of override to threats of harm to health, security and environment alone neglects other basic rights, which should also be considered of enough importance to trigger the possibility of override.

Finally, as a necessary component of the access to information framework, override considerations do not pertain to the decision-making sphere of clients or other parties. Such parties should not have the power to determine compliance with the public’s basic human right. **Such considerations should apply to all documents in possession of the bank.**

Section VI – Implementation Aspects of the Policy

a) Classification

Unfortunately, the draft Policy takes a step back in relation to its classification system. **We recommend that the draft Policy predict a maximum period of secrecy and other periods in-between for information considered less sensitive.**

The current policy determines that information classified as secret will be made available in 20 years. In our previous contribution, we recommended that IDB Invest create a system of classification that differentiates degrees of secrecy, so that information with different levels of sensitivity could be made available to the public in a shorter period of time.³⁵ The draft Policy, however, not only fails to differentiate between the different levels of secrecy, but also makes no reference as to when secret information could be made public – meaning information classified as secret could potentially stay out of public scrutiny *ad eternum*.

IDB Invest should create and provide a list of information considered classified by the Corporation and the legitimate reasons for such classification.

The Bank should also create and provide a list of unclassified information to be released once information is considered public, after the lapse of time or reconsideration by the Bank.

c) Historical Information

As stated in our analysis of the Introduction above, we reaffirm that it is unreasonable for IDB Invest to only apply its updated understanding of access to information as a fundamental human

³⁵ See p.12 of our previous submission, available at <http://rightsindevelopment.org/wp-content/uploads/2017/12/IIC-Policy-Analysis-nov-27-2017.pdf>

right to documents produced after the adoption of this Policy – the respect necessitated to fulfill this human right should have effects ex tunc. Therefore, **the future policy should apply to all documents produced by and/or in possession of IDB Invest, regardless of date.**

Section VII – Requesting Information and Review Mechanism

A – Mechanism for Requesting Information

IDB Invest’s commitment to the principle of maximum disclosure must be complemented by a transparent, predictable, and equitable operational mechanism that enables stakeholders to request information directly from the institution.

With this in mind, **we recommend that IDB Invest:**

- Create a system that acknowledges the receipt of each request in a timely manner, provides users with a registration code of their requests and that allows them to track the status of their requests.
- Create a specific “Access to Information” section on its website, similar to the one on the website of the Inter-American Development Bank, with information available about the Policy, direct access to newly disclosed documents, and an electronic form to request information, among other relevant elements.
- Create and provide timely updates to a public registry of information disclosure requests. This registry should include data such as the information requested, IDB Invest’s response and rationale, and the timeline for these communications.
- Specify that an access to information request can be presented anonymously, by any means, without having to justify the reason for the request, and develop protocols to ensure confidentiality is maintained when requested.
- In case of doubt, the institution in charge should contact the requester to clarify any question.
- In case that the information requested is not available when it should be, the institution must produce or find those documents in order to answer the requester.
- The institution must publish the result of community consultation before the Board considers the investment.
- The Policy should require the client to create a project-level mechanism to receive and register external communications of the public.

- The appeals body should be independent, with allocated budget and staff and report to a body that is independent from the Bank. The process and timeframe for utilizing the system, including clear timelines for the appeals body's decisions and communication with requesters, should be clearly set out and available online in multiple languages that are used in-region.
- The appeals institutions must make reasonable efforts in order to help the requester.

We also recommend that the Policy explicitly provide means for information requests to be received beyond internet dependent formats, such as email. A non-exhaustive list of such means of communication could include: radio transmissions; telephone calls; fax, and cell phone messages.³⁶ Paragraph 68 (Where to Access Information) and Paragraph 69 (Submitting a Request for Information) of this section of the draft Policy rely primarily on public access to the internet so requests can be made. As stated above, it is important for the Policy to recognize that many of those affected by the investments of financial institutions in the American continent do not have ready access to means of communication, such a computer or access to the internet. While written requests might be one alternative, the Bank must consider that those requests also pose a barrier for those that are illiterate, have no means of utilizing the mail, or need information immediately. It **is necessary for the Policy to clarify protocol for the following:**

- For example, If the request is made in writing and in person, what will the office, address or contact be receiving these requests for information?
- Or If the request is made by telephone, what is the contact number and procedure to receive these requests?
- These concerns also apply to the way the Bank will respond to requests for information. We recommend clarifying whether the Bank will use these same means to guarantee that information is delivered in a timely and efficient manner.

Similarly, **Paragraph 70 (Languages) should be amended to allow requests for information in any language, beyond the “four official languages of [IDB Invest].”** Instead, the Policy should state that “IDB Invest will respond in the relevant language of the request.”³⁷ Many vulnerable communities in the American continent do not communicate in IDB Invest's official languages, and efforts should be made to accept requests and answer them in a language and format preferred by the requesters.

Paragraphs 71-73 (Responding to Requests) also contains several provisions that should be amended for clarity. For instance, Paragraph 71 states, in part, that “[IDB Invest] will assess the

³⁶ As one example, according to IFC's Access to Information Policy (Jan. 1, 2012) paragraph 52(a)-(e) (submitting a request for information), requests for information can be sent through telephone, fax, and mail, in addition to the email portal.

³⁷ For example, IFC Access to Information Policy, paragraph 56 states: “English is the working language of IFC . . . However, to the extent that IFC receives requests in other languages, IFC will endeavor to be responsive in the relevant language.”

possibility of responding to requests for information based on the scope of the requests, the number of requests . . .” This clause appears to indicate that IDB Invest could refrain from answering requests depending on the number of requests made, creating what could be interpreted as another loophole. Instead, **IDB Invest should dedicate the necessary staff and resources to comply with the Policy, and not create yet another subjective exception for compliance that could render the whole Policy null and void. As long as the information requested does not fall within the roll of exceptions, it should be provided.** Pro-active publication of as much public information as possible, and of frequently asked questions on the Bank’s webpage might save time and resources for those responsible for the implementation of the Policy.

The timelines for information requests are also unnecessarily long and pose another barrier to access. Paragraph 71 also provides that IDB Invest will *“provide its response [to an information request] within a period of 30 calendar days following receipt of the request.”* **The IDB Invest should acknowledge receipt of the request in no more than 5 working days after the request was made, and should provide the response within the next 20 or 25 days.**

IDB Invest should also make efforts to provide information immediately in cases where the information is urgently required. In such a case, the requester should clarify that the information is urgently required, detailing the reasons for it. Urgent requests can be justified to prevent a harm, to promote effective participation, protection of human rights or environment, and security, among others.

Additionally, **the Policy should explicitly state the maximum time period for the institution to respond to any given information request.** By only providing an estimated timeframe, the institution will leave requesters in limbo, not knowing whether their request was denied, forgotten, or still pending. **Requesters should be afforded a determinate time period so as to proceed with an appeal, in case they wish. The same applies to the IDB Invest Management mechanism when performing of the first instance of review.³⁸ The mechanism should be given a limited time over the initial 30-day period in order to assess the appeal. In the absence of a response within this time frame, the requesters should be able to proceed to the next instance of review.**

Finally, **we recommend omitting Paragraph 75 (Costs), which provides IDB Invest discretion to “charge reasonable fees for the cost of producing and sending copies to requesters, which may be regulated in the implementation guidelines.”** As part of its commitment to transparency, **IDB Invest should bear these costs and budget adequately for requests for information.** As we have noted throughout this submission, many communities already face barriers in accessing information. Creating the possibility of cost for a request will pose an unnecessary burden for those requesting access to information.

Section VII – Implementation Progress and Policy Review

³⁸ See Paragraph 80.

IDB Invest should establish a participatory and inclusive process to implement the new Policy, regardless of the changes that are introduced. Thus, IDB Invest should call a wide range of actors and interested stakeholders (civil society, past requesters of information, affected communities, access to information experts, Bank and ICIM officials, academics, and others) **to collaborate with the Bank on an implementation process for the new Policy.** A similar process was carried out, for example, during the implementation of the World Bank's Access to Information Policy.

In relation to that, **we advise IDB Invest to:**

- Specify the contact information of a person in charge of receiving questions and providing answers regarding the Policy.
- Specify that IDB Invest personnel should be trained in the correct implementation of the Policy.
- Specify that the Policy implementation will be monitored.
- Create an institution in charge of monitoring and controlling the implementation of the policy. This Access to Information Committee should be an administrative body independent of the Bank's Administration and in charge of activities such as:
 - Developing an Implementation document for the Policy containing the procedures and steps to be followed for proper operation of the regime of access to information established under the new Policy.
 - Coordinating the performance and ensuring correct implementation of the Policy;
 - Organizing, classifying and systematizing the information owned by the Bank;
 - Advising and training staff and the different sectors of the Bank regarding the new regime of access to information;
 - Monitoring requests for information and any rejections to them;
 - Carrying out yearly assessments of the Policy's implementation.
- For the formation of that Committee, the Bank should initiate an inclusive process with the active participation of civil society and academy that work on agendas related to transparency, access to information and the operations of the Bank.

IDB Invest should also carry out annual periodic public enquiries with interested parties to gather experiences about the Policy's operation and implementation, in order to strengthen it over time.

The draft Policy states that the document *"will be subject to revision"* (Paragraph 82), but does not establish a time frame. **The Bank should perform regular and thorough revisions of the Policy periodically, both internal and external, to strengthen and perfect it, in transparent and participatory processes.**

IDB Invest should constantly monitor accepted requests for information, the rejections and the results. This monitoring should contain: the dates in which the requests were performed, the department of the Bank that received them, the given answer, the deadlines, and other important aspects. Later, this information should serve as provisions for the annual monitoring reports of the operation of the Policy.

Moreover, **the IDB Invest should also commit to making efforts and involving the necessary resources for the effective implementation, operation, promotion and dissemination of the Policy, and the institutional regime of access to information created thereunder.**

CONCLUSION

By guaranteeing proper access to information and participation to individuals and communities, IDB Invest could foster an environment where development could truly be pursued by those who live it.

We would like to acknowledge the time and dedication of those involved in this process, analysing our comments and suggestions in order to make the future Policy more people-centered and compliant with best standards and practices.

We reiterate our appreciation for the Bank's commitment in making this an effective space for dialogue and consultation, while providing details on the reasons why any of our above recommendations might not be included in the final Policy document.

Please contact Alexandre Andrade Sampaio from International Accountability Project (alex@accountabilityproject.org) and Gonzalo Roza of Fundación para el Desarrollo de Políticas Sustentables (gon.roza@fundeps.org) for any questions or clarifications.

SIGNATORIES

Asociación Ambiente y Sociedad (AAS) – Colombia

Associação Brasileira Interdisciplinar de AIDS (ABIA) – Brazil

Accountability Counsel – United States of America

Amazon Watch – International

Asociación Interamericana para la Defensa del Ambiente (AIDA) – Regional

Bank Information Center (BIC) – United States of America

Both ENDS – International

Center for International Environmental Law (CIEL) – International
Centro de Derechos Económicos y Sociales (CDES) – Ecuador
Centro de Estudio y Conservación del Patrimonio Natural (CECPAN) – Chile
Centro de Estudos e Pesquisas em Economia Pública e Social (CIRIEC) - Brazil
China-Latin America Sustainable Investment Initiative (CLASII) – International
Comunidades Unidas – Colombia
Derecho Ambiente y Recursos Naturales (DAR) – Peru
Ecoa – Brazil
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Fundación Cambio Democrático – Argentina
Fundar, Centro de Análisis e Investigación – Mexico
Fundación para el Desarrollo de Políticas Sustentables (FUNDEPS) – Argentina
Gender Action – International
Instituto Maíra – Brazil
International Rivers – International
International Accountability Project (IAP) – International
Jubileu Sul – Brazil
OXFAM - international
Pacto de Direitos Humanos da UNICAMP – Brazil
Plataforma Internacional contra la Impunidad – Guatemala
Public Services International (PSI) – Inter-America
Ríos Vivos Antioquia – Colombia
Stand Up for Jamaica – Jamaica
SustentaRSE – Chile