

GUIDELINES FOR DISCUSSION

Implementation of an Information Access Policy for
the Brazilian Development Bank (BNDES)



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Asociación Ambiente y Sociedad - AAS
Centro de Derechos Económicos y Sociales - CDES
Centro de Estudios para el Desarrollo Laboral y Agrario – CEDLA
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PRESENTATION

The document we present is the result of a joint work among different regional organizations of the civil society interested in promoting the transparency and the access to the information of the Brazilian Development Bank (BNDES), given the importance that this one has in the countries within the region.

This collective effort among Brazilian organizations and from other Latin American countries began in the seminar “BNDES Investment in Latin America”, organized by the Brazilian Institute of Social and Economic Analysis (IBASE) in March 2013, that sought to exchange experiences regarding the Bank’s investments within the region and analyze its performance in topics such as transparency, safeguards and socio-environmental criteria, monitoring and control mechanisms, among others.

Among the results obtained in the workshop, an initial diagnosis that showed a break-up of networks and organizations around objectives and common agendas was carried out, parties mainly focused in the projects and public policies cycle, and, to a lesser extent, in the flow of regional investments. In addition to the little articulated options, the lessons learned in prior processes of influence in Multilateral Bank and in the National Development Banks were not being added.

This demonstrated the need of a second seminar execution: “Transparency and access to BNDES information within the region”, organized by Rights, Environment and Natural Resources (DAR) and IBASE in June 2013 whose objective was to establish common guidelines that take part of a Transparency Policy and Information Access to BNDES Proposal and also establish a joint work strategy among the region’s civil society to articulate agendas and common objectives.

In both seminars, there was time to exchange ideas with the Bank’s representatives regarding the reasons that make the implementation of an Information Access Policy necessary that complement the recently promulgated Access to Brazilian Information Law.

As a result of this second seminar, an analysis, coordination and influence strategy was proposed. Within the framework of this strategy, a commitment of the region’s civil society organizations to work the guidelines of a Policy Proposal of Information Access to the Bank and counter-arguments related to the limits stated by the institution’s representatives that would prevent the implementation from a Transparency Policy applicable to its total operations was performed.

The organizations that participated in this first stage of the document preparation are: Environment and Society Association (AAS); Center for Economic and Social Rights (CDES); Center for Work and Agricultural Development Studies (CEDLA); CONECTAS Human Rights; Rights, Environment and Natural Resources (DAR); FUNDAR, Center of Analysis and Research; Foundation for the Development of Sustainable Policies (FUNDEPS); Brazilian Institute of Social and Economic Analysis (IBASE); Amazon Legal Network (RAMA), and individually, experts such as Roland Widmer and Ricardo Verдум.

Afterwards, this document was presented in the Third Seminar regarding Transparency at BNDES, organized by INESC, International Rivers, Socio Environmental Institute, IBASE and DAR in November 2013 in Brasilia. This event allowed a

feedback to the document by a greater number of parties involved in the BNDES's influence process. Thus, we present the "Guidelines for discussion. Implementation of a Policy of Information Access for the Brazilian Development Bank (BNDES)", which means the culmination of a first stage (initiated with the first seminar), of a process that continues.

The purpose of this document is to contribute with provision, result of a collective work, which serves for meetings and discussions among the Bank and the Brazilian civil society within the framework of the Participation Forum that will start with the topic of transparency in February 2014. It is also taken into account for meetings that the Bank has foreseen with the region civil society from 2015 regarding the BNDES investments abroad.

Nevertheless, we hope that other participation and debate spaces among the Bank and region civil society organizations that allow the strengthening of the relationships of all the parties involved in the BNDES activities.

EXECUTIVE SUMMARY

In Brazil, the right of access to information is a constitutional right. From 2011, this constitutional mandate became a Law that establishes standards, guidelines and principles that mean important progress in the respect and guarantee of this right.

However, acknowledging such progress, we consider necessary that BNDES adopts a Policy of Access to Information, given its institutional peculiarities, to adapt to the highest standards of transparency and information access. This need is justified in the more active role of BNDES at the regional scope to encourage the Brazilian economy and the strengthening of Brazilian companies that participate in projects that could present tension with human rights on behalf of development.

In this sense, in the first part of the document we present some ideas and initial arguments explaining why an Information Access Policy within the Bank is necessary, taking into account some limitations previously outlined by BNDES representatives, such as the sovereignty of States, the dependence to external policy and bank secrecy. This in a context where an Information Access Law exists.

That is why we start with an analysis of the Brazilian Law of Access to Information, taking as a reference the Model Inter-American Law regarding the Information Access of the Organization of the American States (Model Law OAS), the Index of the Right to Information Access in Mexico (IDAIM), as well as the good international and national practices identified with this index. Three categories have been analyzed: (i) the regulatory provisions; (ii) the institutional design, and (iii) the procedure of access to information.

Then we state the need to execute the content of the Law with the specific needs of the Bank, the innovation and the construction of methods of horizontal dialogue, the reinforcement of the Bank's proactive information and the systematization of public information and digital files, among others. All this from an internal level (to improve the governance inside the Bank) and external (to build trustworthiness with its clients) and considering the need of independent mechanisms to make the institutional design more favorable and progressive with procedures to prove the possible information damage that is not disclosed.

In relation to the sovereignty of States, we understand that, although each country is sovereign and manages its own regulations, most of them have concepts, principles and structures that more or less adjust to general international frames, it is necessary to indicate that human rights respect exceeds the strictly legal scope. In this sense, it is required higher clarity in the procedures or mechanisms from the Bank to guarantee that companies that are supported or the ones in which it participates comply with the regulations of the countries where the investment is developed. This also applies to the compliance of Brazilian internal regulations.

Regarding the dependence from the Bank to the Brazilian external policies, it is necessary to have higher clarity of the requirements and the process of projects election. According to the information we have, at a political level, the Bank does not have major decision but the governments are the ones that relate to determine the priority of the projects that will be executed. On the other hand, at a technical level, there is a company evaluation procedure carried out by the Bank. In this stage, there is a higher level of independence and it is here where companies can be forced to adopt the highest socio-environmental and transparency standards, as it occurs with other National Development Banks and Export and Import Banks.

Regarding the bank secrecy, several arguments are outlined to access the Bank information considering said limit, among them, the need to praise that information where human rights are involved with the responsibility of keeping said information secret. The respect to human rights must be superimposed to bank secrecy and must have clarity in the exceptions and proof that the information that is not given does not violate said rights and is defined in the requirements requested by Law.

The first part finishes with a description of the benefits that the Bank may obtain with the implementation of a Transparency and Access to Information Policy. Among these benefits are the promotion and strengthening of dialogue and the interaction with the parties concerned (civil society, private sector, indigenous movements, among others), assuring its responsible and informed participation; awareness and diffusion in the civil society of the activities and the role of the institution in the process of national and regional development; the evaluation of the operation and the improvement of the institution's governability; the prevention and battle against the corruption and secrecy; the prevention and socio-environmental conflicts and risks management and the improvement of the institution's credibility.

In the second part of the document, we present a Policy of Access to Information base proposal for the Bank that considers the highest transparency standards that manage other National Development Banks, National and International Financial Institutions and also, the principles and mechanisms of the Brazilian Information Access Law.

In this regard, a Transparency Policy for the Bank must be based on the principles that guide the Brazilian Law of Access to Information and also in those that, without being inside the law, are necessary to guarantee the respect of this right. Thus, among the principles that are included we have the Presumption in favor of the Access to Information; Clear and Delimited Exceptions; Automatic and Routine Dissemination; Clear and Simple Procedures to request Information; Acknowledgement of the Right to Appeal and Revision; Universal Access to Information and Translations Availability.

Additionally, in relation to the exceptions, a Transparency Policy for the Bank must clearly delimit and restrict them, trying to avoid the ambiguity in its interpretation and considering those contained in the Brazilian Law of Access to Information. In addition, a Transparency Policy for the Bank requires to facilitate information related to the institution and to its operations and to establish procedures for the information access, according to its peculiarities as institution that includes the automatic and routine dissemination, the access to the decision taking and passive transparency.

On the other hand, a Transparency Policy must include mechanisms or procedures of appeal that assure the right compliance. In this sense, it can be strictly restraint to what the Brazilian Law of Access to Information states or, without being against it, propose a mechanism of proper appeal, according to the peculiarities of the institution. Both possibilities are presented in the document.

This document also includes an annex regarding the information that should be routinely published by the Bank. On the one hand, the one that refers to the institution's structure and internal operation. On the other hand, the one related to the projects or programs from the Bank, its clients or partners and other parties that have the institution's financing for activities inside or outside Brazil.

Finally, it is necessary to indicate that a Policy of Access to Information would substantively affect the BNDES development, operation and performance and the ones from its subsidiary institutions because it has benefits for everyone. On the one hand, it involves a new organizational culture that facilitates labor relations, makes the work more efficient and projects a fresh and transparent image to all users of this important institution. On the other hand, by establishing a Policy of Access to Information, BNDES would confirm and reflect its firm commitment with transparency, the access to information and the accountability as basic and fundamental instruments, to create and keep a dialogue with the public and increase its consciousness over the role of the institution in the process of development and also for the right operation of democracy.





FIRST PART

GENERAL IDEAS

I. THE NEED OF A POLICY OF ACCESS TO INFORMATION BASED ON GOVERNING PRINCIPLES

Over the last years, the Brazilian Development Bank (BNDES) has carried out promising progress regarding transparency and access to information that must be welcomed and acknowledged by civil society. The section of Transparent BNDES from the website launched in 2007, the measures adopted by the Bank to give compliance to the Law of Access to Information N° 12.527/2011¹ of Brazil and the greater quantity of information available in the website of the institution are concrete examples that account for this progress.

Certainly, these measures constitute an institution progress in pursuit of a greater transparency in its activities, and, at the same time, reflect its commitment with the access to information and the institutional transparency. However, acknowledging said progress, it is necessary to emphasize that the Bank should not take important steps in this topic to adapt to the highest transparency and current access to information standards, not only in other financing institutions related to BNDES, but also in different countries of the region and in regional multilateral organizations such as OAS.

At the same time, important limitations to the access to certain information from the Bank continue existing, which tells the scopes of the current transparency system of the institution and from the efforts that have to be still carried out in this topic. Some examples of such limitations are:

- Need of translations to other languages (both documents and sections of the website).
- Lack of systematization of the totality of projects and programs financed by the Bank.
- Difficulty to access to information regarding certain projects (mainly those carried out outside of Brazil).
- Poorly accessible formats to know the information (use of extended tables in Excel, lack of true search engines to find sought information, use of terms barely understandable for the common citizen, identification of documents with initials and numbers hard to understand, etc).
- Difficulty to use the e-SIC system to request institution's information (particularly for non-Brazilian citizens).

In this sense, and in accordance with this recent process aimed at revealing its activities, it is necessary that the Bank adopts a proper Policy of Access to Information that establishes a particular reference framework in information access and transparency for all the institution and its activities and that seek to correct the current existing institutional limitations to be adapted to the current highest standards in the region.

For that, the Bank should initiate a participatory process along with the concerned civil society, aimed at preparing, adapting and applying and operational Policy of Access to Information based on the following governing principles that should guide the institution transparency system:

Principle 1: *Presumption in favor of access to information.* In its website, the Bank clarifies its firm commitment with transparency as one of the most valuable principles by the institution regarding to society². In turn, it determines that,

1 <http://www.cgu.gov.br/acessoainformacao/acesso-informacao-brasil/legislacao-integra-texto-completo.asp>

2 http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/acesso_a_informacao/index.html

in compliance with the Law Access to Information Nº 12.527/2011 of Brazil, lets the public know a great quantity of information, actively or passively³.

In this sense, it is clear that the Bank has recently acknowledged efforts to broaden its transparency system and make the information more accessible for the public.

However, as it works currently, the institution's transparency system is far from effectively complying with one of the fundamental principles in access and may be found in the great majority of access systems, the national development banks, the main international financing institutions as the majority of regulatory frameworks from the countries of the region: the principle of presumption in favor of the access to information. A great quantity of information (particularly those projects outside Brazil) is not truly accessible to society because of many reasons such as: it does not appear in the institution's website, or it is difficult to find or interpret, or it is not offered by the Bank when it is requested.

Therefore, and as per this principle, it must be presupposed that the institution makes available all the information for the public (own or third party's) except a kind of restricted and clearly delimited information, according to the corresponding exceptions regime.

In turn, although the Brazilian Law of Access to Information Nº 12.527/2011 considers this principle, it is important that the Bank adopts a proper policy of access to information whose governing principle and guide is the presumption in favor of the access, so it may have a proper instrument that clearly establishes the dissemination regime and applicable restrictions to particular information owned by the institution.

Principle 2: Clear and delimited exceptions. Although the Bank must become engaged to guarantee the presumption principle in favor of the access to information, it is also true that certain particular cases in which the dissemination of certain information may result more harmful than beneficial for the parties or interests concerned, that is why it must remain confidential. Due to that, the Bank must prepare a restricted and clearly delimited list of exceptions to the principle of presumption in favor of the information access based on criteria that cannot allow ambiguity in its interpretation. In turn, to be declared as confidential, the information must be subject of a harm test that determines, on a case by case basis, that dissemination of said information causes greater damage to public interest to access to it.

The Law of Access to Information Nº 12.527/2011, in its article 23⁴, establishes a list of reasons why certain information may be classified as confidential. However, this list is not sufficiently restrictive and delimited and the mentioned reasons are really ambiguous. In turn, it is essential that the Bank has a proper list of exceptions to the principle of presumption in favor of the access to information that specifically apply to the kind of information that is managed.

Principle 3: Automatic and routine dissemination. As per the active transparency, the Bank must reveal y make accessible automatically and routinely and through different available mechanisms, a wide quantity of free information regarding the institution structure, its guidelines and institutional regulations, its operational policies, strategies and financed projects, its processes of decision-making and any other information that falls into the active transparency category and does not correspond to one of the exceptions.

Currently, the Bank disseminates a wide range of information, both institutional and its projects and activities. However, generally said information is not disclosed automatically and routinely: great part of the information is uploaded to the website after being expressly requested by an information application or after a long time from its preparation. On the other hand, the Bank's almost exclusive means to disclose information automatically is through its website, not using other means or instruments, which represents an important limitation for information access.

Principle 4: Clear and simple procedures to request information. The Bank has two procedures so the citizens may request information that is not available in its website⁵: on the one hand, and preferably, through e-SIC system (*Electronic System of Information Service to the Citizen*)⁶, and on other hand, through the section *Fale Conosco* from the Bank's⁷ website.

3 http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/acesso_a_informacao/index.html

4 <http://www.cgu.gov.br/acessoainformacao/acesso-informacao-brasil/legislacao-integra-texto-completo.asp>

5 http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/BNDES_Transparente/

6 <http://www.acessoainformacao.gov.br/sistema/site/index.html?ReturnUrl=%2fsistema%2f>

7 http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Navegacao_Suplementar/Fale_Conosco/index.html

Despite they both have usage instruction manuals, they are a little complicated and difficult to use, particularly for those non-Brazilian citizens that are not used to the e-SIC system or do not understand Portuguese. Besides, there is another kind of limitations, procedural, for instance: the fact that you have to access the e-SIC system with a username and password and follow a certain procedure (only explained in Portuguese) to request information.

Also, great part of the available information in the website is difficult to access because in most cases it is necessary to surf through different sections and pages to finally access to the required information, and also the search engine is not totally effective to easily find the information. In turn, great part of the information, particularly the one related to projects and activities from the Bank is available in poorly “accessible” formats for the user, such as in large spreadsheets that contain information difficult to interpret.

That is why the Bank must establish clear, efficient, simple and accessible procedures to request and information application or find it in its website.

Principle 5: *Acknowledgment to the right of appeal and revision.* The Bank must acknowledge the right from the applicants to an administrative procedure of appeal if they consider that the institution has unreasonably denied the access to the requested information or if it has somehow violated the policy. The appeal procedure should be carried out through two different stages of proceedings: an internal one from the Bank and the other external and independent from the institution. Currently, the Bank lacks of an own appeal system that has those features, which constitutes an important limitation to an effective access to information.

Principle 6: *Universal Access to information and availability of translations.* The Bank must become engaged to guarantee the universal access to information and must offer corresponding information to all the people that request it (natural or legal), with the same conditions, with no arbitrary differences and no matter its race, sex, nationality or another subjective characteristic. In turn, the Bank must become engaged that the offered information complies with the same quality standards no matter the language the request is made, in so far as languages used belong to the ones in the Bank work area. For that, the Bank must faithfully translate not only the requested documents in a different language that is not Portuguese but also its website.

Currently, the great majority of documents available in the website are in Portuguese and there are not available translations. Besides, although the website presents an option to access the pages in Spanish and English, the quantity of information available is much lower than the one in the Portuguese page and it is also impossible to access sections that are really important such as *Transparent BNDES* or *Access to Information*, because they are not available in English or Spanish.

II. PRELIMINARY ANALYSIS OF BRAZILIAN LAW OF ACCESS TO INFORMATION

In Brazil, the people’s right of access to information is established in the fifth article, fraction XIV, of the 1988 Constitution. However, the Law was recently approved in the Senate in October 2011 as an evident achievement of organizations and citizens committed to transparency and the right of access to information.

In general, the Brazilian Law of Access to Information contributes with important items to encourage transparency and the right exercise of access to information. This Law establishes standards, guidelines and favorable principles that provide with content to the right of access to information. However, it is also necessary to strengthen the institutional design of the enforcement bodies of this right in order to guarantee the specialization, autonomy and impartiality of its actions. Also, it is required to facilitate the access to information processes to offer major certainty and legal security to the users.

For the analysis of the Brazilian Law of Access to Information, we take as reference the Model Inter-American Law regarding the information access of the Organization of the American States⁸ (Model Law OAS), the Index of the Right of Access to Information in Mexico (IDAIM)⁹ and the good international and national practices identified by this Index. The Model Law OAS is the result of intellectual efforts of experts in access to information and therefore, combines the best practices.

8 Adopted in plenary session in June 2010. Available in: http://www.oas.org/es/sla/ddi/docs/AG-RES_2607_XL-O-10_esp.pdf

9 Available in idaim.org.mx

Likewise, IDAIM is an index prepared by FUNDAR, Center of Analysis and Research¹⁰ and Article 19¹¹, that measures the quality of the federal and state transparency laws in Mexico from the principles and constitutional mandates compliance (Base Index) and the best international practices (Progressive Index)

We use three big variables as analysis categories: (i) the regulatory provisions; (ii) the institutional design, and (iii) the procedure of access to information. The first one that is the main variable refers to the way the right of access to information categorizes in the Law. The variable about institutional design evaluates the way in which different government institutions are related regarding their responsibility of respecting, promoting and guaranteeing the right exercise of access to information. The last variable about the procedures verifies the legal provisions that regulate the proceedings to access to information and the standards that regulate the revision procedure.

1. Regulatory provisions

The Brazilian Law of Access to Information includes the right of access to information as a fundamental right, which means a great progress, because this way enforceability and justice mechanisms are constitutionalized. However, it is necessary to strengthen the interpretative scope of the right of access to information, for which it is necessary to incorporate interpretation principles such as the one of maximum publicizing and maximum dissemination¹² to solve controversies and always appeal to interpretation in accordance with the national treaties and good practices¹³.

a. Obligors

The obligors are all the offices, entities and public and private institutions that are subjected to the Transparency Law. In the Transparency Law of Brazil were incorporated, apart from the traditional branches and independent organisms, the private non-profit organizations that perform functions of public interest and/or exercise public resources. This is important because part of the premise that information is public by proper nature and not according to the type of person – natural/moral, public or private – that administers.

b. Transparency obligations

The transparency obligations involve the need of classifying and publishing the information in the websites in a proactive way, i.e. without an information request that mediates. This is how the authorities make available the greater quantity of useful, clear and updated information on their websites to know the operation and performance of public institutions.

That is why it is necessary to considerably broaden the general transparency *obligations* for obligors that are established in the Law of Access to Information and also classify them by category – i.e., by obligors – and guarantee the accessibility to information proactively and efficiently, that is simplifying the process for the concerned parties.

In an illustrative way but not restrictive, it is necessary to include, at least in the transparency obligations section, information about decision-making and the relationship with society, financial information and internal organization of offices. This will allow the citizenship meet clearly and simple the institutions operation and establish a direct communication line among citizenship and government.

Although there is a related category in the Access Law to Information, we also recommend to include in this part, the permanent and updated information of positions profiles of public workers, the management indicators to evaluate their

10 FUNDAR, Center of Analysis and Research, <http://fundar.org.mx/index.html/>

11 Article 19, <http://articulo19.org>

12 The principle of maximum disclosure establishes that all information in the possession of State bodies is public, and therefore the possibility of restricting it will be exceptional and should comply with established procedures. Meanwhile the maximum disclosure involves the assumption that all information is accessible subject only to a restricted system of exceptions.

An example in this sense is the Law of Transparency and Access to Public Information of the Federal District (Mexico), whose writing guarantees because it allows a favorable interpretation to right:

13 "Article 6. For the interpretation of this law, the right of access to public information will be interpreted in accordance with the Constitution of the Mexican United States, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and other international instruments signed and ratified by the Mexican State and the interpretation that the respective international bodies have made [...]."

performance, the result of audits and other revisions, detail information about design, execution, assigned quantities and access criteria to the allowance programs, beneficiary of the social programs registers, public workers lists including the cost of allowances or equivalents, among others. These elements would contribute to a better accountability in the public service.

c. Information reserves

As the maximum publicizing establishes, all the information that any authority has and in any scope is, by general rule, public. Thus, the restrictions for its publicizing are the exception. Likewise, under the doctrine of access to information, a process must be followed and cover certain requirements to be able to reserve the information¹⁴. This is known as harm test and of public interest proof: it is mandatory to reliably confirm and by means of an exhausting analysis of sceneries, the damage to public interest that would generate by revealing the information. In case of reasonable doubt, publicizing must be chosen because this way the maximum publicizing principle is preserved, which means that access to information can be benefit whose dissemination is considered of public interest¹⁵.

Under the premises of these tests, it must be taken into account the information is classified case by case and not at the moment of generating the document. The procedure to classify the information necessarily includes a public interest test and that the reserve is established in a law¹⁶. In case of running out the prior requirements, public versions of documents must be prepared to protect classified information but allow the access to the rest of the information.

So, in the Access Law to Information of Brazil, the information is classified to be reserved confidentially and personally for public. The first one is related to society and State security while the second one refers to the protection of personal data. The classification of confidential information that the Brazilian legislation mentions is divided in restrictive information (five years), secret information (fifteen years) and highly secret information (twenty five years) depending on its confidentiality and importance level.

The confidentiality level that establishes the Brazilian transparency legislation depends on the risk potential or damage to security to society or State. It seems that these restrictions start from an inverted logic in the procedures of information reserve and access i.e. that is established de facto without a prior evaluation. The classification is a priori to the valuation exercise. In the IV part of the Access Law to Information the procedures of classification, reclassification and declassification of the information are mentioned. According to article 27, the more confidential information is classified by the Republic president, the Republic vice-president, the Nation's ministers, the Army's majors and diplomatic heads. The classification of confidential information is also carried out by government agencies, foundations or public or mixed companies' heads

14 Article 52 of the Model Law about the Access to Public Information

Test responsibility

52. The test responsibility should fall back into the public authority to demonstrate that the requested information is subject to one of the exceptions contained in article 41. In particular, the authority shall establish that:

- a) the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system;
- b) disclosure of information could cause substantial harm to an interest protected by this law, and
- c) the likelihood and the extent of that harm exceed the public interest in the disclosure of information.

15 Transparency Law and Access to Information of the State of Nuevo León, Mexico.

Article 5.-

Regarding public information referred to in this Law, the obligors shall observe, both in its application and interpretation, the principle of maximum disclosure. To this effect, in case of reasonable doubt about the classification of discreet information, it should be opted for its publicizing, and whenever possible, by preparing public versions of classified documents.

16 In the definitions part of the Model Inter-American Law about Access to Public Information on the scope and purpose of the Law, it is established that:

- [...]

- This law establishes the widest possible application of the right of access to information that is in the possession, custody or control of any public authority. The Law is based on the principle of maximum publicizing, so that any information held by public institutions is complete, timely, and accessible, subject to a clear and precise regime of exceptions, which should be defined by law and be also legitimate and strictly necessary in a democratic society. [...]

In the sixth article of the Constitution, the principle of maximum disclosure and exceptions to access to information are clearly defined:

[...]

- All information held by any authority, entity, body and federal, state and municipal organization, is public and can be only temporarily reserved for reasons of public interest in the terms established by law. In the interpretation of this right, the principle of maximum disclosure shall be prevailed.

while regarding the restricted information the prior authorities and the ones that are in charge of command or leadership functions (level DAS 101.5 or higher, according to the Brazilian public administration hierarchy), of the Direction or Higher Assessment Group.

The article 29 of the Brazilian Law of Access to Information establishes that the classification of information will be revised by responsible authority and by the hierarchical superior one but it is not clear that they have the necessary knowledge to perform this function. This, invariably, produces lack of legal certainty for users because, ideally, the exercise of the right of access to information must comply with the standards of impartiality, specialty and independence to avoid conflict of interests.

In this case, the information classification is subjected to the arbitrariness of public authorities, and it is indispensable to regulate the classification procedure to make it clear, certain and transparent. According to IDAIM and Model Law OAS regarding the access to information, the information classification must be carried out by administrative units that, because of its competence, have the information according to the guidelines issued by the body in charge or reviewer of the information. This initial classification must be ratified by revision collegial bodies. The revision and classification is produced indirectly when the user requests that the body in charge revises the authority's decision if it denies the access to information.

The exhaustive list of information reserve stated by the Brazilian Law of Access to Information meets the legitimate needs of information reserve, as it qualifies for the security of society and the State. However, in the Brazilian legislation, there isn't the prohibition of invoking bank secrecy when the bank account holder is an obligor; the prohibition of invoking fiduciary secrecy in the case of public trusts and the prohibition of invoking tax secrecy¹⁷. All of the above are unjustified reserves for access to information and constitute serious obstacles to ensure the right.

2. Institutional Design

The building of guarantor institutions of access to information is a first step to implement an effective transparency policy, because specialized and trained institutions are required within each one of the obligors, as well as an external institution¹⁸, autonomous enough to resolve controversies by denying information to users.

Regarding internal institutions, international standards (IDAIM and Model Law OAS) we reviewed are in favor of creating specialized units or attention units for access to information and, also for the institution of revision collegial bodies within each unit and public organizations.

In IDAIM, as obligations of *Liaison Units* (of attention of information requests), the following are incorporated: receive and process requests of information submitted to the obligor; collect; to claim, disclose and update the legal public information; to propose internal procedures that contribute to greater efficiency in the attention of requests of access to information and to keep the requests record of access to information and to update it. The Liaison Units are the first and main means of contact between citizens and public institutions, and therefore, are required to satisfy the right civic exercise of access to information.

Similarly, the obligors have an information committee. These internal bodies review the classification of information and, in a collegiate manner – primordial element for the achievement of solid criteria –, confirm, revoke or modify the original responses.

Therefore, it is highly recommended that the Law of Access to Information of Brazil includes internal bodies in each branch and entity. Its responsibilities – in addition to those mentioned above – would be the possibility to review the classification of information and to protect it in accordance with the criteria and guidelines; to issue the policy and regulations of the

17 Tax secrecy does not apply in the case of bank accounts by a public authority in which resources from the public treasury are handled. About the trust secrecy worth commenting that a trust is a legal form by which an individual or legal entity (trustor) put a trustee in charge of the compliance of an activity through a fiduciary institution. When this form is in the public scope, public authorities that receive resources from the public treasury involve in its structure, and also that the ultimate purpose of its constitution is in principle of citizen interest. That is why the importance of its publicizing.

18 The external institution will be subsequently addressed by reviewing the revision procedure.

obligor according to transparency, access to information and personal data in accordance with the guidelines, criteria and recommendations issued by the guarantor body; to always know discreet or confidential information of the obligor; to confirm, modify or revoke the classification of information made by the administrative units; to force relevant subjects to generate information that because of their legal responsibilities they should have and carry out a formal procedure of declaration of lack of information after doing a thorough search. Thus, the legal certainty of the right users would be strengthened, because a collegial and specialized body would fully review the classifications of information made by each competent administrative unit.

However, about this aspect, Article 40 of the Law of Access to Information of Brazil only mentions that the top leaders of each body or entity of the federal public administration will designate an authority that ensures compliance with standards and principles of the access to information and the objectives of the Law and monitors such implementation; so it is required to invest in the creation and training for the operation of these internal guarantor institutions of such right.

The Law of Access to Information of Brazil includes the creation of the Revision Commission of information composed of the ministers of State and representatives of the Legislative and Judicial designated by their respective presidents. This does not guarantee, however, neither the specialization nor the autonomy of their performance.

Appointments should come from qualified majority voting of a Congress. Candidates should be selected through an open, participatory and inclusive summons in which phases and periods are clearly defined. Likewise, it is important to include the existence of technical tools to evaluate and grade the candidates. Therefore, the professionalism of guarantor body is widely encouraged and, at least in the framework of the law, it is guaranteed the independence and specialization of the body members and thus, a better and greater enjoyment of the right exercise of access to information of all persons.

3. Procedure of access to information

a. Legal provisions that regulate the process of accessing to information

Regarding the access procedure, it should be possible to make information requests through various means to ensure that all segments of the population have the necessary conditions for exercising the right to information. The Law of Access to Information in Brazil only contemplates electronic means; it is necessary to diversify the forms, for example, in writing, by fax, by phone, among others. Furthermore, it is necessary to regulate the restriction imposed so that the identification of the applicant is not required, since it is optimal to allow making information requests anonymously. Therefore, the accessibility to the exercise of the right of access to information would be extended.

In the Brazilian Law of Access to Information, the deadline for response is twenty working days, which can be extended other ten working days more. In accordance with best practice¹⁹, the procedure should be simple, agile and accurate. The standards establish that a significant period is twenty working days, including extension.

The Law of Access to Information only mentions that information requests may be made before public bodies, but does not include the obligation to have a specific competent unit with budgetary sufficiency and with human resources qualified to meet the requests.

Finally, it should also implemented policies of permanent training for public officials about the importance of transparency in the exercise of public functions.

b. Standards that regulate the revision process

The design and implementation of a nonconformity or revision process is useful for supporting the effective enjoyment of the right of access to information. Once the internal procedure is run out, users should be able to challenge information denials before an independent, impartial and expert body that defines, in final and legitimate instance²⁰, controversies about the access to information.

¹⁹ See article 34 of Model Law OAS.

²⁰ In order to strengthen the guarantor body, the decisions that this issue should be final and unassailable for all obligatory entities. The users can go to courts for a judicial revision.

The guarantor body of information, in the countries that decided to create one, is the main institution that protects the right of access to information²¹. Therefore, its integration, design and operation are elementary to the full satisfaction of this right.

As we saw in the section on institutional design, the Revision Commission of Information established in the Law of Brazil, does not necessarily guarantee an independent and specialized procedure, given its integration process.

In addition, the revision process (nonconformity) is relevant, because it favors the certainty of users and incorporates more reasons to disagree. The Law only addresses that the challenge can proceed when the information is classified as confidential or personal, so it is necessary to incorporate other reasons, such as: delivery of incomplete, untimely, illegible, inaccessible and nonexistent information, among others; i.e., the applicant should be provided of legal security in order to be able to appeal decisions by any nonconformity.

In this heading, it is also important to remember the importance of expanding the obligations of transparency and, in particular, the responsibilities of the competent units of processing information request to provide more guarantees to users.

The challenge process that foresee the Law of Access to Information in Brazil is two-stage, i.e. first, the complaint originates before the hierarchically superior authorities and then to the guarantor body. In part IV of the Brazilian Law it is mentioned that in the Executive Branch, it is first challenged before a hierarchically superior authority, then before the Office of the Comptroller General and then before the Revision Commission of the Information. When the nonconformity is about the denial of authority to declassify information, a similar procedure is carried out. The legislative and judicial Branches implement their own revision procedures.

To satisfy a clear and impartial process for users of the right to access to information, it is necessary that the appeal is directly made before the guarantor body and not before hierarchic superiors, so that the process is autonomous and specialized. Furthermore, to avoid heterogeneity of normative provisions, procedures of access to information and revision should be governed under a same legal system and a same guarantor body.

Access to information is a civil right that should be available to everyone, and for its effective compliance a technical use or legal expertise should not be required. In the Brazilian Law of Access to Information it is necessary to establish explicitly the substitution of the complaint²² in favor of the appellant, to detail the deadlines for the precautions, and in general, of the challenge process.

Finally, we consider it appropriate to include in Brazilian legislation elements that allow the accountability. In this sense, it is viable to incorporate simple mechanisms, such as the obligation of the guarantor body to give to the citizenship an annual work report, to allow publication of the resolutions of the revision appeals and to publicize the public meetings of the guarantor bodies, among others.

In conclusion, the Law of Access to Information of Brazil condenses useful technical tools and valuable conceptual premises, for right exercise of access to information. As we saw in this chapter, there are necessary adjustments to be made. A particular concern appears to regulate and incorporate greater security elements and legal certainty for users with procedures of information classification. We should also take care of the institutional structure within each branch and public entity, because that is where the users find the guarantee of their right. In the case of the external institution, it is required to strengthen the Information Commission from its design and its operation as well as the expanding of its application scope to include other branches and other institutions subject to the Law of Access to Information. We should also reform its integration method in order to safeguard, as far as possible, a greater professionalism and impartiality of the right of access to information.

21 See article 34 of Model Law OAS.

In order to strengthen the guarantor body, the decisions that this issue should be final and unassailable for all obligatory entities. The users can go to courts for a judicial revision.

22 The substitution of the complaint is a legal concept that obliges the authority to solve in the best way, and as far as possible, the deficiencies of the appellants in their requests.

III. WHY A TRANSPARENCY POLICY AND ACCESS TO INFORMATION IS NECESSARY FOR THE NATIONAL BRAZILIAN DEVELOPMENT BANK (BNDES) IF THERE IS ALREADY A TRANSPARENCY LAW IN BRAZIL?

A policy of access to specific information for a branch encompasses several mechanisms and actions beyond the law. The institutional and legal design is a first step. However, it is also required to implement the content of the law according to specific needs such as, in this case would be the BNDES. Furthermore, it is necessary to implement a number of mechanisms, provisions, behaviors and practices favorable to transparency, and to promote the importance and ways of exercising the access to information among the citizenship. So you can build a civic culture on the right of access to information and its full exercise.

A Policy of Access to specific Information for BNDES represents an opportunity to expand the exercise of the right in order to incorporate institutional channels of civic participation, to include mechanisms of social accountability, to evaluate the performance of officials in the branch and to monitor development projects. It also represents an opportunity to strengthen policies and to build methods of horizontal dialogue in processes that go beyond the Brazilian regulatory framework, as the various projects financed by the Bank outside Brazil.

The Policy of Access to Information requires internal and external processes. Internally, in the sense of training and sensitizing people who collaborate with the BNDES and its subsidiary institutions, so that they internalize the paradigm and the importance of transparency. Externally, to enhance the trust and dialogue with the Bank's clients and with the people who will be involved in projects the institution fund.

Through institutional channels of participation it is possible to involve citizenship in matters of public interest. With social accountability, people evaluate the actual functioning of an institution that is an obligated party as it is a public institution and exercises public resources. This would help to bring decidedly the works of BNDES, its subsidiaries and organizational culture to citizens who access to this system.

A Policy of Access to Information for the BNDES would require procedures for classifying information, with guidelines duly founded, motivated and according to good practices and standards followed by other National Banks of Development and Export Banks. The classification, declassification and reclassification of information should have as parameter the full satisfaction of public interest. In the policy, the harm test and public interest such as exercises of deliberation of values and rights for delivery or not of information should then be included and regulated.

A field of important opportunity for the Policy of Access to Information of the Bank refers to the area of transparency obligations so that the information publication is proactive. This raises the standards of disclosed information quality and facilitates its use for any user of social networks.

Through proactive transparency, information obligations that go beyond the minimum legal are established: those obligations are regulated so that they appear orderly in different areas, depending on topic and the corresponding institution; it is also encouraged an accessible, clear, updated and easy for all users, diffusion mechanism, including the use of open data.

Open data and open government are part of a recent initiative of the Latin American countries, including Brazil, which are precursors²³. Open data emphasize the importance of the information quality because it is not enough, as the Law of Access to Information of Brazil states it, that the branches and entities provide the information. It is about, in fact, to make an effort to deliver information in an accessible and reusable way by anyone, favoring to the maximum and at any time the user request.

Through a digital governmental policy, the traditional model of communication between rulers and citizens is transcended and approximation measures as technology platforms are implemented. I.e., it is about making a means of technology for strengthening participatory democracy.

23 To review information about the Alliance for Open Government, see: <http://aga.org.mx/SitePages/Principal.aspx>

A common obstacle for access to public information is the constant declarations of lack of information, so that it should be incorporated rules that limit this practice in all administrative units and require them not only to deliver, but also to generate information derived from the exercise of its functions. Thus, it is of prime importance to systematize public activities and to have digital files and documentaries to make the count. These tools do not yet exist in the Law of Access to Information of Brazil, and Bank Policy would then have the opportunity to include them. The digitization of information goes hand in hand with digital policy and the extensive use of open data in information.

In summary, a Policy of Access to Information would substantially impact on the functioning and performance of BNDES and its subsidiary institutions, because it brings benefits to both the institution and the people where activities of the Bank or its two subsidiaries are present. This certainly involves a new organizational culture that facilitates labor relationships, does the job more efficiently and projects a fresh and transparent image to all users of this important institution.

IV. PRINCIPAL LIMITS FOR THE IMPLEMENTATION OF A POLICY OF ACCESS TO PUBLIC INFORMATION IN BNDES

1. Sovereignty of states?

Does the principled basis of the Transparency Law of Brazil differ greatly from the other laws in the region? In this sense, would a transparency policy in BNDES violate the normative sovereignty of the countries?

The respect for human rights exceeds the strictly legal and national scope. Even so, the rules related to transparency and access to information in countries of Latin America have considered standards to protect the right to access to information through concepts, principles and structures that more or less adjust themselves to general international frameworks. In this sense, a policy that generally adjust itself to these concepts, principles and structures could be applied within these countries, as the World Bank (WB) or the International Finance Corporation (IFC), other National Development Banks (as KfW) and the Export-Import Bank (U.S. Ex-Im) currently do, without implying a violation, in any way, to the regulatory sovereignty of these countries.

First, we will take as a reference the study prepared by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights in 2011, which includes countries such as Antigua and Barbuda, Argentina, Canada, Chile, Colombia, Ecuador, El Salvador, United States, Guatemala, Jamaica, Mexico, Nicaragua, Panama, Peru, Dominican Republic, Trinidad and Tobago and Uruguay.

According to this study, somehow all studied laws collect expressly or indirectly the principle of maximum disclosure. The same applies to the principle of good faith. Also, in most of the laws it is referred the principle that establish that the right to access to information is the rule and the secrecy, the exception, through the principle of maximum disclosure. In some laws, such as the case of Mexico, Uruguay, Guatemala and Colombia, it is even established the positive administrative silence, i.e., if no response to the request within the statutory period is given, it is understood that the applicant is entitled to access to the information.

Also, in most of the studied legislation, it is established that all persons are entitled to the right to access to information, with disregard of nationality. About this point, as the Commission points out, to restrict the right to persons who are citizens or legalized immigrants implies an unjustified restriction to this right.

All analyzed countries have regulated the procedures for accessing to information as well as its judicial guarantees. To complement this, these countries have different types of judicial resources destined for counteracting negative responses or omissions of the administration against the requests for access to public information.

An important matter to stress is the promotion of active transparency. The State's obligation to produce information and promote a culture of transparency is considered in all legal systems, but in very different degrees.

The issue of exceptions has a quite controversial role. In most of the analyzed countries, the laws of access to information establish the principle of maximum transparency and the grounds are limited to the confidentiality of personal data and the caution of information that may affect other interests such as national security. Guatemala, Mexico, Peru and Uruguay

even establish that the information about violations of human rights cannot be reserved. In any case, judges and courts have a fundamental role in the interpretation of exceptions and the right to public information, in accordance with the highest standards of respect for human rights.

Another study prepared by the Center of Files and Access to Public Information²⁴ in seven Latin American countries: Argentina, Bolivia, Chile, Ecuador, Mexico, Peru and Uruguay, allow to appreciate the institutional framework of transparency in these countries. All these have more or less state structures whose formal principal objective is the protection of the right to transparency and access to information. Almost all the analyzed countries, except Argentina and Bolivia, have laws of access to information, and all countries have administrative rules that consider this right, as well as legal development in this line.

It is again emphasized the difference between the discussion of international legal standards on access to public information and the discussion about the institutional design necessary to implement this regulation (policies): "The public sector traditionally maintains its "inertia" after approval of a Law of Access to Public Information and generates resistances to apply transparency due to the culture of prevailing secrecy"²⁵. In contrast to the concepts, principles and institutions as prescribed in the laws of access to information; the realization of public policy for the creation of an institutional framework that facilitates the application of these regulations is more heterogeneous. Only Mexico and Chile have tracking systems to requests of access to information and independent bodies of compliance of law in administrative procedures.

In relation to the model of administrative review of compliance with this right, it should be noted the progress of the laws of Chile and Mexico, whose independent bodies have the power to issue binding opinions. Although in some countries there is no specific legal action to protect this right (in the case of Argentina, Bolivia, Chile), there are actions that are generally ordered to protect it (constitutional protection, compliance protection or protection by a standard).

In some way or another, these countries have an institutional framework for the right of access to information, but it is clear that you cannot expect that everyone handles the same structures, because they are different realities. That's why a policy of transparency applicable to these countries should consider the general principles and the existing mechanisms in these countries.

Brazil has not been included in any of the mentioned studies, because the Brazilian Law came into force in November 2011, and the culture of transparency in this country is still in training. However, the role which some time ago Brazil has assumed in the region as a driving force of integration projects under the framework of the South American Infrastructure and Planning Council (COSIPLAN), based on its Policy of Growth Acceleration that considers the potential of countries for its integration purpose, requires leadership in the performance of transparency standards not only within Brazil, but also in countries where participate with financing and in accordance with principles that these recognize that, as noted, are not very different among them: they all recognize the international standards of transparency.

This Transparency Policy should not only be set through domestic law that govern Brazil, but in a policy that integrates the highest standards of the region, given the presence of BNDES in practically most countries in the region. This policy based on clear principles should be collected by Brazilian companies that work in the countries, understanding that those which do not have the principles of the Bank Policy in its internal operation, could not be financed by it, as happens with most National Development Banks and private banks²⁶. Only then, the development projects that the Bank finance, could contribute to the improvement of governance in the region.

2. Dependency of BNDES to the Brazilian external policy?

In political terms, the direct role of the Bank in determining the projects in which often participate, remain in the background. Like any public institution, the intervention of BNDES should be adjusted the policy decisions of the Executive. For example, in determining these, there is an instance of government to government where ministries that receive benefit from the project communicate with their Brazilian counterparts. The proposal comes to the Bank for a technical analysis

24 Center of Files and Access to Public Information. Overcoming the culture of secrecy. Obstacles in the implementation of policies and standards of access to public information in seven Latin American countries. Available Online <http://fundar.org.mx/mexico/pdf/venciendolacultura.pdf>

25 Idem, p.41

26 Example: The Principles of Ecuador.

that considers financial and productive aspects, among others, and, in parallel, the dialogue between governments is performed²⁷.

In this scene, the BNDES does not determine independently whether or not to approve a project: the decision is made by the Brazilian government, and specifically, the Committee of Finance and Guarantees, so if there was not a prior understanding between the governments the financing will not be carried out²⁸. Under this system, once laid out the formal interest of the requesting country and the formal approval of the Brazilian authorities – to which the Bank is subordinated – the technical parts start to be analyzed.

As mentioned before, there is a procedure for the approval of projects within the Bank from the technical point of view. First, the basic specifications of the company and the actions that will require support from BNDES are evaluated. Second, once the operation is approved, the called “positioning letter” that indicate the area of the Bank to contact the client is carried out and will be responsible for managing the project. Usually, the Environment Department of the Bank normally checks the socio-environmental risks of the project. Third, the analysis made by the Bank area responsible for the project is sent to the Board of BNDES for its final decision. With the favorable result, the company is notified and informed of the documentation necessary for preparing the contract, for the subsequent signature of the parties.

Thus, in the political aspect, the Bank’s performance is subject to the decisions and interests of powerful groups (state, corporate and trade). However, in the technical aspect, as has been observed, the BNDES has a procedure that includes series of steps and requirements that the presented projects and companies should accomplish in order to be approved.

Exactly in the framework of this technical evaluation, the Bank has more space to act because, as noted, it is an objective and specific assessment of compliance of determined criteria. This is where it should be evaluated that the companies to be supported by the Bank comply with the highest standards of transparency and respect for human and environmental rights, not only the national regulation, since respect for human rights, as noted above, transcends the strictly legal sphere in the national scope.

As States should respect, protect and enforce human rights – whether or not there are appropriate legal frameworks for this –, companies also have responsibilities on that matter, regardless of what their interests and the operational context are²⁹. Within this duty, it could be considered the national and international financial institutions.

In this sense, it is necessary that BNDES implement policies of socio-environmental safeguards, transparency and participation effective for organizations and movements, not only Brazilians but also of the region, serving the integrator role assumed by Brazil in the region.

3. Bank secrecy?

Bank secrecy is the determination adopted by the banks within its general regulation, which establish that all information relating to deposits and deposits received by these should be kept secret and can be disclosed only to those who are holders of the managed money, and to those they authorize to, so that it implies the duty of silence against an existing information. Although there is no specific definition of the term on a doctrinal level, this has been practically developed by the normative content of different laws.

This mechanism of protection of the information has been adopted by different legislations. For example, in Colombia it is understood that the protection of client information that is in the databases of financial institutions is a duty and corresponds to a protection of the data that are in the possession of the financial sector³⁰, a trend that is supported by Article 74 of the Constitution of Colombia of 1991, in which it is established that “everyone has the right to access to public documents, except in cases established by law. Professional secrecy is inviolable”. Thus, the bank secrecy is compared to the idea of professional secrecy.

27 According to the information of the meeting with the Director of International Affairs of the BNDES in March 2013, where the following institutions participated in: COICA, CAIO, ILSA, DAR, Regional Coordination of Social Movements, FASE, FOCUS, FUNDAR.

28 Idem.

29 *Confróntese, las empresas y los derechos humanos (Confront companies and human rights)*. Isea Ricardo Silva. Chair “La Caixa” of social responsibility of company and corporate government. Available in <http://www.iese.edu/research/pdfs/ESTUDIO-161.pdf>

30 *Aprendamos sobre la reserva bancaria y sus límites (Learning about bank confidentiality and its limits)*. Luis Bernardo Quevedo Quintero.

Likewise, the Constitutional Court supports this article stating that “respect for the right of privacy of individuals requires the protection of data about their private life or other personal information of legal entities or natural persons who trust in the financial system according to trade relations of professional nature”³¹.

In Argentina, bank secrecy was incorporated in Law 18,061, fulfilling the role of caring for the proprietary aspect of the right to privacy of the users. Specifically, it is regulated in Article 32 of this law, although it is a principle that has been implemented since 1935 by Law 12,156, Banking Law, which in its Article 14 established the confidentiality of the information gathered by the Central Bank³². Since 1969, the legal nature of bank secrecy is consolidated in this legislation, by incorporating expressly in the above-named Law 18.061 Article 33, where the concept of bank secrecy is comprehensively laid out, understanding it as the duty of reserve of all transactions made by clients³³.

Later, in 1977, by Law 21526, with the Financial Institutions Law, a new regime is formed in the field of banking, being regulated – the bank secrecy – in Article 39. This article states that “the entities included in this Law may not reveal passive operations they perform”. Nowadays, this law remains in effect, although with the reform given in Law 24.144 of 1992, a modification in the scope of bank secrecy is made, as its range of application and effect is limited, as will be discussed later. In Peru, the bank secrecy is expressly regulated by Law 26702 of 1996, General Law of the Financial System and Insurance System and Organic Law of the Superintendence of Banking and Insurance, which Article 140 states that:

[...] companies of financial system, as well as their directors and employees, are forbidden to supply any information about borrowing operations with their clients, unless with written permission of these or it is about the assumptions recorded in Articles 142 and 143.

They are also forced to observe the bank secrecy:

1. The Superintendent and the Superintendence workers, except in the case of information regarding the checking account holders closed by writing checks without funds advanced.
2. The Directors and workers of Central Reserve Bank of Peru.
3. The directors and workers of audit firms and risk rating agencies.

Likewise, Article 141 of the same Law states that, in addition to the criminal liability may exist due to the violation of bank secrecy, violation of this is a serious fault in the workplace, and if no lack is set, it would be a fine on the offender.

Also in Brazil bank secrecy is regulated by Complementary Law 105 of 2001, Bank Secrecy Law, which lay down that this covers the financial transactions of the services provided by the institutions, and by Law 9.613 of 1998, Anti-Money Laundering Law. Supplementary Law 105 establishes that the sharing of information is permitted “for procedures of due diligence regarding the client, in connection with debtors in arrears; for central banks of credit reporting bureaus; for public authorities in relation to criminal investigations (including AML); for tax authorities; when the client allows it”³⁴. This regulation is supported by the United Nations Convention against Corruption of 2004.

In article 18, the Responsibility of States Party to empower courts and competent authorities is established to submit or seize all bank documents that are necessary in case of commission of a crime, without the possibility to refuse it on the ground of bank secrecy. Likewise, Article 40 of the Convention provides that each State Party shall ensure that, in the case of national criminal investigations of crimes standardize in accordance with this Convention, exist in its internal legal system mechanisms appropriate to overcome obstacles that may arise as a result of the application of bank secrecy law, so that being Brazil a country Party of the Convention it recognizes existing limits against its internal application.

The information is also managed for the registration in credit reporting bureaus by the Central Bank. This is an obligation of all financial institutions against all made banking transactions such as loans, guarantees and all that is understood as the

31 Constitutional Court. Sentence C-200-2012.

32 Article 39 of the Financial Institution Law. Bank Secrecy, p. 3.

33 Article 39 of the Financial Institution Law. Bank Secrecy, p. 5.

34 Banco Central do Brasil. *Panorama of Brazilian legislation on bank secrecy and exchange of information*, p. 2.

responsibility of debtors. Thus, all financial institutions with prior approval of the debtor have access to this information for access to these data, based on Decision 359 and 160-DF Habeas Data of Superior Court of Justice.

The Central Bank has also access to this kind of information for monitoring cases of branches of foreign banks in Brazil or Brazilian banks abroad, as well as for exchange of information for the investigation of money laundering. For this, a “memorandum of understanding” that authorizes researches is required.

a. Scope and exceptions to bank secrecy in Brazil and BNDES

The Access Law allows that vital information for the state and society security are object of classification in case that they may harm or compromise the development of negotiations or international relationships of the country, or that have been placed with discreet character by other States or international organizations, among other assumptions listed in article 23 of such Law.

The Access Law also establishes that public organizations may classify information according to different degrees of confidentiality and protects industrial secrecy derived from direct economic activity by the State or individual or private entity that has any link with the government³⁵.

The scope of the Access Law application extends to federal public companies, and therefore, to BNDES, since it is a public institution that operates with public resources. The decree that regulate the Access Law establishes in its Article 5, part 1, that “disclosure of information by public companies, society of mixed economy and other entities controlled by the Union that act competition regime, subject to the provisions of article 173 of the Constitution, will be subject to relevant regulations of the National Securities Committee in order to ensure its competitiveness, the corporate governance and, if appropriate, the interests of minority shareholders”. The BNDES operates in a competitive regime and carries out operations in the capital market. However, not all information held by the Bank is able to affect the operation of the Brazilian capital market, so that the provisions of this article shall be restrictively interpreted. On the other hand, for the management of public funds, BNDES is joined to the general principle of “publicizing”, which may not be unduly restricted by infrared standards.

Bank secrecy and the prerogative of public entities in determining the degree of confidentiality of information under the Access Law should in all cases be analyzed according to the other interests involved in specific situations in which the BNDES and the government are urged to make public documents relating to the financing of the internationalization of Brazilian companies.

b. Limitations on the use of bank secrecy to BNDES operations

The BNDES is a federal public company, i.e., an entity of the indirect public administration. Public companies are federated entities created by the Union to act in economic activities (general manager). Its legal and administrative regime, as a general rule, is ruled by private law, but in many cases the rules of private law are replaced by the regulations of public law. For example, the BNDES should carry out the public tender for the provision of jobs, unlike private financial institutions that freely hire its staff according to work rules in Brazil.

The exception BNDES to the public law regime will only prevail over what is essential to the maintenance of competition, one of the pillars of the Brazilian economic order (Article 173 of FQ). In other cases, the BNDES, being a federal public company, is subject to the rules and principles that regulate the actions of the Brazilian public organizations.

Article 37 of the Federal Constitution establishes, as one of the principles of Administration, the publicizing of information. This principle became strengthened with the promulgation and entry into force of the Access Law to Information, Law No. 12.527, of November 18, 2011, regulated by Decree No. 7.724, May 16, 2002.

As the public interest is greater than private interests, and as publicizing is the rule but not the exception, the bank secrecy (or fiscal, commercial and industrial) may not be invoked as an obstacle to the exercise of society control over the use of public funds. According to Belinetti³⁶ “whenever there is public policy or public interests in clarifying certain situations, to

³⁵ Article 21 and 22, only paragraph da Lei de Acesso à Informação.

³⁶ Bellinetti, Luiz Fernando. “Limitações Legais ao Sigilo Bancário”, publicada na Revista de Direito do Consumidor, abril/junho, 1996, p. 154.

justify the revelation of this fact or there is consent of the holder [...] may not invoke the right to privacy for subtracting it from the knowledge of applicants”.

There are three main reasons for excluding bank secrecy in order to access to information of BNDES.

First, because most of the documents to be obtained are not under the support of industrial or fiscal bank secrecy. Reports of socio-environmental sustainability, socio-environmental impact studies and other documents produced during the project cycle may not be framed as part of active or passive operations of the LC 105/2001. There may be cases where a company has developed a technique to mitigate the environmental impact through technological advances that are protected by industrial secrecy, but these situations are not the rule. The environmental impact assessment implies public methodologies and analysis, and the results, as a rule; do not bring information that can leave the company at a competitive disadvantage.

Second, the BNDES manages resources that are, for the most part, from public sources. The capital structure of the Bank denotes the almost exclusive presence of resources from national public sources (97%), distributed between the National Treasury (15.4%), FAT resources (4%), and other forms of public financing³⁷. The reinvested capital for the return of its credit operations also fits the nature of public funds, because there is no private partner in the corporate composition of the BNDES and attraction of resources among private investors represents a low percentage of the capital structure of the Bank. The latter modality accounts for 77.4% of the Bank's financing³⁸. In addition, the BNDES is a public company dependent of the Ministry of Development, Industry and Foreign Trade, and therefore, is under strict control of direct administration. The government has almost absolute power over the appointment of its main corporate organizations, including the Board of Directors, the Executive Board, the Audit Committee and the Fiscal Council.

Third, bank secrecy may not be invoked as an obstacle to the investigation of violations of fundamental rights. Article 21 of the Access Law is expressed as follows:

Article 21. It may not be denied the access to information necessary for judicial or administrative supervision of fundamental rights.

Single paragraph. The information or documents that focus on behaviors that involve human rights violations committed by government official or by motion of government may not be object of access restriction³⁹.

In summary, according to the Brazilian legal system, the BNDES should increase its level of transparency for three main reasons: (i) because many documents are not protected by the bank, tax, commercial or industrial secrecy; (ii) because the fundamental right to information is greater than the private interests of the Bank or of the beneficiary companies, and (iii) because the confidentiality of information may not dismiss the protection of fundamental rights, either through judicial or administrative authority.

In a recent decision, the Federal Court of the Second Region (TRF-2) accepted the request for Folha of Sao Paulo so that the BNDES spreads the “analysis reports” of operations with more than 100,000 real values, approved between January 2008 and March 2011. For the TRF-2, “they are nonexistent in such reports discreet data or that compromise the security of society or the state”. Even so, the TRF-2 considers that “the lack of publicizing in relation with the criteria and BNDES operations emphasizes the existence of a system of planned darkness”⁴⁰.

In this way, it may be established that, although the bank secrecy is a practice established in the regulatory level in different legal system seeking to protect the rights of civil society also has an aspect regarding ensuring governing principles of

37 Incluem o Pis-Pasep, o Fundo de Marinha Mercante, o Fundo Setorial do Audiovisual e Fundo Nacional sobre Mudança no Clima.

38 Dados extraídos do Relatório Anual BNDES de 2012, pp. 48-50. Em 2012, a captação externa e outras obrigações, que podem incluir credores privados, respondeu por 9,9% do funding do Banco. Vale salientar que parte desses recursos são captados por meio de agências multilaterais de desenvolvimento. Segundo o BNDES, desde 2009 o Tesouro Nacional Brasileiro tornou-se uma das mais importantes fontes de financiamento. A fim de apoiar o aumento dos desembolsos do BNDES, o Tesouro Nacional Brasileiro concedeu empréstimos de R\$ 105 bi em 2009, R\$ 107 bi em 2010, R\$ 50 bi em 2011 e R\$ 55 bi em 2012 e, até outubro de 2013, R\$ 15 bi.

39 Art. 21. Não poderá ser negado acesso à informação necessária à tutela judicial ou administrativa de direitos fundamentais.

Single paragraph. As informações ou documentos que versem sobre condutas que impliquem violação dos direitos humanos praticada por agentes públicos ou a mando de autoridades públicas não poderão ser objeto de restrição de acesso.

40 Folha de São Paulo. Justiça manda BNDES liberar documentos. Disponível em: < <http://www1.folha.uol.com.br/fsp/poder/133164-justica-manda-bndes-liberar-documentos.shtml>>. Acesso em 10.10.2013.

systems, since its application will strictly imply, in specific cases such as those already mentioned, the direct limitation of basic principles, as the public interest or the same legal security of States, and even the international community. For this reason, although it constitutes a limitation against the development of right to information, it establishes a supported limitation and respecting previously established principles.

In conclusion, bank secrecy is not an absolute duty to be applied by bank institutions, as there are higher-level principles that can match its application. As we saw, principles such as public interest or legal security are some examples. Likewise, by applying this mechanism in different legislations, it may be established how bank secrecy should seek within its application the protection of fundamental rights and human rights of citizens in general and specially protected communities, so that a specific focus is established, as we saw in the different applications of bank secrecy in several countries that allow to establish its implementation on the basis of principles and rights of vital importance for the harmonious development of the existing legal system.

4. About the quality of the information disclosed

BNDES is based on Decree No. 4418 of October 11, 2002, in which its statutes are stipulated, which were approved by the Republic President.

Initially, it is important to establish the importance that is inside the statutes which support the organizational focus of BNDES, to later establish how this content is materialized. The statutes provide that BNDES will be managed by a Directorate that consists of the president, vice president and seven directors, who shall be appointed by the Republic President. It is important to establish that, in the content of the Bank's Statute, a focus is given about the right to information, seeking to establish mechanisms to facilitate knowledge in the institutional field of progress and achievements of the institution.

In article 17 of the statute, it is established that one of the functions of the president is "to send to the competent authorities, in statutory deadline, data about budgetary matter and other information about the progress of the BNDES works and its operations"⁴¹. In this aspect, the interest of the organization in generating a harmonious process of information about the performed activities is established.

On the other hand, in article 22-C it is established as one of the functions of the Audit Committee "to establish and disclose procedures for receiving and processing information about the breach of legal and statutory regulatory applicable to companies that constitute the System BNDES, including its internal regulatory act, establishing specific procedures for protection of the lender and the confidentiality of information"⁴² and establishing the obligation to disclose information concerning procedures regarding the managed information and the application of internal regulations of companies that are part of the Bank.

Likewise, the obligation to establish procedures is laid out in order to ensure the privacy of some specific issues. Thus, it is clear that within the analyzed statutes, the importance against the development of effective mechanisms to ensure the access to information by the institutions and civil society is established, respecting the public principle that steadily express the BNDES in its foundations as an organization.

The BNDES is based on a scheme of corporate governance that lay out as a base principle of governance practices the broad transparency, applying as the pillar against the relationship with external parties. For this reason, it is established as a necessary mechanism one communication channel with society, which is materialized with regular publicizing of news relating to performed activities such as operations of financing, policy and practice of credit. Furthermore, publicizing about activities of the institution is made through published news by the newsroom of the organization, which actively develops the act of the organization.

Although there are optimal mechanisms for the transmission of information about the operation of the organization, such as investment newsletters published in 2005 and concerning the performance of the months of August and November, the annual report published in 2010 or free access to news relating to activities of the BNDES, would be important to

⁴¹ Statute BNDS, article 17.

⁴² Statute BNDES, article 220-C.

guarantee, through clear and effective mechanisms, access to the right to information, which in accordance with article 19⁴³ of the Universal Declaration of Human Rights includes access, application and knowledge of data, documents and other content that citizens consider interesting or necessary.

V. WHAT ARE THE BENEFITS THE BANK CAN GET WITH THE IMPLEMENTATION OF A TRANSPARENCY POLICY AND ACCESS TO INFORMATION?

There is no doubt that access to information becomes a fundamental prerequisite for empowering citizens to achieve a meaningful, efficient and informed participation of individuals and to consolidate a participatory and responsible democracy, since without adequate, timely and reliable information, society will hardly be in good condition to participate in decision-making. This is not limited to the scope of the (national or local) governments, but extends to other areas, including Financial Institutions, Private Banks and National Development Banks as BNDES.

However, society is not the only beneficiary of the adoption of effective regimes of transparency and access to information by public institutions: these latter may also be largely benefited, contradicting arguments that highlight the highest bureaucratic costs and human and material resources that bring a greater transparency of public bodies.

In this way, there are several aspects that can benefit the BNDES through the implementation of a Policy of Access to information that strengthen the regime of transparency and access to information from the institution. Among them:

1. To promote and strengthen dialogue and interaction with parties concerned (civil society, private sector, indigenous movements, etc.) obtaining effective and informed participation

The opening and access to information allow promoting and maintaining public dialogue, building trust in the relationship between the Bank and civil society. This, in turn, may lead to improvement in design and realization of projects and the application of policies and may reinforce the results in terms of development, as the Bank may obtain important provisions from the informed participation of society. Efficiency in citizenship participation is directly conditioned to the information that is owned.

2. To make aware and disseminate activities in society and the role of the institution in the process of national and regional development

The accurate dissemination of information by the Bank permits increase awareness of civil society and public sensitivity about the operations of the institution, as well as the role pursuit the development in the national and regional scope.

3. Evaluation of operating and improvement of the governance of the institution

Through access to information is possible to know the operation of the Bank, to monitor it (both internally and independently) and to evaluate its performance. This database permits to improve the management, effectiveness and quality of its operations and the internal activities of the institution. The adoption of a Policy of Access to Information that includes the highest standards of transparency and access to information, will promote that the institution, seeking to achieve the provisions, improves its duty.

4. Prevention and fight against corruption and secrecy

Access to information promotes a greater transparency and contributes to accountability in the internal activities of the institution, contributing to expose malpractices in the administration and potential corruption and criminal acts, not only by its officials but also by companies or governments that work with the Bank.

43 Everyone has the right to freedom of opinion and expression; this right includes to not be offended because of their opinions, research and receipt information and opinions, and to issue them, without limitation of borderlines, by any means of expression.

5. Prevention and management of socio-environmental conflicts and risks

Environmental and social risks of specific projects and programs funded by institutions such as the BNDES usually generate social conflicts that obstruct the progress of development initiatives. Given this context, participation and access to information may operate as important variables for risk management and environmental conflicts.

Regarding the risks, this variable directly strengthens the role of civil society as monitoring agent of works, plans and programs. In this way, the opportunities of early detection of risks increase, which would enable a preventive response and better management. Regarding the socio-environmental conflicts, participation and access to information act as spendthrift of tensions. Thus, the demands of the affected communities find valid interlocutors in responsible persons of the project, with possibilities to obtain satisfactory answers and to be part of the decision-making processes of projects that directly affect their lives. The denial of information and opportunities for participation only deepens the negative perceptions of civil society, aggravating environmental conflicts.

For all this, the creation of effective opportunities for participation and the creation of mechanisms of accessible, accurate, timely and open information will strengthen the possibilities for prevention and management of both risks and socio-environmental conflicts.

6. Increase of the investors trust and public and private sector to operate with the Bank

The more information the institution provides and makes it accessible, the greater trust is put in its operations and activities by, not only society in general, but also investors, companies and private sector parties, and the different public sector agents who are interested in operating with the Bank.

7. Promotes the accountability capacity of the institution

The Bank has to respond and render accounts for the public resources it uses. In this sense, the information available to the public will justify the actions and the proper performance of the Bank and its employees.

8. Improvement of employees performance

To provide in due form and time all information that employees require to develop their routine activities improves their performance.

9. Harmonization with the highest standards of transparency and access to information existing in national and regional regulations and legislations and in other related institutions

To adopt a Policy of Access to Information that includes the highest standards of transparency and access to information will allow the institution to harmonize and compare their transparency regime with that in other institutions, regulations or legislations in the national and regional scope. This would allow it to adjust to the existing internationally best practices, especially in Latin America.

10. Improves the credibility of the institution

Any system or democratic institution that expects to be legitimate and reliable in its operations should support transparency and access to information, since this gives internally and externally credibility.



SECOND PART

GUIDELINES FOR THE DISCUSSION

SECTION I: INTRODUCTION TO 'THE POLICY'

1. The Brazilian Development Bank (BNDES) reaffirms and reflects, through this policy, its strong commitment to transparency, access to information and accountability as basic and fundamental instruments to create and maintain a dialogue with the public and to increase their awareness of the role of the institution in the development process; and for the proper operation of democracy, because:
 - Access to public information forms a necessary and fundamental instrument for the proper preparation and implementation of effective public policies;
 - The right of access to public information is strongly linked to freedom of expression and the promotion and development of both elements prevents the concentration of information in a few hands;
 - The right of access to information, in addition to the creation of a substantive right itself, has an instrumental role to guarantee full validity and protection of other fundamental human rights, such as the right to education, a healthy environment, health, political participation of citizens, a productive and healthy life, among many others;
 - Access to information becomes a fundamental pre-requirement for empowering citizens, to achieve a meaningful, efficient and informed participation of individuals, and to strengthen a responsible and participatory democracy;
 - Transparency, access to information and accountability are key instruments to combat corruption and its impact on development; to ensure proper use of public resources; to prevent conflicts and to contribute to the monitoring and evaluation of the management of government officials and penalize the offenders.
2. By applying this policy, the Bank assures to promote dialogue and public participation; to increase public awareness about the activities, objectives and operation of the institution and to strengthen links with the parties concerned, what allows improving the design and realization of its operations and activities, thereby strengthening development results. In turn, it tries to reveal its activities and the use of public resources.
3. This Policy applies to all denominated "*BNDES System*", which includes the operations and activities of the Bank and its three subsidiaries: BNDESPAR FINAME and BNDES Limited. From now on, by mentioning "the BNDES", "the Bank", "the Institution" or any other similar concept, it is understood that makes reference to all the BNDES System as a whole.

In turn, the Policy applies to all operations and activities financed by the Bank, regardless of the place where the same are developed, either inside or outside Brazil.
4. The Governing Principles that guide this Policy are the following:
 - **Principle 1: Presumption in Favor of the Access to Information**
 - **Principle 2: Clear and Delimited Exceptions**

- **Principle 3: Automatic and Routine Dissemination**
- **Principle 4: Clear and Simple Procedures to Request Information**
- **Principle 5: Acknowledgement of Right to Appeal and Revision**
- **Principle 6: Universal Access to Information and Availability of Translations**

5. This policy starts from the principle of **Presumption in favor of Access to Information**, for which the Bank agrees to give public access to all information in its possession, regardless of its origin, format or preparation date; unless such information is committed within one of the **exceptions clearly delimited** in the list contained in Section 2-A) of this Policy. In turn, this Policy recognizes the **right to appeal and revision** to those applicants of information that consider and demonstrate that the Bank is in breach of this policy restricting access to certain information inappropriately or unreasonably. With the passage of time, the **declassification** and dissemination of certain information that is restricted is considered.

In practice, the Bank distinguishes two ways to access information: **Active Transparency**, which considers all the information that the institution proactively disseminate through various means and that, under this Policy, is subject to **automatic and routine dissemination** by the Bank. And, on the other hand, **Passive Transparency** under which determined information that is not available can be requested to the Bank through Orders or Requests of information. According to this, this policy seeks to establish **clear and simple procedures of dissemination and access to information**.

In turn, the Bank recognizes that its operations have transcended Brazilian national borders, which imposes the need to provide existing information in the language of the place where Brazilian companies operate that receive some kind of financing from the Bank or where it is a shareholder. In this sense, this Policy establishes the institutional commitment of BNDES of seeking appropriate **local language translations** of documents held by the institution.

Finally, certain elements that make the proper **implementation and monitoring** of this policy are introduced. According to this, a **Committee of Access to information** that depends on the Cabinet Office is established; a restructuring of the **Transparency Bank Website** ("*BNDES Transparent*"); and measurements of Monitoring and periodic Revision of the Policy. These measurements are not exhaustive and open the door to the preparation of additional documents that consider the implementation and monitoring regime.

SECTION II: THE POLICY

6. According to the Presumption in favor of Access to Information, the Bank will allow access to any information in its possession, unless it falls within one of the categories clearly delimited by the List of Exceptions listed in Section 2 B) of this Policy.

The Bank recognizes the validity, for this Policy, of the Principles on Transparency and Access to Information existing in the Brazilian legal system. But, in turn, it establishes a set of particular Governing Principles applicable to special regime of Access to Information and Transparency of the Institution.

1) GOVERNING PRINCIPLES

7. This Policy is guided by the following Governing Principles:
- **Principle 1: Presumption in Favor of the Access to Information.** The BNDES recognizes the fundamental importance that inspect for the development process, transparency, access to information and accountability in all its activities. Therefore, it seeks to ensure, as the basis of this Policy, the Presumption in Favor of the Access to Information. Thus, it is assumed that the Institution makes available to the public all the information they have (own or third party's), except for a limited and clearly delimited group of exceptions.
 - **Principle 2: Clear and Delimited Exceptions.** Although the Bank is committed to ensure the principle of Presumption in Favor of Access to Information, it also recognizes that there are certain particular cases in which the disclosure

of certain information may be more harmful than beneficial to the parties or affected interests, and because of that, it should maintain its confidentiality. For this, a restricted and clearly delimited list of exceptions is prepared to the principle of Presumption in Favor of the Access to Information based on criteria that may not give cause to ambiguity in its interpretation; and that should be considered with by provisions in this regard by the Law of Access to Information No. 12.527/2011 of Brazil.

- **Principle 3: Automatic and Routine Dissemination.** The Bank reveals and makes automatically and routinely accessible a large amount of free information about the structure of the Institution, its directives and institutional rules, operational policies, strategies and funded projects, its decision-making processes, among others. All documents listed in the Annex of this policy are subject to the Principle of Automatic and Routine Dissemination. All this information should be widely disseminated using different mechanisms and means listed in Section III of this Policy.
- **Principle 4: Clear and Simple Procedures to Request Information.** The Bank establishes clear, effective and simple procedures ("Friendly") to make a Request for Information or to find it on the website of the Bank. This Policy, in its Section III clearly details how information requests are processed, which should be: simple, effective, timely and free or low cost. In turn, the terms for the answers and sending of the requested information are clearly detailed.
- **Principle 5: Acknowledgement of Right to Appeal and Revision.** The Bank recognizes the right of applicants to an administrative procedure of appeal if they consider that the Institution has denied them access to the information requested without justification, or this Policy has otherwise violated. This appeal procedure shall be governed by the provisions of the Law of Access to Information No 12.527/2011 of Brazil, Chapter III, Section 2 (OPTION 1). But at the same time, applicants can choose to require revision of the Bank's decision through an appeal presented to the Internal Mechanism of the Bank Appeal established under this policy, which comprises two separate entities: an internal one, for the Cabinet Office, and other external and independent one, for the Appeals Independent Panel. (OPTION 2)
- **Principle 6: Universal Access to Information and Availability of Translations.** The Bank is committed to ensure Universal Access to information possessed, under which will provide information corresponding to all who request it (natural or legal), on equal terms, without making arbitrary distinctions without importance of his race, sex, nationality or other subjective characteristics. In turn, it acknowledges that the information provided should meet the same quality standards regardless of the language in which the application is made, for what it is committed to translate faithfully the requested documents to other languages other than Portuguese.

2) EXCEPTIONS

8. Although the cornerstone of this Policy is the Principle of Presumption in Favor of the Access to Information, the Bank recognizes that in some cases there are convincing reasons to restrict legitimately confidential information. According to this, it establishes a system of exceptions with the following characteristics:
 - 1) exceptions and restrictions protected by confidentiality are clearly delimited and restricted, seeking to avoid the ambiguity in its interpretation. In this policy, an Exceptions list is presented, which should be considered with the Exceptions listed in the Law of Access to Information No. 12.527/2011 of Brazil, Chapter IV.
 - 2) To be classified as confidential, information should go through a "Harm Test". This means that information can only be restricted when it can be clearly demonstrated, on a basis case by case at the moment of the order, that: a) the dissemination of such information could cause serious harm to one of a set of clearly and thoroughly defined and accepted interests, which are specifically listed; and that b) the harm to this interest exceeds the public interest in gaining access to such information. Thus, the exceptions should be based on the potential harm that would cause the dissemination of certain information and not on who has developed or foreseen.

According to this, the Bank will not give access to the following information:

9. **Personal Information:** The Bank will maintain appropriate safeguards to respect the privacy of officials and members of the Bank and to protect the confidentiality of its personal information. Therefore, the BNDES will not provide personal, medical or personal communications information of its officials, or of the processes of selection and appointment of staff, unless:
- The person in question expressly consented to provide such information;
 - The person is dead for more than 20 years;
 - The information requested refers to data of labor contact, of their official functions or activities within the institution
10. **Legal matters subject to professional secrecy between client-lawyer:** No legal information that is subject to the principle of confidentiality between client and attorney will be disclosed unless the person who enjoys such privilege has expressly renounced to it.
11. **Confidential Information of Third Party:** The Bank may refuse to disclose information that a third party has provided as confidential, only when it can be proved that the dissemination of such information could cause serious harms to the commercial or financial interests of that third party.
12. **Health and Security:** No access to information whose dissemination can put life, health or security of any person at risk will be given; national security of any State or the environment, for which that risk should be demonstrated.
13. **Commercial and Financial Interests of the Bank:** The Bank will not give access to certain information whose dissemination could negatively affect the commercial and financial interests of the Institution, provided that they can demonstrate how this information can produce to that result.
14. **Deliberative Information:** No certain information relating to internal deliberations of officials of the Institution whose dissemination could affect decision-making or the particular interests of the Institution is disclosed, unless the officials otherwise expressed.
15. **Institutional Administrative Information:** No access to certain information related to institutional administrative matters such as operating expenses, hiring of personnel, acquisitions, among others, will be given.
16. **Internal Financial Information:** The BNDES will not provide information relating to its internal operations of cash office whose dissemination could affect the finances and activities of the Bank's financial and capital markets.
17. **Information about particular Investigation:** The Bank may refuse to disclose certain information when it may cause damages in an ongoing investigation of commercial or disciplinary nature.
18. **Ethics and Disciplinary Matters.** No information that could harm the correct operation of the internal bodies of the Bank in charge of Discipline, Ethics and Accountability of officials and the internal activities of the Institution matters will be disclosed.

3) INFORMATION RELATING TO THE INSTITUTION

19. From the effective date of this Policy, the BNDES makes available to the public all the internal information relating to the institution with which count, except that institutional information that can be categorized within one of the Exceptions listed in Section II B) of this Policy.

It should be disclosed pursuant to the Principle of Automatic and Routine Dissemination, in due form and time, and through the available means to the institution. Among the institutional information that should routinely disclose the Institution emphasize: Information about Institutional Governance of the Bank; its Organic Structure and Strategies, Guidelines and Operating Policies; Plans of Public Enquiry, Financial and Operational Reports and other institutional documents that are in the Annex of this Policy.

4) INFORMATION RELATING TO THE BANK'S OPERATION

20. The Bank recognizes the importance of establishing rules and suitable and clear procedures so that various parties and the general public can have access to information about activities or operations financed directly or indirectly by the Institution. Thus, and according to the Principle of Presumption in Favor of the Access to information, regardless of its origin, the Bank will establish through this Policy clauses in the contracts of those contractors or subcontractors financed by the Bank, that ensure the free access to such information, unless it is specifically classified as confidential and subject to the "harm test" entering into the categorization of the exceptions listed in this Policy.

This applies to all information about projects or programs to be developed (jointly with clients or individually by the Institution) or be held by the Bank, its clients or partners, governing contractors and other parties that have financing of the Institution for activities within or outside Brazil.

21. Any party or organization that obtains financing by the Bank to develop any specific activity, whatever their nationality is, is committed to respect and comply with the terms of this Policy of Access to Information, with risk to lose the financing if contrary.
22. In turn, the Bank will promote, according to this Policy, effective compliance of relevant national legislation of those countries where funds projects or programs.

SECTION III: ASPECTS RELATING TO THE EXECUTION AND APPLICATION OF THE POLICY

1) PROCEDURES FOR THE ACCESS TO INFORMATION

23. **Active Transparency - Automatic and Routine Dissemination.** In accordance with the provisions of Article 6, most of the information held by the Bank is disclosed proactively, routinely and automatically and in open, accessible and simple formats, through its Website, and particularly, through Transparency Website "*BNDES Transparent*" restructured for this purpose from this Policy.

Certain information that is relevant to local communities or affected by a project or program financed by the Bank will be available in paper format for easy access. In these particular cases that involve projects or programs with affected potentials, the Bank will proactively disseminate information corresponding to the activities (to be) financed, in the language of the community involved, timely and free of charge and with an advance of 60 days prior to decision-making.

In turn, in places where they carry out such projects or programs, the Bank shall, in accordance with this Policy, prepare the establishment of "Temporary Information Centers" responsible for providing proactive information about the project or program in question, the Bank, the involved companies, among others.

This Annex at the end of this Policy presents a list of information that should be routinely disclosed by the Bank through its Website.

24. **Access to Decision-Making.** The Bank recognizes the importance of access to information for an informed and effective participation in decision-making, especially by the communities and populations potentially affected by a project financed by the Bank. Therefore, it commits to the extent possible, to proactively disseminate such information. This includes, among others:
- specific information about the decision-making procedures of the institution, and its procedures and organizational standards;
 - information about enquiry plans, reform and revision of programs and institutional strategies of the Bank;

- information about projects or programs under discussion for its approval;
- Information about meetings, communications and other deliberative processes where important decisions are taken for the institution;
- Information about public enquiry and participative processes conducted by the Bank.

This information will be made available to the public 60 days in advance of the decision-making, in order to promote effective participation of the parties concerned.

25. **Passive Transparency - Information Requests.** Any required information held by the Bank hands may be requested through an Information Request.

The Applicant may be bent on the Information Request via e-SIC system (Electronic System for Citizen Information Service) established pursuant to the National Law of Access to Information No 12.527/2011, or through receiving system of information Request created by the Bank to provide specific information that is in the Institution's hands.

Any person may present a written Information Request to the Bank, either by electronic means such as postal mail, fax or even in person at the information Offices created by the Bank. There the requested information as accurate as possible will be detailed and described to allow the Bank to find it easily. When the Applicant requires a specific document should try to provide as much information as possible about such document to facilitate its location (project title, date of approval, country where the project is introduced, origin, etc.). Otherwise, the Bank officials that receive the Request try to solve the technical deficiencies of the same. In exceptional cases, the Bank will receive oral requests.

Information Requests will be received in Portuguese, Spanish and English, and the Bank will provide information in the language in which the request is made.

26. **Response Deadline to Requests.** Once receiving the request, the Bank will acknowledge receipt of the same within a maximum of 5 working days after the receipt and will provide an open, accessible and clear response to the Request in the course of the next 20 working days. In exceptional circumstances, the Bank may delay its response in the event that the requested information is voluminous, complex or difficult to find in which case it shall inform the Applicant of the delay in submission. In turn, the Bank will make efforts to provide information immediately to cases where the information is urgently required. In that case, the applicant should clarify in its Request that the information is urgently required, detailing the reasons for it. Urgent requests are justified based on: to prevent a harm, to promote effective participation, protection of human rights or environment, security, among others.
27. **Fees and Costs.** The Bank is subject to the principle of free information. In the event the request requires information in print, the Bank may charge fees corresponding to its reproduction. In the event that the person does not possess the necessary resources, the Bank will seek to subsidize the cost of access to that information.
28. **Rejections of Requests.** The Bank may reject those information requests that fall within the system of Exceptions set forth in Section II-B).

In the event in which the Bank rejects the information request, the applicant will be notified of the possibility of using the Appeal Procedure applicable to the Bank, and the corresponding procedure will be described.

2) APPEAL PROCEDURE

29. **Instances and Reasons for Appeal.** If applicants disagree with the denial of information by the Bank, they may lodge an Appeal following the procedure established by the Law of Access to Information No 12.527/2011 of Brazil, Chapter III, Section 2. **(OPTION 1)**

At the same time, applicants may choose to require the revision of the Bank's decision through an appeal presented to the Internal Mechanism of Appeal of the Bank established under this policy, which consists of two separate instances, an internal one to the institution, and another external and independent one to the institution: a) complaint before the Cabinet Office of the Bank; and b) complaint before the Independent Panel of Appeals. **(OPTION 2)**

The appeal to the Bank's decision may be presented against a complaint of that the Bank has violated this policy or the right of access provided in the Law of Access to Information No. 12.527/2011, by denying or restricting inappropriately the access to information.

30. **Appeal before the Cabinet Office.** The first instance to which the applicant should appeal in case it wants to present an appeal in light of a denial of the Bank's information is through a complaint presented before the Cabinet Office, in charge of Transparency within the BNDES. Appeals in this instance should appear in writing, via email, mail or fax within 60 calendar days after the Bank's response to the initial request. The Cabinet Office will analyze the claim to determine its eligibility and should provide a response to the appeal within the next 15 working days. If necessary, the Cabinet Office may consult third parties to make a decision. If the appeal is eligible, the applicant should receive the requested information in the course of the next 15 working days. On the other hand, if the appeal is ineligible, the Cabinet Office should prepare a document with the arguments that support that decision. In addition, the Cabinet Office is empowered to correct breaches of this Policy if they consider necessary by virtue of an appeal.
31. **Appeal before the Independent Panel of Appeals.** In the case of receiving a rejection of the appeal appeared before the Cabinet Office, the applicant may appeal to the second instance of appeal: the Independent Panel of Appeals, which consists of three experts in matters of Transparency and Access to information, and acts independently of the Institution. It should do that in writing, via email, mail or fax, within 15 working days after the determination of ineligibility by the Cabinet Office. The Independent Panel will analyze the complaint within 60 calendar days, and will come to a conclusion, by which has the power to revoke or confirm the decision adopted by the Cabinet Office. Its decision is final and such decision and documents used to argue should be public.

3) CLASSIFICATION AND DECLASSIFICATION OF INFORMATION

32. **Classification of Information.** From the effective date of this Policy, the Bank will begin applying a new system of Classification of the information in the Institution's hands, which will be extended to the pre-existing information. All documents in the possession of the Bank will be classified according to the following three categories:

- "Public"
- "For Official Use"
- "Confidential"

Pursuant to the provisions of this Policy, Bank's officials should ensure to classify in one of the three mentioned categories each of the documents prepared by the institution and all documents held by the Bank prior to the effective date of this Policy. From the entry into force, the Bank will begin with routine dissemination of those public documents classified in this category.

In turn, the Bank will require to clients, partners and third parties financed by the Bank to classify all the information provided to the Bank and that this should spread under the Principle of Presumption in Favor of the Access to Information, regardless of its origin.

33. **Declassification of Information.** With the passage of time, the Bank declassifies and disseminates certain information which at its time was classified as restricted. The deadline for the declassification of documents may vary between 5, 10 and 20 years, according to the document. This deadline will be established at the time of classifying information.

4) ASPECTS BOUND TO THE CORRECT IMPLEMENTATION OF THE POLICY

34. **Transparency Website.** To facilitate access to all information routinely disseminated, the Bank makes available to the public a Transparency Portal "BNDES Transparent" where databases with all the information held by the Bank is systematized and organized and where simple mechanisms are established to find the sought information.

Prior to the entry into force of this policy and restructuring of the Transparency Website, the Bank commits to perform a work of organization, classification and systematization of all the information that currently owns, through the Committee of Access to Information, specifically created for this purpose.

Such restructuring of the Transparency Website will allow specific instruments to facilitate access to information for the Institution and for simple and effective presentation of Information Requests.

35. **Committee of Access to Information.** According to this Policy, the Bank will create within its institutional scheme, a Committee of Access to Information, dependent of the Cabinet Office. The functions of the Committee will include, among others:

- To develop an Implementation document of this policy that contains the procedures and steps to be followed for a proper operation of the regime of access to information established under this Policy.
- To coordinate the performance and to ensure the correct implementation of this policy;
- To organize, classify and systematize the information owned by the Bank;
- To advise and train staff and the different sectors of the Bank regarding the new regime of access to current information;
- To perform the monitoring of the Information Requests and rejections to them;
- To carry out yearly assessments of Implementation of the Policy.

For the formation of that Committee, the Bank will initiate an inclusive process with the active participation of Organizations and Parties of the civil society that work agendas related to Transparency, Access to Information and activities of the Bank.

36. **Information Offices.** In order to decentralize the activities of dissemination and provision of information of the Bank, Information Offices will be established either in different States of Brazil or in various countries of the region where the projects funded by the Institution are developed. They will be empowered to receive Information Requests.

37. **Temporary Information Centers.** The Bank will be in charge of establishing Temporary Information Centers in each of the places where projects or programs funded by the institution are developed and that have potential negative impacts either on communities or the environment and that are distant from Bank's Headquarters or the Information Offices. Such Centers shall have as function:

- To provide specific information (both Active and Passive) of the project or program in question, the Bank, involved partners or companies, or any other relevant information.
- To organize meetings and workshops of information dissemination about the project or program in question.
- To disseminate totally the existence and content of this policy and the possibility the parties concerned have to make use of it.
- To operate as a link between information applicants and Information Offices or the Central Bank Headquarters.

38. **Translations and Languages of Websites.** Although the Bank regularly handles with Portuguese as its official language, it recognizes the importance to translate the greatest possible number of documents into other languages, mainly Spanish and English. When it is about documents related to projects or programs financed by the Bank outside Brazil, the Bank will translate such documents. In turn, the Bank commits to have websites in English and Spanish.

39. **Technical and Contextual Information.** The Bank will try that this technical information and difficult to understand for the population be accompanied by a simple explanation thereof and by context documents if necessary, to facilitate the understanding of them by the non-expert population.

SECTION IV: PROMOTION, MONITORING AND REVISION OF THE POLICY

40. **Periodic Revision and Monitoring.** The Bank will constantly monitor the operation of this Policy, preparing Annual Reports about their condition. It will also perform regular and thorough revisions of it every three years, both internal and external, to strengthen and perfect it, in transparent and participative processes.
41. **Public Enquiry about Implementation of the Policy.** The Bank will (annually) carry out periodic public enquiries with interested parties to receive provisions and experiences about the operation of the policy in order to strengthen them.
42. **Tracking and Monitoring of Information Requests and Rejections:** The Bank, through the Committee of Access to Information, will constantly monitor the performed Information Requests, the rejections and its results. This monitoring shall contain: the dates in which the Requests were performed, the Bank sector that received them, the given answer, the deadlines, and other important aspects. Later, this information will serve as provisions for the annual monitoring reports of the operation of the Policy.
43. **Promotion, Diffusion and Resources.** The Bank commits to make efforts and involve the necessary resources for the effective implementation, operation, promotion and dissemination of this Policy and the institutional regime of access to information created thereunder.

ANNEX

INFORMATION THAT SHOULD BE ROUTINELY DISCLOSED BY THE BANK

INFORMATION RELATED TO THE INSTITUTION: The Bank should disclose all information regarding the structure and inner operations of the Institution. Non-exhaustive examples of this type of information that should be routinely disclosed by the Bank are:

- Information about Institutional Governability of the Bank
- Actions and Decisions of the Board, Audit Committee and Boards of Administration and Inspection
- Operative policies and strategies
- Financial Information and budget
- Monitoring reports
- Carbon footprint
- General Information and of contact about the personnel

INFORMATION RELATED TO OPERATIONS OF THE BANK: All information about projects or programs prepared (jointly with clients or individually by the institution) or that are held by the Bank, its clients or partners, governing contractors, and other parties that have financing of the Institution for activities within or outside Brazil should be routinely disclosed. Among these documents that should be routinely disclosed by the Bank include, stand out, above all, the Documents relating to the Environmental Assessment of Projects and Programs of the Bank; as well as Approval Documents of Investment Instruments. Other (Non-exhaustive) examples that fall within this category are:

- Information about Project Period
- Decision-making Process in the Project Period
- Information about the Financial Viability of the Undertaking
- Information about Environmental and Social Impacts of the Projects funded by the Bank
- Monitoring types of Companies and Projects funded by the Bank
- Information about Operations of Share Holding of the Bank
- Information related to Investments
 - » Investments Period of the Bank
 - » Information Summary about Investments
 - » Social and Environmental Information of possible investments
 - » Results of Public Enquiries and participative processes of Civil Society
 - » Detailed information of projects funded by the Bank
 - » Social and environmental impact of projects funded by the Bank
 - » Monitoring and Tracking Information of the Projects
- Certain Information Belonging to Third Parties (Partners, Clients) Funded by the Bank

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