

Office of the United Nations High Commissioner for Human Rights

Recommendations for IDB Invest’s “Access to Information Policy”

3 August 2018

Introduction

1. The Office of the United Nations High Commissioner for Human Rights (OHCHR) welcomes the opportunity to comment on the draft Access to Information Policy (“draft Policy”) of IDB Invest (or Inter-American Investment Corporation, IIC). OHCHR notes the vital function that freedom of information laws and policies play throughout the world in fostering transparency, accountability and good governance. Transparency is fundamental to sustaining relations of trust and an active public dialogue and awareness about IDB Invest’s mission. It is also a foundation stone for better long-term investment and development results.
2. OHCHR welcomes the recognition (para 3 of the draft Policy) of the human right to access information, and notes that the public information policies of the IFC, EIB and ADB do likewise.¹ Article 19 of the Universal Declaration on Human Rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” Article 19 of the International Covenant on Civil and Political Rights, which has been ratified by 171 countries, Article 13(1) of the American Convention on Human Rights (23 states parties) and Article 13(1) of the UN Convention on the Rights of the Child (194 states parties) contain similar provisions. International organizations, including IDB Invest, are subjects of international law and are bound by general rules of international law,² including with respect to human rights. OHCHR welcomes the IIC’s recognition of certain of its human rights responsibilities in its Environmental and Social Sustainability Policy (2013).³

¹ For example in its discussion of “Recent Global Trends in Public Communications”, para 17 of the ADB Public Communications Policy notes: “Freedom of information is recognised as a fundamental human right as set forth in the Covenant on Civil and Political Rights. Citizens are demanding greater transparency and holding governments and private sector corporations to higher standards of accountability.”

² Interpretation of the Agreement of 25 March 1951 between WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, 89-90 (Dec. 20).

³ See <http://www.iic.org/environmental-and-social-sustainability-policy.pdf>, paragraph 7, reflecting IIC’s commitment to “good international practice in the context of all social aspects of the projects it finances including human rights.” The IIC requires good labor practices of its clients “guided by the core ILO conventions and other ILO standards” (para 7(ii)), and “participation and inclusion of persons with disabilities ... and adherence to the principles of the UN Convention on the Rights of Persons with Disabilities” (para 7(v)).

3. The explicit recognition of the right to access information under global and regional human rights instruments is particularly important when the freedom of the press is facing unprecedented threats in the region, and world-wide.⁴ The importance of this right for development was put beyond doubt by its inclusion within SDG 16, target 10: “Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements.”⁵ However, as presently formulated, the 2nd sentence of paragraph 3 of the draft Policy could be read as implying that the right to access to information is not currently recognised as a fundamental human right. OHCHR recommends that that sentence be amended along the following lines: “In addition, the IIC welcomes the international recognition of the right to access information as a fundamental human right, and that most countries in Latin America and the Caribbean (LAC) have adopted regulatory frameworks on transparency and access to information.”⁶

4. Furthermore, OHCHR recommends that the IIC include a more explicit and specific organisational commitment, flowing from the right to access information, such as that of the ADB’s Public Communications Policy 2011 (para iii, p.3; replicated in para 30, p.12): “Right to access and impart information and ideas: ADB recognizes the right of people to seek, receive, and impart information and ideas about ADB assisted activities. ADB shall provide information in a timely, clear, and relevant manner. Information shall be given to affected people and other stakeholders, including women, the poor, and other vulnerable groups early enough for them to provide meaningful inputs into project design and implementation. ADB shall not selectively disclose information. People will have equal access to the information that ADB makes available under the policy.”

5. There are numerous other positive features of the draft Policy from OHCHR’s perspective. We note that the draft Policy encourages maximum disclosure subject to defined exceptions which protect legitimate interests from harm and that the list of exceptions is similar to those of other MDBs (and the IFC in particular). However the substance of the draft list of exceptions could be strengthened in many respects, as

⁴ See e.g. Reports Without Borders’ press freedom rankings (2018): <https://rsf.org/en/ranking#>; <https://freedomhouse.org/report/freedom-world/freedom-world-2018>; and Committee for the Protection of Journalists’ global impunity index: <https://cpj.org/reports/2017/10/impunity-index-getting-away-with-murder-killed-justice.php>.

⁵ See <https://sustainabledevelopment.un.org/sdg16>, and SDG indicator 16.10.2: “Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.” See also UNESCO, Press Freedom and Development (2008) at <http://unesdoc.unesco.org/images/0016/001618/161825e.pdf>.

⁶ See also UNESCO, World Trends in Freedom of Expression and Media Development: Regional Overview of Latin America and the Caribbean (2014), p.7, at <http://unesdoc.unesco.org/images/0022/002277/227740e.pdf>: “In all countries in the region but one, there have been constitutional guarantees or laws that protect freedom of expression as a fundamental right.”

outlined further below, taking into account Indicator 29 of the Access Info Europe and Center for Law and Democracy’s Global Right to Information Rating (an authoritative source in this field)⁷ and the Organization of American States’ model law on Access to Public Information.⁸

6. OHCHR notes the reasonably specific illustrative listing of documents that will be disclosed (Section III) and (in para 32(v)) the IIC’s recognition of the need to obtain the free, prior informed consent of indigenous peoples. We welcome the inclusion of a positive override (paras 62-63), subject to the comments below, and warmly welcome the IIC’s decision not to include any negative override, which might otherwise have generated inconsistent results in practice and frustrated the objective of maximum disclosure (para 10). This would be an important example for other MDBs to follow, in OHCHR’s view. We also note the proposal to establish a two-tier (including independent, external) review mechanism which, subject to the comments below, we expect will be critical for promoting the consistent and effective application of this Policy.
7. However OHCHR notes that, in numerous respects, the draft Policy appears to fall short of the standards set by other MDBs and many national legal systems. In OHCHR’s view, further strengthening would be needed if the Policy is to help IDB Invest achieve the objective of maximum, proactive disclosure, as well as timely and fulsome responses to requests (reactive disclosure). The suggested areas for further strengthening are set out below, dealing first with contextual issues (how shrinking civil society space may impact upon public information policy objectives), then the draft Policy’s provisions on information made routinely available, then comments on exceptions, and other issues.

Context – shrinking civil society space

8. The draft Policy appropriately notes (para 8) the accountability of IDB Invest for the use and management of its resources and (para 3) the increasing demand of people in the region (and world-wide) for information and greater transparency. However the unfortunate reality is that civil society space in many countries, including in the Latin American region, is rapidly shrinking. Restrictions on media freedom and access to information are a central part of this phenomenon. In Latin American countries in recent years, the proportion of countries with a “free” media in annual press freedom surveys has reportedly been declining, while the number of “not free” countries has reportedly

⁷ See <http://www.rti-rating.org/methodology/>.

⁸ OAS, Model Inter-American Law on Access to Public Information and its Implementation Guidelines (2012), s.40, at http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf.

risen.⁹ The region has reportedly seen increasing restrictions on broadcasting licencing to silence opposition voices, abuse of defamation, libel and public security laws to limit information in the public domain, media concentration in particular sectors, threats to independence and pluralism, and emerging indications of on-line censorship.¹⁰

9. Moreover, over 300 human rights and environmental defenders were reportedly killed world-wide last year, the worst year on record, mostly in connection with large development projects and business ventures.¹¹ Alarming, two-thirds of the reported killings (212) took place in Latin America, and 156 in Brazil and Colombia alone.¹² Killings of journalists in the Latin America region have also been increasing.¹³ Countless other environmental and human rights defenders have been subjected to intimidation, harassment, assault, vilification, arbitrary detention, torture or forced disappearance. Women human rights defenders are disproportionately affected, as has been observed in El Salvador, Dominican Republic, Guatemala, Nicaragua, Mexico, Brazil, Colombia, Peru and Honduras.¹⁴ The Hidroituango dam project in Colombia, the subject of a complaint to MICI, is emblematic of the increased threats that communities are facing.¹⁵
10. Target 10 of SDG 16 (“protect fundamental freedoms”) affirms that addressing these issues is a global development priority.¹⁶ Addressing these challenges is also necessary for the successful implementation of access to information policies. Citizens, project-affected communities and other stakeholders will be less likely to seek and act upon information if they face serious threats, intimidation or reprisals. While the State is of course the primary duty-bearer under international human rights law, rigorous human rights due diligence will be needed from IDB Invest and its clients in order to identify and mitigate these kinds of risks in the context of particular sectors and investments.
11. With these factors in mind, OHCHR recommends that the introduction to the draft Policy include specific reference to the problem of shrinking civic space in many countries, and

⁹ Freedom House, *Freedom of the Press 2017*, at pp.21 and 24, at https://freedomhouse.org/sites/default/files/FOTP_2017_booklet_FINAL_April28.pdf; and UNESCO (2014), p.7.

¹⁰ UNESCO, *Id.*

¹¹ Frontline Defenders, *Annual Report on Human Rights Defenders at Risk (2017)*, p.13, at https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf.

¹² *Id.* at p.12. Killings of human rights defenders were also reported in Mexico (31), Guatemala (11), Honduras (7), Nicaragua (3), Argentina (1), Belize (1) and Venezuela (1).

¹³ UNESCO (2014), pp.25-27.

¹⁴ Frontline Defenders (2017), p.13.

¹⁵ See <https://www.ciel.org/news/communities-hidroituango-dam-colombia-file-complaint-idb/>.

¹⁶ See <https://sustainabledevelopment.un.org/sdg16> and Indicator 16.10.1: “Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months.”

the constraints and disincentives that this may present for people seeking to access and utilise information concerning IIC-supported investments. Mindful of its clients' human rights responsibilities and its own obligations under international law, OHCHR recommends that IDB Invest include a commitment that it will respect the rights to freedom of expression, association, assembly and access to information under the SDGs and global and regional human rights agreements, and will encourage its clients to undertake human rights due diligence in accordance with the UN Guiding Principles on Business and Human Rights.¹⁷

12. OHCHR notes that policy commitments of the kind recommended above would be consistent with the IIC's existing human rights commitments in its Environment and Social Sustainability Policy.¹⁸ With these additional commitments to respect human rights and encourage clients' human rights due diligence, in OHCHR's view, stakeholders will more likely to be able to freely seek and make use of information under IIC's Access to Information Policy, for the benefit of IIC-supported investments. Furthermore, whenever people accessing and/or utilising information under the Policy *are* subjected to intimidation, reprisals or other threats, the IIC itself will more readily be able to demonstrate its own due diligence and contribute to appropriate risk mitigation measures.

Information routinely made available

13. OHCHR recommends that institutional information should include documents circulated to the Board (e.g. World Bank Access to Information Policy, s. III.B.4.d), advance notification of projects to be considered, and that the IIC specify the notice period for the posting of documentation in advance of Board meetings.¹⁹ Early disclosure is essential if stakeholders are to be able to engage in good faith with the Board in relation to decisions that affect them. OHCHR also notes that other MDBs, such as AfDB, ADB, IDB and the World Bank, disclose their full budgets, rather than "general guidelines of ... the IIC's budget" as para 21 of the draft Policy proposes.
14. Insofar as operational information is concerned, OHCHR notes the importance of disclosing project implementation and completion reports, as other MDBs routinely do, for the sake of transparency, accountability, and to provide the feedback loops necessary to sustain strong development outcomes. In line with the practice of the

¹⁷ See http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Due diligence under the Guiding Principles includes assessment of context risks such as threats to civil society.

¹⁸ Note 3, above.

¹⁹ The ADB's Public Communications Policy is a good practice in this regard: "ADB shall post on its website (i) the provisional schedule of items for Board consideration for the forthcoming 3 weeks on a rolling basis." ADB, Public Communications Policy 2011: Disclosure and Exchange of Information, para. 85.

AfDB, ADB, EBRD, EIB, IDB and World Bank, OHCHR recommends that draft operational policies and sector strategies be disclosed before they are approved by the Board, in addition to the final versions after Board approval (as foreseen in para 21(iii) of the draft Policy). OHCHR also recommends that the IIC publish advance information about future strategy and policy reviews, and that para 18 of the draft Policy set a clearer expectation that there will be two rounds of public consultation on any policy with potentially broad operational and/or community impacts, and that the IIC's written responses to public submissions will also be made public within a specified timeframe.

15. OHCHR recommends that para 29 of the draft Policy be amended in line with para 29 of the IFC Access to Information Policy, upon which it is based, by adding the phrase: "and provides periodic updates on the investment."
16. OHCHR recommends that para 31 of the draft Policy be amended to make it clear that where there is any conflict between information disclosure requirements of the IIC Environmental and Social Sustainability Policy and the Access to Information Policy, the latter should prevail.
17. OHCHR warmly welcomes the recognition of the importance of obtaining the Free, Prior, Informed Consent (FPIC) of indigenous peoples, in para 32(v) of the draft Policy, in line with para 31(a)(vii) of the IFC Access to Information policy. However there appears to be a verb missing in the operative sentence. OHCHR recommends that para 32(v) be amended as follows: "description of the process of *obtaining* free, prior and informed consent of indigenous peoples, for projects that require such verification;" [emphasis added].
18. In line with para 31(a)(i) of the IFC Access to Information Policy, OHCHR recommends that the Environmental and Social Review Summary (ESRS) include reference to the IIC Environmental and Social Sustainability Policy and performance standards applicable to the investment.
19. OHCHR notes that the references to environmental and social assessments and evaluations (and "impact evaluations", if this is different) in paras 32 and 33 seem duplicative, and that para 31(a) of the IFC Access to Information Policy, on which the relevant provisions of the draft Policy were based, contains no equivalent to para 33. Pre-approval disclosure of ES information is dealt with in para 32, and post-approval disclosure is dealt with in para 46, hence it is difficult to see what para 33 adds. OHCHR recommends that these provisions and the relationship between them be clarified, and consideration be given to deleting para 33. Should footnote 3 be retained, OHCHR

recommends that the phrase “whenever relevant and available” be deleted and replaced with “in accordance with the IIC Environmental and Social Sustainability Policy”, given that “non-availability” of EIAs or related studies is not an excuse for non-compliance with the latter policy.

20. OHCHR notes the 30-day and 60-day time limits for investment and ES information in paras 35-37, modelled on para. 34 of the IFC’s Information Disclosure Policy 2011. However OHCHR recommends that the Investment Summary and ESRS for Category A investments (including financial intermediaries and their Category A sub-projects) be disclosed 120 days prior to Board approval. Para. 51 of the ADB’s Public Communications Policy constitutes best practice insofar as the disclosure of ES information is concerned: “In accordance with the requirements under the Safeguard Policy Statement, ADB shall post on its website .. a draft environmental impact assessment (EIA) for an environment category A project, at least 120 days before Board consideration;” and “a draft environmental assessment and review framework, where applicable, before appraisal[.]” OHCHR would strongly recommend that the IIC adopt similar requirements for comparable documentation.
21. In OHCHR’s view, para 38 of the draft Policy should be amended in line with para 32 of the IFC Access to Information Policy, which more clearly delimits the exceptional circumstances which may justify the IIC exceeding document disclosure timelines: “There may be some limited circumstances that may prevent the observance of these time periods (see paragraph 14).” Paragraph 14 clearly sets out those circumstances (market conditions and legal or other regulatory requirements), which are prescriptive and exhaustive. The “exceptional circumstances” in para 38 of the draft IIC Policy, by contrast, are open-ended and illustrative, opening up scope for inconsistent practice and potential abuse.
22. OHCHR recommends that para 43 of the draft Policy be amended to make it clear that the client’s review of environmental and social information does not affect the time limits for disclosure of that information. Moreover OHCHR recommends that the draft Policy include provisions along the lines of paras 38-39 of the IFC Access to Information, requiring updated information prior to the Board’s review, without prejudice to the time limits for public disclosure of environmental and social information.
23. OHCHR recommends that para 46 of the draft Policy be amended along the lines of para 41 of the IFC Access to Information Policy. The latter provision provides a more comprehensive and rigorous basis for monitoring the environmental and social performance of investments, embracing all investments “except those expected to have

minimal or no environmental or social adverse risks and/or impacts” (rather than just Category A projects) and, insofar as ESAPs are concerned, is not limited to disclosure on an annual basis. Moreover, disclosure of the status of implementation of ESAPs (not just the content of the ESAPs themselves) should be disclosed.

Exceptions

24. As indicated at the outset, OHCHR welcomes the clear presumption of maximum disclosure subject to clearly specified exceptions to prevent harm to legitimate interests, set out in part IV. This is consistent with the approach of other MDBs. However there are a number of areas where the exceptions regime could be clarified and strengthened, in OHCHR’s view, in order to ensure that the objectives of the policy and better development results are achieved in practice.
25. Firstly, OHCHR notes potential confusion relating to the use of the term “confidential” in the draft Policy. Materially, paragraph 64 provides that the information that the IIC produces and receives will be classified either as “public” or “confidential” in nature.” Paragraph 65 implies that the “confidential” classification is determined by the scope of the listed exceptions (although the main subject of para 65 is redactions, not classification), and paragraph 73 appears to confirm this although it might also be read as establishing a self-standing (and potentially open-ended) “confidentiality” exception.²⁰ Paragraph 51 (which introduces the list of exceptions) does not refer to “confidentiality” at all.
26. A number of other provisions contain the term “confidential.” For example para 9 provides that “in accordance with the Policy, IIC respects and protects the confidentiality of the information it receives[.]” Para 15 provides that “All information detailed below [ie. the illustrative list of information routinely made available] will be disclosed *excluding any confidential information*” [emphasis added]. Paras 47 and 50 exclude “confidential information” from the publication of development impact results.
27. However “confidentiality” is itself an explicit part of exception IV(a) (“commercially sensitive information”, based on the IFC Access to Information Policy, para 11(a)) and is an implicit element of other exceptions. Hence, without further clarifications, the use of the term “confidential” in paragraphs 15, 47, 50 and 73 seems unclear and may appear

²⁰ Para 73: “The IIC may deny a request for information when it determines that the information requested is “confidential” under the Policy. Whenever the IIC denies a request for information, it will explain the reasons for its decision to the requester, indicating the exception under which the information is considered “confidential” under the Policy, and inform the requester of the right to request a review of the denial.”

to operate as an additional self-standing exception, detached from the core requirement to show harm to specific parties or legitimate interests.

28. In order to resolve any confusion about the possible operation of an additional (ill-defined) “confidentiality” exception, and in line with practice elsewhere, OHCHR would recommend that information be classified as “public” or “non-public” (para 64), subject to recognised exceptions. We note that the “non-public” classification already appears in para 62 (governing the Positive Override).

29. There would not seem to be any need to amend paragraph 9, in OHCHR’s view, given the more general context in which confidentiality is mentioned there and the fact that it should be interpreted “in accordance with this policy.” However OHCHR would recommend the following consequential amendments:

- Delete para 15 and amend the first sentence of para 14 as follows: “The information described belowroutinely discloses, *subject to the exceptions established in this Policy.*” [emphasis added];
- Amend the first sentence of para 47 as follows: “With the client’s consent, and subject to the exceptions established in this Policy, ...”
- Amend para 50 as follows: “Upon completion of the activities for each advisory service project, with the consent of the client and subject to the exceptions established in this Policy, the IIC will disclose information on the standard development impact indicators.”
- Amend the first sentence of para 65: “Information falling within the Policy’s exceptions ...”

30. OHCHR also notes with concern that paragraph 71 of the draft policy appears to set forth a de facto “feasibility” exception, in addition to the list of exceptions in part IV (ie. “The IIC will assess the possibility of responding to requests for information based on the scope of the requests, the number of requests, and the availability of the information requested”). OHCHR recommends that the sentence in quotations be deleted and that all provisions governing exceptions to disclosure be co-located within part IV.

31. While the public interest override is welcome, in principle, OHCHR would strongly recommend that the “exceptional circumstances” and “serious and imminent harm”

requirements be removed, and that the protected interests not arbitrarily be limited to health, security and environmental concerns. The public interest override may be rendered nugatory otherwise.

32. Finally, in line with s.44 of the OAS model law on Access to Public Information, it should be specified that the public interest override should apply in cases of serious violations of human rights. This is not an academic matter: human rights violations (such as forced resettlement, killings, torture, labour rights violations, gender-based violence, and so forth) are frequently associated with infrastructure investment, extractives, agribusiness and other business ventures, in Latin America and elsewhere, directly or through equity stakes, supply chains or financial intermediaries. While the State is the primary duty-bearer under international and regional human rights law, lenders, investors and corporate clients should undertake human rights due diligence commensurate with their roles, risk exposure and leverage.²¹

Other issues

33. OHCHR welcomes IIC's commitment to transparency and accountability, as well as IIC's acknowledgment (Introduction, paragraph 2) that transparency and accountability are fundamental and necessary for the fulfilment of the IIC's mandate. However OHCHR recommends that the IIC spell out further the functional importance of transparency for better project performance, promotion of good governance, minimisation of corruption, and improved stakeholder relations. The ADB's former (2005) Public Communications Policy, paragraphs 9-14, may provide inspiration in this regard. Moreover, paragraph 24 of the latter policy states: "[G]reater openness and information sharing have improved the quality of operations. Experience has also shown that projects generate complaints from local constituencies when insufficient information is made available during project design and implementation and when information is not made available early enough."
34. OHCHR notes that paragraph 5 (Introduction) maintains the pre-existing disclosure regime for information received or generated prior to the commencement of the new policy. We recognise that third parties' interests may be adversely affected in some circumstances where information provided to the IIC is dealt with, and disclosed, other than in accordance with the public information policy applicable at the time that the information was provided. However in order to maximise the objective of transparency

²¹ UN Guiding Principles on Business and Human Rights (2011). At its core, this entails proactively identifying human rights risks relevant to a particular project and publicly showing how those risks are being addressed. This does not mean that IDB Invest should play the role of a court of law in adjudicating violations; rather, financiers and investors should identify human rights-related *information* and *risks*, taking into account the recommendations and decisions of competent human rights bodies at national, regional and global (UN and ILO) levels, and integrate the latter information within their due diligence processes.

and minimise the potential complexity and confusion that might arise from the operation of parallel disclosure regimes, OHCHR recommends that the continuing operation of the previous (2005) policy should be restricted to situations where third parties furnished information to the IIC in reliance on the 2005 policy and their interests would be adversely affected were that information to be disclosed other than in accordance with the 2005 policy.

35. Paragraph 5 states that the policy does not provide “rights to any party.” Yet, the policy establishes a number of important procedural entitlements, including timeframes and form of responses to requests, and entitlements to reasons for any refusal and access to review mechanisms. Indeed, paragraph 13 refers specifically to the requesters’ “right to request a review”. Moreover, OHCHR notes that individuals have the right of access to information under international and regional human rights law and national freedom of information laws. We would therefore recommend that the above reference to the non-creation of rights be clarified or deleted.
36. Under Section VI (“Implementation Aspects of the Policy”), given that the sensitivity of almost all kinds of information diminishes over time, OHCHR recommends the inclusion of a specific provision for a de-classification schedule. The AfDB, for example, provides that non-public information will be made available after 5, 10 or 20 years or more, depending upon its sensitivity and harmful effects (AfDB Policy on Disclosure and Access to Information (2013), paras 4.8.1 and 4.8.2). The World Bank, EIB, ADB and IDB public information policies contain similar provisions. The World Bank policy (s.B.6) lists specific categories of information that will be made publicly available after 5, 10 and 20 years, respectively, as well as documents that are not eligible for declassification.
37. In OHCHR’s view, there does not seem to be sufficient clarity concerning the scope of application of the policy and its relationship with information disclosure requirements in other IIC policies. In OHCHR’s view, it is important that disclosure requirements across the full range of the IIC’s policies are clear and internally consistent, and harmonised upwards in accordance with the draft Policy’s objective to ensure maximum transparency. The EIB and ADB policies may offer model provisions in this regard.²²

²² Para 1.3 of the EIB Group’s Transparency Policy appears to be among the clearest and strongest in this regard: “In applying this Policy, the EIB Group takes into account other EIB Group Policies and rules such as the Anti-Fraud Policy, the Whistleblowing Policy, the Complaints Mechanism Principles, and relevant Codes of Conduct applicable to staff and governing bodies. This Policy does not override these Policies and rules but must be read in conjunction with them as they are mutually reinforcing. In case of conflict between specific transparency and disclosure rules in other EIB Group Policies and this Transparency Policy, the provisions of the latter shall prevail.” The ADB’s Public Communications Policy (2011), para 34, is another good example.

38. It should be recognised that extra effort and proactiveness may be needed by the IIC and client in order to inform and engage stakeholders experiencing particular types of discrimination, such as women, indigenous peoples, ethnic minorities, persons with disabilities, migrants, internally displaced persons and many others.²³ OHCHR welcomes the fact that para 41 of the draft Policy provides for communication “in the formats and languages accessible to communities,” though suggests that this requirement not be limited to high risk projects. OHCHR recommends that paras 41 and 70 of the draft Policy be amended to encourage translation of documentation into different languages, where required, posting of documents produced in other languages, and making information available to persons with disabilities in accessible formats whenever such persons may be affected by an IIC-supported investment. The EBRD Public Information Policy (2014), for example, makes provision for translation of documentation in numerous specified circumstances and categories (paras 2.1.2, 2.3.4, 3.1.10, 3.4.1., and Annex, para 2(ii) and 3(ii)).
39. OHCHR notes that the implementation guidelines will contain important information affecting people’s rights and therefore recommends that these be consulted upon publicly. We recommend that the policy itself provide further detailed guidance on where and how to submit requests for information (beyond the minimal guidance in para 69), and stipulate that acknowledgements of receipt of requests will be sent by the IIC within 5 calendar days and responses within 20 calendar days (not 30 calendar days, as paragraph 71 currently provides). The ADB’s 2011 Public Communications Policy, paragraphs 130-135, provides useful precedents in these respects.
40. On the question of costs (para 75 of the draft policy), in line with s.27(1) of the OAS model law on Access to Public Information and many national laws, OHCHR recommends that the policy itself (rather than the implementation guidelines) provide that the requester should only pay for the costs of reproduction of the information requested, and, if applicable, costs of delivery, and that information provided electronically should be free of charge. No costs should be levied against requesters below a specified income level.
41. In view of the closing of civil society space in many countries in the region, OHCHR considers it particularly important to include provision that requests for information may be made anonymously, and that anonymity (where it is sought) must be accepted

²³ In international law, measures to remove structural obstacles to inclusion are called “special measures” or “positive measures”, or in the case of persons with disabilities, “reasonable accommodation.” See UN Convention on the Elimination of Discrimination Against Women, article 4(1); UN Convention on the Elimination of All Forms of Racial Discrimination, article 2(2); and UN Convention on the Rights of Persons With Disabilities, article 5(3).

by the IIC. The public information policy of the AfDB (para 54) provides a potential model: “Bank Group staff shall not inquire into the identity or intent of a person requesting access to a Bank Group document, unless such an inquiry is necessary to allow the Bank Group to judge whether there is any obstacle as per the list of exceptions to the release of the document.”

42. In order to ensure the consistent and effective implementation of the Policy, OHCHR recommends that para 81 be strengthened in line with the reporting requirements of other MDBs, and require the presentation by the President to the Board of an annual report on the implementation of the Policy (rather than the Board merely being informed annually as part of the IIC’s overall Annual Report). The EBRD and EIB information policies provide useful models in this regard, specifying that annual implementation reports should include statistics on the number of requests received, the timeframe and nature of the banks’ responses, and data on appeals.²⁴ The EIB, EBRD and ADB also commit to making annual implementation reports public.

43. Finally, OHCHR welcomes the two-tier appeals mechanism proposed in the draft Policy, including an independent Expert Panel. However OHCHR would recommend that further details be included within the policy on membership criteria, in order to ensure independence (see e.g. para 65, fn 25, IFC 2012 policy; para 128, fn 38, of the ADB 2011 policy), and that recourse should not be limited only to decisions concerning denial of access. In line with practice elsewhere (e.g. IDB Access to Information Policy 2010, para 9.3), OHCHR would also recommend that the IIC specify that the above mechanisms should not preclude complainants’ access to the IIC’s independent accountability mechanism.²⁵

Concluding remarks

44. OHCHR is grateful for the opportunity to contribute to the IIC’s consultation on its draft Access to Information policy. We hope that our comments are useful, and that the final version of the policy will fully reflect best practice in other MDBs and national laws, and thereby assure maximum transparency, accountability, and superior development outcomes. We look forward to our continuing dialogue and stand ready to provide further comments and clarifications on request.

²⁴ EIB Transparency Policy, para 9.4; EBRD Public Information Policy, Annex, para 4.

²⁵ See e.g. IDB Access to Information Policy 2011, paras. 9.1-9.3.