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CEE **Bankwatch
Network**



Jamaa Resource Initiatives
Promoting the Spirit of Ubuntu

March 12, 2021

Re: European Investment Bank's *Transparency Policy* Review

Dear Policy Review Team,

Thank you for the opportunity to contribute comments to the review of the European Investment Bank's (EIB) *Transparency Policy*.

We are environmental and human rights organizations who directly support communities affected by projects financed by the EIB. Our recommendations draw on our past engagement in policy reforms at a number of international financial institutions¹ in relation to advancing communities' rights to access information, as well as our work supporting communities and civil society groups in monitoring and accessing information on development projects through the *Early Warning System* initiative.²

¹ By way of background, through the *Early Warning System*, the International Accountability Project (IAP) and our partners have monitored the online disclosure practices of several development finance institutions, to better understand what project information is being disclosed, when it is being shared, and ultimately, how accessible the information is for communities.

See past analyses: [Dutch Development Bank \(FMO\)](#), [European Bank for Reconstruction and Development](#), [IDB Invest](#), [New Development Bank](#), and the [United States International Development Finance Corporation](#).

² *Early Warning System*, available at: <https://ews.rightsindevelopment.org/>.

As organizations that support communities worldwide to participate in the development decisions that impact them, we know firsthand that meaningful access to information and stakeholder engagement are vital to ensuring rights-respecting and truly sustainable development. In our collective experiences, when communities' rights to information and participation are fulfilled, their local expertise and legitimacy can better the design of potential projects, anticipating and mitigating adverse impacts, to ensure that projects achieve positive outcomes that also further community development priorities. We have also witnessed the devastating impacts that can occur when these fundamental building blocks for transparency and accountability are absent.

With these high stakes in mind, we strongly recommend that the EIB substantively revise its draft revised *Transparency Policy* to:

1. Acknowledge and embed EIB's responsibility to meaningfully fulfill the right to information and participation for the communities it impacts;
2. Implement the internationally recognized principles on access to information; and
3. Codify disclosure practices that enable communities' right to participation.

We also urge the EIB to institute a second period of consultation on this important *Transparency Policy* to ensure the approved document meets the high standards required of a public institution.

This submission begins by highlighting serious issues with EIB's *Transparency Policy* that we have observed and experienced in practice supporting communities affected by EIB-financed projects in Nepal and Kenya. The latter part of our comments provide concrete recommendations to strengthen the draft *Transparency Policy* to better prioritize and serve the needs of communities, the intended beneficiaries of development.

Community Experiences Demonstrate Failures in Access to Information and Transparency

Tanahu Hydropower Project, Nepal

The Tanahu Hydropower Project is a 140 MW hydropower project proposed to be built in Tanahu, Nepal, co-financed by the EIB, the Asian Development Bank and Japan International Cooperation Agency.

According to local residents in Tanahu, more than 750 households will be affected by the hydropower project. Residents are concerned about the specific impacts to their traditional lands and environment. Community members belong to different Indigenous groups including Magar, Gurung, Newar, and depend on the land for their livelihoods. However, from the outset, the communities' concerns have focused in on the lack of information about the project. As one

resident noted during a community meeting in 2016, “*We don’t have any information about who exactly is funding this project. There was no public hearing.*”³

In 2017, the affected communities conducted a community-led research process.⁴ In total, over 173 people from 8 affected communities shared their opinions about the project, their knowledge of the proposed plans and their engagement with decision makers on their development priorities. At the time of that research, key findings included:

- 75% of participants stated they had not been consulted during the planning phase of the project;
- 65% of those consulted by project developers wanted more information and more time to consult;
- Only 2% of respondents said they had the information they needed to be able to provide informed opinions about the project and only 1% believed that their ideas and opinions were incorporated; and
- 51% of survey participants did not feel safe to express all or some of their real opinions about the project.

The research also found that community members did not know how to access the information necessary for them to understand the enormous impact of the project on their lands, rivers, and environments, and many stated that the information that was made available was too technical to easily understand. In the complaint eventually filed to the EIB’s independent accountability mechanism, the primary concerns raised included the lack of access to vital environmental and social information, unavailability of information in local languages and dialects, and adherence to Free, Prior and Informed Consent (FPIC).⁵ Til Bahadur Thapa, one of the community representatives and complainants, stated that:

“We did not receive adequate information and opportunity for meaningful participation and proper consultation in the project. Key documents were not provided to us in our native tongue. The form and rates of compensation were determined without our

³ Tom Weerachat, “How Villagers in Nepal are Making Sure their Concerns Over a Mega Dam Project Are Heard”, available at: <https://scroll.in/article/841402/how-villagers-in-nepal-are-making-sure-their-concerns-over-a-mega-dam-project-are-heard>

⁴ International Accountability Project, “Leadership by Local Communities in Nepal Paves the Path for Development that Respects Rights,” available at: <https://accountability.medium.com/leadership-by-local-communities-in-nepal-paves-the-path-for-development-that-respects-rights-bdb906f43209>

⁵ See “Complaint and request for mediation function regarding the Tanahu Hydropower Project”, available at: <https://www.eib.org/attachments/complaints/tanahu-complaint-february-11-2020-b.pdf>

participation and as a result, are unfair, inadequate, and discriminatory against our families and thus are being imposed on us.”⁶

Text from the complaint itself underscores the very practical implications resulting from failures in fulfilling the right to information and participation of the affected communities:

“An Environmental Impact Assessment (EIA) should fully and adequately capture the impacts of the Project on our lives. As currently drafted, the EIA report has not effectively included the impacts of the project on us, the indigenous peoples. Several issues should be re-assessed, clarified, and addressed with the participation of our community.”⁷

The problems experienced by the communities affected by the Tanahu Hydropower project also highlight issues of disclosure in co-financing arrangements, and on the problematic wholesale reliance on clients for disclosure and stakeholder engagement. Further detailed in the final section, as an institution composed of member States and operating with public resources, the EIB should disclose all information, especially environmental and social documents on its own platforms, in addition to assuring disclosure and translation at the local level, regardless of co-financing arrangements. The EIB should also take responsibility for ensuring communities’ rights to information and participation are fulfilled at all stages of the project cycle, with particular attention paid to the design stage.

Power System Expansion Project, Nepal

The EIB has been funding transmission lines in Nepal since 2014, including the 220 kV Marsyangdi Corridor project as part of the expansive Nepal Power System Expansion Project being implemented by the Nepal Electricity Authority (NEA). Throughout implementation of the project, communities in Lamjung and Manang districts have voiced concern that the EIB and its client have failed to provide meaningful information disclosure and consultation about the project and its impacts.

The communities filed a complaint with the EIB’s Complaints Mechanism in October 2018 requesting a mediation to help resolve their issues with project financiers, promoters and government authorities.⁸ The Complaints Mechanism released their Initial Assessment Report in

⁶ Jocelyn Medallo and Ishita Petkar, “Not a Checkbox: The right to information as the foundation for development,” available at: <https://accountability.medium.com/not-a-checkbox-the-right-to-information-as-the-foundation-for-development-8e4ae1cf5fb8>

⁷ See “Complaint and request for mediation function regarding the Tanahu Hydropower Project”, available at: <https://www.eib.org/attachments/complaints/tanahu-complaint-february-11-2020-b.pdf>

⁸ See “Complaint and request for mediation regarding the Nepal Power System Expansion Project (including the 220 kV Marsyangdi Corridor Transmission Line)”, available at:

July 2019 recommending mediation,⁹ however the NEA refused to participate in a mediation process. The Complaints Mechanism is now in the final stages of a compliance investigation to determine whether the EIB followed its environmental and social requirements in this project.

The communities' main concern is that the EIB and its client have failed to take steps to seek their Free, Prior, and Informed Consent (FPIC) as required under the EIB's social and environmental rules. The EIB has conceded that community land rights of traditionally governed Indigenous communities are directly implicated by the 220 kV Marsyangdi Corridor. Affected communities are concerned they have not received meaningful information disclosure about the route of the transmission line and the project's environmental, human rights, and economic livelihood impacts, including:

- health, safety and other impacts on humans, animals, birds, and plants;
- physical displacement;
- economic displacement including restrictions on land use, devaluation of land, and restrictions on securing mortgages;
- forest cover reduction and other environmental issues;
- visual and sound impacts;
- Indigenous cultural heritage impacts;
- social issues resulting from outside labor; and
- cumulative impacts with the other projects in the region.

On 8 October 2020, exactly two years after filing a complaint, the FPIC & Rights Forum submitted an FPIC Protocol to the EIB, providing concrete guidance on designing an FPIC process.¹⁰ Developed through consultation with communities, the protocol outlines the steps project authorities must take, including sharing all project information in languages Indigenous communities understand, ensuring an environment free of coercion, and fully abiding by whatever decision Indigenous Peoples reach. With respect to information disclosure, the FPIC protocol lists the documents and information communities should be provided with, and specifies that they should be translated into the communities' languages, including Khas Nepali and Tamu (Gurung), Lila Kai and Tamang languages. For community meetings, the EIB should provide services of translators in the mother tongues of communities.

With five months having elapsed, communities continue to await a substantive response from the EIB in relation to their FPIC protocol.

<https://www.accountabilitycounsel.org/wp-content/uploads/2018/10/10-8-18-final-complaint-eng.pdf>

⁹ See Complaints Mechanism, "Initial Assessment Report", available at:

<https://www.accountabilitycounsel.org/wp-content/uploads/2019/10/2019-07-30-complaint-sg-e-2018-39-nepal-power-system-expansion-project-initial-assessment-report.pdf>

¹⁰ See FPIC & Rights Forum, "Free, Prior and Informed Consent Protocol", available at:

https://www.accountabilitycounsel.org/wp-content/uploads/2020/10/fpic-protocol_final.pdf

Akiira I Geothermal Power Plant, Kenya

In 2018, the EIB proposed US\$192 million in loan financing for the Akiira I Geothermal Power Plant, located in Naivasha, Kenya. Although the EIB subsequently withdrew from the project in October 2019, the results of community-led research highlighted the failures in transparency, access to information, and stakeholder engagement during the period when the EIB was involved in the project. Key findings from the research show that out of the total community respondents:

- 44% identified as Indigenous, therefore requiring the communities' Free, Prior, and Informed Consent (FPIC) under international law;
- 73% did not have information about the funders of the project, and lacked key details about the project itself, such as where, when and how the project company intended to carry out its activities;
- 58% indicated they did not have the necessary information to participate and provide informed opinions and ideas about the project;
- 67% of those consulted felt it was unsafe to share their opinions; and
- 77% indicated they did not know how to file complaints about the project.¹¹

Highlighting a crucial flaw in EIB's disclosure practices, a member of the Suswa community stated during the community-led research process that:

“The Environmental and Social Impact Assessment prepared for the exploration programme was not shared with us as affected communities. What we know is through word of mouth. We want this information shared with us.”¹²

Salient quotes from a respondent in the focus group conversations and a community elder further underscore the crucial relationship between adequate access to information and meaningful participation for the affected communities:

“The company should give us more information about the project; we are currently unable to fully participate in the project process.”

¹¹ International Accountability Project, “Akiira 1 Geothermal Power Plant Project: Community-Led Research & Outreach Report,” available at: <https://accountabilityproject.org/wp-content/uploads/2019/10/Akiira-1-Geothermal-Power-Plant-Project-Community-Led-Research-and-Outreach-Report.pdf>

¹² Ibid.

“When the company came into the village for exploration of the geothermal resource, no one knew what was going on. The company did not get consent from the villagers, let alone inform us of their planned activities.”¹³

Recommendations to Strengthen EIB’s Disclosure Practices and Transparency Policy

The collective experiences of the communities we have supported demonstrate that EIB’s current disclosure practices and *Transparency Policy* have repeatedly failed to fulfill communities’ fundamental rights to information and participation.

Given this stark reality, this review of EIB’s *Transparency Policy* must not be cosmetic, but rather substantive and aimed at better meeting the needs and fulfilling the rights of the communities impacted by EIB projects. The draft policy should be people-centered, and codify disclosure practices that will serve to ensure that communities have the potential of being informed participants and lead the development processes that affect them.

We remind EIB that Article 2 of the *United Nations Declaration on the Right to Development* states that:

“The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”¹⁴

This unequivocal acknowledgement that communities are the intended beneficiaries of the right to development demands a corresponding centering of their rights and leadership in the development process at the heart of the EIB’s policies and practices.

Furthermore, as an institution composed of member States and operating with public resources, the EIB has an obligation to ensure that its investments protect and fulfill the rights of communities. While the current draft *Transparency Policy* seeks to shift this responsibility to the EIB’s clients, such obligations cannot be entirely transferred to private entities at the will of a public institution, generating a clear conflict of interest. The experiences of communities affected by EIB projects shared in the previous section point to serious issues in the Bank’s current practice of relying on the client to ensure fundamental rights are fulfilled. The responsibility of disclosure of information to fulfill communities’ rights to information and participation must be

¹³ International Accountability Project, “Recognize Communities as Decisionmakers! The Akiira 1 Geothermal Power Plant Project in Kenya,” available at: <https://accountabilityproject.org/wp-content/uploads/2018/12/akiira-infographic-english-Dec15-2.pdf>

¹⁴ See United Nations Declaration on the Right to Development, Art. 2, available at: <https://www.un.org/en/events/righttodevelopment/declaration.shtml>

borne by the EIB, and reflected as such within the draft *Transparency Policy*, accompanied by provisions detailing EIB oversight over its clients.

We also draw the EIB's attention to the high percentage of respondents in the community-led research processes described above who did not feel safe to express themselves and participate in the project in question. While we welcome the EIB's assertion in Sec. 7.4 that it does not tolerate reprisals or intimidation in relation to its activities, we urge the Bank to take a more proactive approach by seeking to create an enabling environment where communities feel safe to access information and participate, and are assured that their voices lead project design and implementation.

The first step to achieving an enabling environment requires recognizing the Bank's responsibility to protect and fulfill the rights of the communities it affects and the potential conflicts of interest that can arise when clients alone are relied upon to safeguard meaningful disclosure and consultation. The second step requires the EIB to become truly people-centered in its approach by proactively disclosing accessible information, respecting the right to Free, Prior, and Informed Consent (FPIC), and promoting community leadership from the project design stage onwards.

To this end, we strongly recommend the EIB adopt and institute the following in its review of the draft *Transparency Policy*:

- **Recognize and embed the right to information at the core of the *Transparency Policy*.** The right to information is a fundamental human right, and has had a long history in practice internationally since the very first resolution of the United Nations General Assembly in 1946, and the adoption of the *Universal Declaration of Human Rights* in 1948.¹⁵ As stated above, regional advancements, including the *UNECE Aarhus Convention*, are particularly relevant for the context the EIB operates within, and the framing of the *Policy* should reflect this understanding. The purpose of information disclosure as fulfilling the rights of communities and bettering development outcomes should be reflected in the contextual framing of the new draft as well, and throughout its provisions.

While we welcome the EIB's recognition of the rights to information, participation, and remedy as part of Sec. 7.4 "Principles for Stakeholder Engagement", these rights should frame the policy as a whole, with the right to information in particular serving as the

¹⁵ For more information, see UNESCO, "About Freedom of Information," available at <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/about/>

anchor, as elaborated above.

- **Re-orient the draft *Transparency Policy* around the internationally endorsed principles on right to information**, including the principle of maximum disclosure, which dictates that all information held by EIB be subject to disclosure unless falling under a narrow list of clearly defined exceptions.¹⁶ We recommend further shifting EIB's commitment of a presumption of disclosure on request to automatic disclosure, as is best practice for international financial institutions operating with public money.¹⁷
- **Implement the internationally endorsed principle of limited exceptions by instituting the three-part test when determining disclosure of information.** The exceptions outlined in EIB's draft *Transparency Policy* are wide-ranging and serve to prioritize commercial interests first, over the rights of the communities the Bank's projects affect. We advise the EIB to follow the internationally endorsed three-part test, formulating a limited and reasonable hall of exceptions that should relate to a legitimate aim.¹⁸ When determining to withhold information, the information in question should be taken as a substantial threat to this aim, and the harm to the aim must be greater than the public interest in accessing the information.¹⁹ In accordance with the principle of maximum disclosure, we urge the Bank to disclose all information in its possession by default, unless it falls under a narrowly defined field of exceptions, as determined by this

¹⁶ The list of principles, endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression and the Organization of the American States (OAS) Special Rapporteur on Freedom of Expression, include:

1. The Right of Access
2. Automatic Disclosure
3. Access to Decision-Making
4. The Right to Request Information
5. Limited Exceptions
6. Appeals
7. Whistleblower Protection
8. Promotion of Freedom of Information
9. Regular Review

Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation", available at: https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf

¹⁷ Global Transparency Initiative, "Transparency Charter for International Financial Institutions: Claiming our Right to Know", available at: https://www.access-info.org/wp-content/uploads/charter_en.pdf

¹⁸ The three-part test is a test developed under principle 4 "limited scope of exceptions" of the Principles on Freedom of Information Legislation developed by Article 19 and endorsed by international courts and experts around the world, such as the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression. For details, see <https://www.article19.org/data/files/pdfs/standards/righttoknow.pdf>, principle 4.

¹⁹ *Ibid.*, pp. 5/6

three-part test.

- **Codify environmental and social information disclosure practices, including timelines for disclosure and translation, within the draft *Transparency Policy*.** In line with a people-centered approach, the significance of environmental and social information for those affected by Bank operations warrants the clear regulation of its disclosure practices within the *Policy* itself. The current provisions in Sec. 4.8 of the draft *Transparency Policy* should be amended to remove vague and discretionary language, and provide clear timelines for disclosure of all environmental and social documents, among other project-related information.

Based on our collective experiences supporting communities to engage with EIB projects, the *Policy* should specify the proactive disclosure of:

- Rationale for project risk categorization to encourage participation and transparency prior to Board approval;
- All environmental and social documents prior to Board approval, and provide explanations when certain documents are considered inapplicable or not required;
- Information about which policies are considered applicable for each project, including a list of relevant standards likely to be triggered and explanations for those that are considered inapplicable;
- Timely updates about the status of a project within the project cycle, anticipated date of project approval, and about the status of consultations and FPIC processes; and
- Information pertaining to sub-projects of all financial intermediary investments, especially those deemed high-risk.²⁰

The *Transparency Policy* should also provide for the regular and proactive translation of project information and environmental and social documents into local and Indigenous languages and in formats accessible to the communities affected.

- **Recognize the EIB’s responsibility to ensure communities’ rights to information and participation are meaningfully fulfilled within their operations.** We urge the EIB to amend Sec. 7.7 and associated relevant provisions to recognize the EIB’s obligations

²⁰ This list of information is based on criteria we have developed to evaluate the disclosure practices of international financial institutions. This criteria is based on our experiences supporting communities to access the information necessary for them to meaningfully participate in projects that affect them.

For more, see Jocelyn Medallo and Ishita Petkar, “Not a Checkbox: The right to information as the foundation for development,” available at <https://accountability.medium.com/not-a-checkbox-the-right-to-information-as-the-foundation-for-development-8e4ae1cf5fb8>

under international law to protect and fulfill human rights as a public institution. As such the primary responsibility for disclosure and consultation must be borne by the Bank itself. The revised *Transparency Policy* should clearly reflect this responsibility and also delineate provisions for oversight of disclosure and consultation at the community-level.

- **Include provisions that serve to proactively create an enabling environment for communities to safely access information, express their opinions, and meaningfully participate and lead project processes.**

We offer the above recommendations with the aim of contributing to a robust consultation process, and a stronger *Transparency Policy* and disclosure practice at the EIB that promotes the meaningful fulfillment of the rights of communities - the intended beneficiaries of development. We look forward to continuing our engagement with the EIB and seeing our feedback meaningfully incorporated within the draft *Transparency Policy*.

Sincerely,

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