

Development for People?

THE BNDES FINANCING
AND HUMAN RIGHTS



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#2

Development for People?

The BNDES Financing and Human Rights

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About Us

Founded in 2001 in São Paulo, Brazil, Conectas Human Rights is an international non-governmental organisation that defends and promotes human rights and the rule of law in the Global South (Africa, Asia and Latin America).

Through its Justice, Foreign Policy and South-South Cooperation programmes, Conectas works at the national, regional and international levels. Since 2005 Conectas has also worked with Business and Human Rights, with an emphasis on human rights issues related to development finance. Its actions involve advocacy, strategic litigation, use of the UN and regional mechanisms for the protection of rights, production and dissemination of knowledge, training of human rights defenders, and joint actions and partnerships with other organisations, among others.

Conectas believes that the realisation of human rights involves the construction of a diverse and global movement of people and organisations engaged in this cause. The organisation also develops communication and institutional actions that aim to engage society and the general public with human rights.

Conectas Series

Since its founding, Conectas has relied on knowledge as a tool and essential ally in achieving its mission.

In 2013 the organisation launched the Conectas Series initiative, consisting of a series of publications that aim to promote and disseminate the experience and knowledge produced in the organisation to human rights defenders, academics, civil society organisations and other stakeholders in the struggle for rights.

With the motto “knowledge to action”, the Conectas Series aims to contribute to the collective construction of a critical discussion of human rights as well as the engagement of society in the defence of human rights.

Happy reading!



Summary

Since its founding in 1952, the Brazilian Development Bank (BNDES) has played an extremely important role in the formulation and implementation of development policies and strategies for the country. Throughout its existence, the BNDES has enabled successive government economic policies, from Industrialization by Import Substitution (ISI) to the privatizations of the 1990s and through today, with the return of the state as a promoter of economic activity and social transformation marked by the rise of the middle class and reduction of poverty at historic levels.

Since the middle of the first decade of this century, economic and political circumstances reinforced the dominance of the BNDES in financing Brazilian development. At the end of 2013, almost 75% of long-term credit to companies and 20% of all investments in Brazil were financed by the bank. **In the current development strategy of the Brazilian government, the BNDES undoubtedly occupies a leading role.**

However, the rapid expansion of the disbursement capacity and loans/assets portfolio of the BNDES in the last decade has not been accompanied by proportional strengthening of mechanisms for social participation and transparency of the bank. In spite of the advances made in the field of active transparency, such as creation of the Transparent BNDES Portal and increase in information available via requests for access to information protected by the Freedom of Information Law (Law No. 12,257/2011), **the persistent culture of secrecy and insufficient accountability to society remain obstacles to greater social control of the BNDES' activities**, especially with respect to projects financed abroad.

The BNDES' lack of transparency or openness to social participation contribute to the suboptimal performance of tools for prevention, mitigation and monitoring of social, environmental and human rights impacts employed by the Bank in various stages of the project cycle. Despite the existence of a Social and Environmental Responsibility Policy, which provides tools for social and environmental risk assessment, there are numerous reports of human rights violations in the context of projects financed by the BNDES. Among the most serious and/or repeated violations are significant changes in the life and culture of indigenous peoples through the implementation of projects and exploitation of resources in their territories, forced removals of traditional populations without due compensation, damage to ecosystems and the environment caused by floods and deforestation, maintenance of workers in degrading conditions analogous to slavery, sexual exploitation of children and adolescents, and child labour in and/or around the projects.

These and other negative impacts on human rights, especially those of vulnerable social groups and communities, associated with projects financed by the BNDES, are a fact, with proof of their existence

supported by several document sources, such as administrative procedures of control agencies (such as the Public Prosecutor and the Federal Auditing Court), on-going lawsuits in different courts and investigative reports prepared by independent civil society organisations and reports from media outlets.

The recognition that the BNDES has provided financial support to businesses and ventures that are highly questionable in terms of compliance with basic environmental and human rights laws in Brazil is unquestionable. Thus it is essential to discuss **the role and responsibility of the BNDES in the prevention and reparation of adverse impacts to the environment and lives of individuals and communities** when the bank operates through traditional lines of financing or through more modern instruments of financial support, such as shares in private companies.

Even more importantly, **it is essential that concrete proposals are outlined so that the BNDES, one of the largest development banks in the world, guides its work on behalf of people and social and human development, and not the traditional indicators of economic and financial performance**, such as volume of disbursements, return on equity and its impact on gross fixed capital formation in the country.

This publication aims to contribute to the debate about the importance of the BNDES for Brazilian social and economic development through an analysis of the bank's policies and practices of transparency, accountability and the protection of human rights and presents recommendations for strengthening the normative framework governing its operations in selected dimensions: **i) transparency and access to information; ii) participation of people directly affected by the projects in the planning and implementation phases; and iii) effectiveness of social and environmental guidelines and policies and respect for human rights.**

Through this publication Conectas Human Rights recommends that the BNDES, a federal public company that operates mostly with public funds:

- Be more transparent and disclose institutional information, including that produced throughout the project cycle, as well as establish institutionalised spaces for participation by society in the definition and implementation of policies for allocating public funds operated by the Bank;
- Adopt a human rights policy that encompasses all rights guaranteed by the Federal Constitution of 1988, international treaties ratified by Brazil and other international human rights standards;
- Conduct analyses of social and human rights impacts in all of its operations, including transactions in the securities market and social and environmental funds;
- Promote changes in the functioning of its ombudsman or institute a new body capable of resolving conflicts, and which can receive reports and complaints from victims and affected parties through clear, transparent and democratic procedures.

In addition to the recommendations above, which aim to promote changes in the standards and internal procedures of the BNDES, this document also provides recommendations to fill legal and regulatory gaps in the existing Brazilian legislation. Such gaps contribute to make the BNDES' responsibility to protect human rights unclear and reinforce the secrecy of its domestic and international operations, despite the legitimate right of society to access information on the use of public resources managed by the financial institution. In this sense recommendations to the National Congress, federal government and Central Bank are presented.

This publication is the product of a study undertaken by Conectas throughout 2013. Among Conectas' actions and projects in the programme area of Business and Human Rights, the organisation has prioritised the issue of development finance. The choice to focus on this topic was due to, among other reasons, the realisation that, despite their predominantly public nature, financial institutions that promote development do not have policies and operational mechanisms compatible with the highest standards of protection of human rights, which is a gap in the governance of the current development strategies of emerging countries like Brazil.

Conectas understands that the overarching goal of development finance institutions such as the BNDES should be sustainable, inclusive development that focuses on people and recognises the inherent dignity of all human beings. Such institutions should formally commit to the protection and promotion of human rights recognised by international and national laws and take effective measures to prevent their borrowers and beneficiaries from violating human rights or imposing on society the negative effects of their activities.

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Highlights

In this publication you will find:

- A brief recap of the history of the BNDES and presentation of its business activities, governance, legal and administrative regime, and social and environmental policies and practices;
- A critical analysis of the BNDES Policy for Social and Environmental Responsibility based on the legal obligations arising from international and national human rights standards;
- A proposed application of some elements of the United Nations Guiding Principles on Business and Human Rights (UNGPs) to BNDES operations;
- A discussion of the importance of, and obstacles to, greater transparency and access to BNDES information and proposals for overcoming barriers based on information gaps mapped throughout the project cycle of the bank;
- Recommendations for strengthening the human rights framework applicable to the BNDES in order to improve its mechanisms for prevention, mitigation and reparation of human rights violations.

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List of Acronyms

| | | | |
|-----------------|---|----------------|---|
| <i>ADC</i> | Andean Development Corporation | <i>MMA</i> | Ministry of the Environment |
| <i>AIOs</i> | Automatic Indirect Operations | <i>MP</i> | Federal Public Ministry |
| <i>BACEN</i> | Central Bank of Brazil | <i>MPE-PA</i> | State Public Prosecutor of Pará |
| <i>BB</i> | Banco do Brasil | <i>NAIOs</i> | Non-automatic Indirect Operations |
| <i>BD</i> | Board of Directors | <i>NFS</i> | National Financial System |
| <i>BNDE</i> | National Bank of Economic Development | <i>PFDC</i> | Attorney General of Citizens Rights |
| <i>BNDES</i> | Brazilian Development Bank | <i>PA</i> | Department of Planning |
| <i>BNDESPar</i> | BNDES Participações SA | <i>PR-MS</i> | Public Prosecutor of Mato Grosso do Sul |
| <i>CEF</i> | Caixa Econômica Federal | <i>PR-PA</i> | Public Prosecutor of Pará |
| <i>CMBEU</i> | Joint Brazil-United States | <i>SEM DPL</i> | Sustainable Environmental Management |
| <i>CMN</i> | National Monetary Council | <i>SMA</i> | Secretary of the Environment |
| <i>CONTEC</i> | Capitalisation Programme for Small Businesses | <i>UnB</i> | University of Brasília |
| <i>CSI</i> | Corporate Social Investment | <i>UNGPs</i> | UN Guiding Principles on Human Rights |
| <i>CSR</i> | Corporate Social Responsibility | | |
| <i>CUT</i> | Central Única dos Trabalhadores | | |
| <i>CVM</i> | Securities and Exchange Commission of Brazil | <i>WB</i> | World Bank |
| <i>EXLM</i> | Export-Import | | |
| <i>FAT</i> | Workers Support Fund | | |
| <i>FPIC</i> | Free Prior and Informed Consent | | |
| <i>GDP</i> | Gross Domestic Product | | |
| <i>HPP</i> | Hydroelectric Power Plants | | |
| <i>IBRASA</i> | Investimentos Brasileiros SA | | |
| <i>IDB</i> | Inter-American Development Bank | | |
| <i>IFC</i> | International Finance Corporation | | |
| <i>IFIs</i> | International Financial Institutions | | |
| <i>ILO</i> | International Labour Organization | | |
| <i>ISI</i> | Industrialisation by Import Substitution | | |
| <i>KfW</i> | German Development Bank | | |
| <i>LTIR</i> | Long-Term Interest Rate | | |
| <i>MCE</i> | Methodology for Company | | |
| <i>MDBs</i> | Multilateral Development Banks | | |
| <i>MDIC</i> | Ministry of Development, Industry and Foreign Trade | | |



Preface

*Por Flávia Piovesan**

The publication “**Development for People? BNDES Financing and Human Rights**,” by Conectas Human Rights aims to contribute to one of the most important debates of the current Brazilian economic and social reality: the responsibility of the National Bank for Economic and Social Development (BNDES) to protect and promote human rights in Brazil and abroad.

Since the 1950s the BNDES has played a prominent role in the formulation and implementation of Brazilian development policies and strategies. The BNDES is one of the largest development banks in the world today. In 2013 the bank’s disbursements exceeded the combined disbursements of the World Bank and IADB by more than two and half times.

Structured in three parts, the starting point of the present study is an examination of the history and governance of BNDES and its operations.

The second part is an analysis of the BNDES and the transparency that is needed in the bank’s operations, unveiling its functioning and obstacles to a policy of transparency. Civil society is calling for greater transparency, democratization and accountability in the management of the public budget and the adoption and implementation of public policies. In legislative terms the supremacy of the public interest in ensuring access to information in the possession of public bodies (to the detriment of secrecy) is enshrined in the Freedom of Information Law (Law No. 12,257/2011). The new law applies to indirect government administration, of which the BNDES is part, requiring it to reconcile its activities with modern standards, in which secrecy is the exception and disclosure, the rule.

The third part of the publication focuses on BNDES’ social and environmental responsibility policy, with an emphasis on its accountability for violations of human rights in projects it funds and the role of the Bank in the prevention and remediation of adverse impacts to the environment and the lives of individuals and communities.

Finally, the study presents recommendations to the BNDES, the National Congress, the Federal Government and the Central Bank, including greater transparency and access to information; strengthening of the democratic component; greater effectiveness of social and environmental guidelines and policies; and respect for human rights. As regards concrete measures for the BNDES to improve transparency, participation, accountability and mitigation of adverse impacts to the environment and human rights, this Conectas publication is innovative because it systematises the shortcomings of the legal and institutional framework that regulates BNDES financing to private Brazilian companies and articulates recommendations in a broad and systematic manner. The

recommendations show that the improvement of the BNDES' accountability is conditioned upon a combination of regulatory, ethical and even internal behavioural changes to the institution itself, as well as a review of the governance between the BNDES and other bodies of Brazilian democracy.

More than 60 years after its creation, the BNDES has been reaffirmed as an instrument of flexible economic policy that is responsive to the most diverse variations in the economic scenarios and political coalitions that govern the country – a characteristic intrinsically associated with its singular institutional profile among public administrative bodies in Brazil.

The role of a public development bank such as the BNDES is inserted into a context in which there is an urgent need for consolidation of financial mechanisms to enable projects, programmes and policies for economic and social development, especially in the face of exclusionary, asymmetric and non-egalitarian societies. The BNDES is affirmed as an important actor within the framework of a political discourse that has been gaining traction among the countries of the so-called Global South.

The successive crises that affect the global economy, and which traditionally severely punish emerging and developing economies, are evidence that development is a complex, multi-faceted issue. If the theme of development was traditionally monopolised by economists that emphasised economic development of countries based on their GDP, since the 1980s development has taken on new meaning, guided by the human dimension. As Article 2 of the 1986 UN Declaration on the Right to Development recognises, “The human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

For Stephen P. Marks, “The Declaration takes a holistic, human-centered approach to development. It sees development as a comprehensive process aiming to improve the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation and in the fair distribution of the resulting benefits. In other words, recognizing development as a human right empowers all people to claim their active participation in decisions that affect them – rather than merely being beneficiaries of charity – and to claim an equitable share of the benefits resulting from development gains.”¹

For Amartya Sen, development must be conceived of as a process of expanding real freedoms that people can enjoy². Similarly, Arjun K. Sengupta maintains that the right to development is “the right to a process that expands the capabilities or freedom of individuals to improve their own well-being and to achieve what is important to them”³.

Thus, the right to development includes three central dimensions:

¹Marks, Stephen P. The Politics of the Possible: The Way Ahead for the Right to Development, Friedrich Ebert Stiftung, June 2011, p.2.

²By thinking of development as freedom, Amartya Sen argues: “In this sense, the expansion of freedoms is seen concurrently as 1) a purpose in itself, and 2) the main meaning of development. Such purposes can be called, respectively, as the constitutive and instrumental function of freedom in relation to development. The constitutive function of freedom deals with the importance of substantive freedom for the exaltation of human life. Substantive freedoms include the basic abilities such as the right to be free from hunger, malnutrition, avoidable death, premature mortality, as well as freedoms associated with education, political participation and the prohibition of censure. From this constitutive perspective, development involves the expansion of these and other fundamental freedoms. Development, in this view, is the process of expanding human freedoms.” (Amartya Sen, Development as Freedom, New York, Alfred A. Knopf, 1999, p.35-36 and p.297).

³Report of the Independent Expert on the Right to Development, Arjun Sengupta, A/55/306, 17 August 2000, paragraph 22.

I. Social justice

In accordance with Article 28 of the Universal Declaration of Human Rights, “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

Social justice is a central component to the concept of the right to development. The realisation of the right to development, inspired by the value of solidarity, must provide equal opportunity to all in access to basic resources, education, health, food, housing, work and income distribution.

According to the Declaration on the Right to Development, the right to development comprises an economic, social, cultural and political process that aims to ensure the constant improvement of the well-being of the population and individuals, based on their active, free and meaningful participation in this process, guided by the fair distribution of benefits resulting from it.

In promoting development, equal consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. Effective measures must be adopted in order to provide women an active role in the development process.

II. Participation and accountability

In addition to the social justice component, the democratic component is essential to the right to development.

It is the duty of States to encourage popular participation in all spheres as an important factor of the right to development and the full realisation of human rights. National governments should promote and ensure free, meaningful and active participation of individuals and groups in the elaboration, implementation and monitoring of development policies.

To Amartya Sen, political rights (including freedom of expression and discussion) are not only crucial to demand political responses to economic needs; they are central to the formulation of these economic needs⁴.

In this context the principles of participation and accountability are central to the right to development.

⁴ Sen, Amartya. Foreword to the book Pathologies of Power, Paul Farmer, Berkeley, University of California Press, 2003.

III. National programmes and policies and international cooperation

The right to development encompasses both a national and international dimension.

According to the UN Declaration on the Right to Development, States must adopt individual and collective measures to create an environment to allow, in international and national plans, the full realisation of the right to development. Although the Declaration recognises States as being primarily responsible for the realisation of the right to development, it emphasises the importance of international cooperation.

One of the most extraordinary advances of the 1986 Declaration is that it incorporates a human rights-based approach to development. From the perspective of human rights, the right to development includes important principles⁵: a) inclusion, equality and non-discrimination (particular attention should be paid to gender equality and the needs of vulnerable groups); b) accountability and transparency; c) participation and empowerment through free, meaningful and active participation; d) international cooperation.

The human rights-based approach is a structural design to the development process, based on international standards of human rights and directly geared to their promotion and protection. This approach aims to integrate norms, standards and principles of the international human rights system into plans, policies and processes of development.

In the words of Mary Robinson, “The great merit of the human rights approach is that it draws attention to discrimination and exclusion. It permits policymakers and observers to identify those who do not benefit from development.... [S]o many development programmes have caused misery and impoverishment – planners only looked for macro-scale outcomes and did not consider the consequences for particular communities or groups of people”.⁶

In this context this Conectas publication is a remarkable breakthrough of the efforts of an independent civil society organisation to bring the technical and sometimes inaccessible world of the financial system under the protection and promotion of human rights.

This publication represents an exciting invitation to the BNDES and other public and private actors to adopt measures to solidify the work of the bank as an agent of democratic, inclusive development and the realisation of human rights.

This unprecedented Conectas publication defends with complete competence and consistency that development finance institutions – especially the BNDES – should be guided by inclusive and sustainable development based on the protection of human rights, in accordance with constitutional

⁵ See Robinson, Mary: What Rights Can Add to Good Development Practice, In Philip Alston and Mary Robinson (eds.), Human Rights and Development: Towards Mutual Reinforcement, Oxford: Oxford University Press, 2005, p.37. For Robinson: “Lawyers should not be the only voice in human rights and, equally, economists should not be the only voice in development”. (op. cit)

⁶ Robinson, Mary: What Rights Can Add to Good Development Practice, In Philip Alston and Mary Robinson (eds.), Human Rights and Development: Towards Mutual Reinforcement, Oxford: Oxford University Press, 2005, p.36.

and international protective parameters. This publication emphasises that the work of the BNDES should adopt a social and human development paradigm and not be reduced to traditional economic and financial performance indicators.

By redefining the right to development based on the human rights-based approach, this study is an extraordinary contribution to the public debate, challenging us to rethink development – its actions, policies, programmes and institutions, with emphasis on the strategic role of the BNDES – in light of the human rights paradigm.

São Paulo, 8th August 2014.

Flávia Piovesan

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Introduction

*"As has occurred until today, it is crucial that the BNDES is open and attuned to what is going on in Brazilian society and the world, producing discussions, capable of converting these into a vision of the future and a practice that seeks to anticipate the problems and demands of society and the country."*⁷

Sérgio Besserman Vianna (former Director of the BNDES)

1. The problem to be confronted: different standards for the “economic” and “social”

In the inaugural speech of the first directorship of the Banco Nacional de Desenvolvimento Econômico (National Bank for Economic Development – BNDE) in 1952, the then Finance Minister Horacio Lafer blessed the creation of one of the country's most important economic institutions with the following sentence: “At this moment... begins the life of one of the instruments that can most decisively contribute to the progress of Brazil and greater well-being for its people.”⁸

In its more than sixty years of existence, the BNDES⁹ has accumulated a long history of achievements. Created as an instrument to enable investments recommended by the Joint Brazil-United States Commission (CMBEU) as essential to overcoming structural bottlenecks of the Brazilian economy¹⁰ and to fill a gap in the web of Brazilian public entities with regard to the management of complex and long-term projects, the BNDES was born in the heyday of “national-developmentalism”¹¹, spanned the era of privatization and state reform of the 1990s¹² and today – or more specifically, since the second Lula administration – is undergoing a phase in which it is clearly a protagonist of Brazil’s latest development model, which some refer to as “new developmentalism”¹³.

⁷ 50 Anos do BNDES (50 Years of the BNDES), Statement by Sérgio Besserman Vianna, 2002.

⁸ 50 Anos do BNDES (50 Years of the BNDES), Statement by Pedro Malan, 2002.

⁹ The “S” in BNDES was added in 1982.

¹⁰ Centro Celso Furtado/Celso Furtado Center, Notebooks of Development.

¹¹ Generally speaking, “national-developmentalism” can be understood as the development strategy in which the State assumes a role of direction and direct control of economic activity. Roughly speaking, this model was in effect until the 1980s, although some of its policies have showed signs of exhaustion since the last decade, such as industrialisation by import substitution (ISI). The ISI was an industrialisation strategy adopted by Brazil and other emerging countries whose central element was the strong performance/work/action of the State for “forced” development of industries that could locally produce consumer and capital goods, which at that time had to be imported, thus aiming for the emergence of a national industry.

¹² Privatisation of public enterprises initiated during the government of Fernando Collor and deepened under Fernando Henrique Cardoso are commonly identified as part of a series of liberalisation measures adopted by developing countries (in particular in Latin America) in an attempt to find an outlet for inflation and public debts that had reached alarming levels in the transition from the 1980s to 1990. Such reforms, inspired by economic canons of liberal schools, are usually referred to as the “Washington Consensus”. Traditionally, the Washington Consensus has been identified by the ten measures listed by John Williamson in a chapter of the document that gave rise to the expression, which are: fiscal adjustment and fiscal discipline of states, reduction of public spending, tax reform, financial liberalization, maintaining competitive exchange rates, reduction of import tariffs, privatization of state enterprises, guarantee of property rights, promotion of market competition and removing barriers to foreign direct investment. However, neoliberal reforms are not limited to those listed above, because there were “generations of reform” that were gradually implemented in the countries-target, so that the original scope was greatly expanded and had even been diverted from the original consensus (RODRIK, 2006, p. 10). For Bresser-Pereira, “the Washington Consensus is, in fact, the effective way that neoliberal and globalist ideology assumed in economic policies recommended to developing countries” (2010, p. 95).

¹³ On “new developmentalism”, see: Glauco & Arbix (2010) and Bresser-Pereira (2011).

In its economic and financial dimension, the BNDES is undeniably a success. Its economic and financial performance indicators, such as the default rate, return on capital and operational efficiency, are sufficient to repel arguments against the existence of development banks on the grounds that these institutions are invariably inefficient and prone to corruption and mismanagement. The malleability of the BNDES as an instrument of economic policy and the relative ease with which it has absorbed different functions throughout its history, such as counter-cyclical strategies in the face of economic shocks, are representative of the difficulty to determine, from traditional economic canons, the role that a public bank should exercise in the concert of institutions responsible for the social and economic development of emerging countries.

If, in the lens of economics, the BNDES is at the forefront of development institutions, it is urgent that one of the largest development banks in the world also improve its policies and practices of (i) transparency; (ii) participation and dialogue with civil society concerned and affected communities; and (iii) effectiveness of its mechanisms for prevention and mitigation of social and environmental impacts and human rights, including mechanisms for handling complaints and conflict resolution.

In each of these three dimensions, there are higher levels of transparency and tools for managing negative impacts on the environment and human rights among institutions similar to the BNDES, such as multilateral development banks (MDBs) and initiatives by financial market actors for integration of social and environmental dimensions into finance such as, for example, the Equator Principles.

Comparison between the BNDES and MDBs is relevant insofar as the Brazilian Development Bank has considerably increased its credit portfolio for works and services of Brazilian companies abroad.¹⁴ In addition, there are cases of co-financing between the BNDES and MDBs, such as the IDB, in which the higher standards of the latter institution prevail regarding transparency of financial and non-financial information of projects funded. Thus, it is legitimate to question why the BNDES has a double standard for projects it finances individually and those on which it collaborates with other international financial institutions.¹⁵

For example, the five major MDBs¹⁶ define, in an internal policy, clear criteria for active transparency. Through such policies these MDBs make public which documents will be subject to disclosure and which will be subject to secrecy, but more importantly, the institutions define a clear procedure for clients and interested parties to submit requests to access to specific information, in addition to available appeals, deadlines and other requirements for judgement of the requests. Although the Freedom of Information Law (Law No. 12,257/2011) can be invoked as an equivalent domestic legal instrument, the BNDES lacks clear and transparent criteria to guide its decisions as to whether or not

¹⁴ According to IBASE's second study (2012), in 2011 the BNDES increased its investments in infrastructure outside Brazil by 1,185%.

¹⁵ In response to questions submitted by Conectas, elaborated by Rights, Environment and Natural Resources in Peru, about the standard of management of prevalent social and environmental impacts in financing the construction of the Chaglla hydroelectric plant in Peru, the President of BNDES, Luciano Coutinho, said to the Senate Committee on Economic Affairs that the parameters of the Inter-American Development Bank (IDB) prevail. These are superior to those of the BNDES, at least in terms of transparency, since environmental and social impact studies are disclosed on its website, as well as progress reports of projects.

¹⁶ World Bank, Inter-American Development Bank (IDB), the Asian Development Bank (ADB), African Development Bank (AfDB) and the European Bank for Reconstruction and Development (EBRD).

to disclose certain information, and in most cases related to information on management of social and environmental impacts, the rationale of bank secrecy prevails.

The contrast between the practices of the BNDES and well-established market standards also reveals some weaknesses of the Bank. For example, Performance Standard No. 7 of the International Finance Corporation (IFC), the World Bank's arm for the private sector, and the Equator Principles¹⁷, recognise the need for the client to ensure the free, prior and informed consent of indigenous and tribal peoples for projects that will greatly impact on their livelihoods and culture. To date conditions for BNDES financing for projects that generate impacts in the territories of indigenous and traditional peoples are unclear.

The lack of transparency of communication channels between the BNDES and communities that will directly suffer the impacts of projects it finances, and failures to manage social and environmental impacts of the financial institution, are supported in reports and case studies produced by various social actors, such as civil society organisations, academic centres, the Federal Prosecutors and other branches of public administration.

The following cases can be cited:

I. The BNDES does not provide sufficient information to government authorities. In contrast to the greater democratisation of the management of public information and the right of society to access data that are not legitimately protected by bank secrecy, the BNDES refuses to provide information about its activities to government authorities of the executive and legislative branches. In response to questioning from the newspaper O Estado de São Paulo on monitoring by the Comptroller General (CGU) of BNDES activities, the executive agency replied that “both in financing transactions as well as equity operations, the CGU has encountered some difficulty in accessing the information requested from the BNDES, in view of the different interpretations of the limits of bank secrecy and market confidentiality”¹⁸. Brazil’s General Accounting Office (TCU) has also faced difficulties in accessing information held by the BNDES. In an open audit to check the regularity of the use of the bank’s resources in the construction of the Belo Monte hydroelectric plant, the TCU encountered refusals and insufficient information that did not allow auditors to perform a complete overhaul of the use of funds transferred by the National Treasury to the BNDES¹⁹.

¹⁷ OThe Equator Principles are an initiative of the financial institutions for setting social and environmental criteria for certain financing arrangements, such as project finance and project financing. The Equator Principles were inspired by the IFC Performance Standards. With each new release of the latter, the Principles are updated to reflect similar patterns of protection of human and environmental rights for operations included pursuant to the rights agreement. According to the third version of the Equator Principles, “EPFIs recognise that indigenous people are often a vulnerable segment of Project-Affected Communities. Projects affecting indigenous peoples will be subject to a process of Informed Consultation and Participation, and will comply with applicable national law, including those laws implementing host-country obligations under international law. In non-OECD countries and OECD countries not designated as High-Income, consistent with special circumstances described in IFC Performance Standard 7, Projects with adverse impacts on indigenous people will require their free, prior and informed consent”. Available at: <<http://www.equator-principles.com>>.

¹⁸ According to material published by Canal Ibase titled, “Quebra de braço entre BNDES e imprensa (Arm twisting between the BNDES and the press)”, from 25 February 2014. Available at: <<http://www.canalibase.org.br/>>.

¹⁹ According to material published by Agência Estado, entitled “BNDES ‘sonega’ dados a órgãos de fiscalização (BNDES ‘short-changes’ data to oversight agencies)”, from 19 January 2014. Available at: <<http://economia.estadao.com.br/noticias/geral/bndes-sonega-dados-a-orgaos-de-fiscalizacao,175688e>>.

II.The BNDES does not consult all stakeholders on policy development, resource allocation and preparation and monitoring of projects. In an audit performed in 2012, the TCU concluded that BNDES has no proper governance for conflict resolution and engagement with different stakeholders and recommended that the Bank “include key stakeholders in the intended results of its financial support instruments in the formulation, monitoring and evaluation of effectiveness indicators, and in analyses of its observed impacts”²⁰.

III.The BNDES continues to fund projects and companies challenged in courts for environmental damages and human rights violations. The Federal Public and Labour prosecutors have conducted different investigative procedures and filed lawsuits that deal with problems and negative impacts of projects financed by BNDES, which appears as a defendant in some of these legal proceedings. Regarding the Belo Monte Hydroelectric Plant (Belo Monte HPP), the Prosecutor’s Office of the state of Pará (PR-PA) has filed twenty-one lawsuits challenging various aspects of the project, such as the irregularity of environmental licenses and lack of free, prior and informed consultation of indigenous peoples of the region, according to the provisions of ILO Convention 169, ratified by Brazil. In one of the lawsuits in which the PR-PA alleges failure of analysis of impacts in the Environmental Impact Study / Environmental Impact Report (EIS/EIR), delay in carrying out further studies and not predicting impacts and compensation for the indigenous people in the area directly affected by the Belo Monte project, BNDES figures directly in the case as a defendant in the lawsuit²¹.

In another lawsuit filed by the Federal Prosecutor’s Office in the state of Tocantins (TO-PR), the adequacy of licensing for a project financed by the BNDES jointly with the IFC is questioned, in which it is alleged that the loan beneficiary, Itafós Mineração Ltda. disregarded impacts to the environment and riverine populations which will suffer from the release of effluents into the river they use for their subsistence²².

IV.The BNDES finances projects with formal environmental license, yet with concrete evidence of environmental damages and human rights violations, reports from civil society organisations have also pointed to flaws in the governance of projects funded by the BNDES, which lead to negative impacts to the environment and human rights. According to one study conducted by the Rapporteur on the Human Right to the Environment from Plataforma Dhesca, the construction of the Rio de Janeiro Petrochemical Complex (Comperj), a project funded by the BNDES, has spurred serious environmental and social conflicts in communities affected by that industry, including death threats against human rights activists working in the region. The report ends with the recommendation that the BNDES, “in addition to accepting environmental licensing, recognise its role as a developer of public policy

²⁰ Tribunal de Contas da União. Auditoria Operacional no Banco Nacional de Desenvolvimento Econômico e Social - BNDES. Identificação e Análise dos Critérios e Instrumentos Empregados pelo BNDES para Avaliação da Efetividade das suas Operações Financeiras e do Alcance das Respectivas Metas. TC-018.693/2012-1, 2012.

²¹ See: <<http://www.prpa.mpf.mp.br/news/2010/noticias/belo-monte-os-problemas-do-projeto-e-a-atuacao-do/mpf>>

²² See: “MPF/TO propõe ação civil contra Itafós e Naturais e requer paralisação da exploração de fosfato em Arraias (MPF/TO proposes lawsuit against Itafós and Naturals and orders a stop to phosphate mining in Arraias)”. Available at: <<http://www.prto.mpf.mp.br/news/mpf-to-propoe-acao-civil-contra-itafos-e-naturais-e-requer-paralisacao-da-exploracao-de-fosfato-em- arraias>>.

and promote internal debates with society about changes to its funding criteria, with the aim of promoting projects that respect, protect and promote human rights”²³.

Instituto Socioambiental (ISA) has carried out several analyses on the fulfilment of conditions established by environmental agencies for the installation, construction and operation of the Belo Monte hydroelectric power plant. According to the organisation, which collected data from the Brazilian Institute of the Environment and Renewable Natural Resources (IBAMA) and the National Indigenous Foundation (FUNAI), of the more than forty conditions imposed by the environmental regulatory agency as pre-requirements to the operational license of the Belo Monte hydroelectric power plant, only fifteen were deemed as “in compliance” under satisfactory terms. Of the fourteen conditions classified as “not in compliance”, eleven referred to indigenous peoples. Among the irregularities not remedied, but which did not stop the BNDES from continuing to provide funds to the project, were the lack of regularization of impacted indigenous lands and access of some tribes to the reservoir set up for the power plant²⁴.

Press agencies have also reported on the irregularity of social and environmental aspects of various projects financed by the BNDES and on the questionable practices of companies that receive its financial support. According to Agência Pública, an investigative journalism non-governmental organisation, of the twenty largest enterprises financed by the BNDES in the Amazon region, seventeen were subject to some kind of legal questioning by public prosecutors in Brazil. Among the main problems presented are breakdowns in the development of environmental impact studies, lack of dialogue with affected communities as required by law, non-compliance with social and environmental conditions and workers in degrading situations or analogous to slavery, including reports of worker deaths²⁵. In total, the public prosecutors filed 80 lawsuits against those responsible for the 20 largest projects financed by the BNDES in the Amazon region.

V.The BNDES has little transparency in its international activities. As for the lack of transparency in BNDES contracts outside Brazil, the Ministry of Development, Industry and Foreign Trade (MDIC) declared, in a manner unprecedented in the country, confidentiality of all the negotiations involving Brazil and the countries of Angola and Cuba²⁶. Thus, it is not possible to know the exact values being loaned to Brazilian companies for the export of goods and services to these two countries.

In June 2014 the Federal Labour Prosecutors Office (MPT) filed a lawsuit pledging collective damages in the amount of BRL 500 million against the construction company Odebrecht,

²³ See: Plataforma Dhesca. Indústria do Petróleo e Conflitos Ambientais na Baía da Guanabara: O caso de Comperj (The Petroleum Industry and Environmental Conflicts in Guanabara Bay: the case of Comperj), 2013. Available at: <file:///C:/Users/Caio/Google%20Drive/Conectas/Transferir%20para%20Onedrive/BNDES%20Final/892_relatoria_ma_missao_comperj.pdf>.

²⁴ See: Infographic shows that of the 14 unmet conditions of Belo Monte, 11 are indigenous. Available at: <<http://www.socioambiental.org/pt-br/blog/blog-do-xingu/infografico-belo-monte>>

²⁵ According to Agência Pública, from 24 October 2013, entitled “BNDES in the Amazon: 17 of the 20 largest investments have lawsuits by MPs”. Available at: <http://apublica.org/2013/10/bndes-na-amazonia-17-dos-20-maiores-investimentos-têm-ações-ministério-público>.

²⁶ According to the newspaper Folha de S. Paulo, on 9 April 2013, entitled “Brasil coloca sob sinal apoio financeiro a Cuba e Angola (Brazil puts confidential financial support for Cuba and Angola)”. Available at: <<http://www1.folha.uol.com.br/poder/2013/04/1259471-brasil-coloca-sob-sinal-apoio-financeiro-a-cuba-e-a-angola.shtml>>.

after an investigation showed that its workers in Angola were in conditions similar to slavery. According to the MPT, there is evidence that Odebrecht's subsidiaries are operating in Angola with funds originating from the BNDES; however, due to lack of transparency with respect to such contracts, "there is no public record of the financing: publicly, it doesn't exist"²⁷. According to the lawsuit filed by the MPT, "evidence from the records demonstrates that the Brazilian taxpayers' money awarded in secrecy was actually used to fund an enterprise characterised by immeasurable exploitation of hundreds of Brazilians". According to another publication by Agência Pública²⁸, and a study by the Instituto Brasileiro de Análises Sociais e Econômicas (IBASE)²⁹, there is a lack of information on the criteria, agreed values, dates and amounts of disbursements made to projects outside of Brazil. The data provided by the BNDES are only in aggregate format and data related to pre-shipment operations are entirely confidential.

The cases cited above are illustrative and just a few among countless others that could be brought under a non-formalistic analysis of BNDES obligations vis-à-vis the environment and its commitment to a development that is truly geared towards the protection of rights of people and reduction of social inequalities. From the way that the BNDES understands its role in the prevention, mitigation and remediation of social and environmental impacts and human rights, the mere existence of environmental licenses suffices for the provision of the credit. This is regardless of concrete evidence that its funds are severely affecting the lives of already marginalized communities, which usually are not properly compensated for changes to their livelihoods, such as access to water and food.

However it must be emphasised that, since the BNDES does not act directly in the execution of projects that impact human rights, it is through its financial support that the bank gets involved in human rights violations committed by private companies, a connection that is established with greater intensity when the BNDES fails to take all necessary measures to prevent the occurrence of such violations.

2. Why human rights and why the BNDES?

Human rights, as currently understood, are indivisible, interdependent and universal rights to which all human beings are entitled, in any part of the world. Human rights essentially aim to safeguard the dignity of the human being, to limit the powers of the State, and to impede arbitrary actions of public

²⁷ According to the action proposed by the MPT. See: <http://portal.mpt.gov.br/wps/portal/portal_do_mpt/comunicacao/noticias/conteudo_noticia/lut/p/c4/04_SB8K8xLLM9MSSzPy8Bz9CP0os3h92BPJydDRwN_E3cjA88QU1N3L7OgMC93l_2CbEdFAovLRYUWCM_GLOBA>

²⁸ According to material published by Agência Pública, titled "BNDES, para exportação (BNDES, for export)", 28 November 2013. Available at: <<http://apublica.org/2013/11/bndes-para-exportacao/>>.

²⁹ Colombini, Iderley. A atuação internacional do BNDES como parte do Novo Modelo Desenvolvimentista. Seminário Investimentos do BNDES na América Latina (The international activities of the BNDES as part of the New Developmentalist Model. Seminar on BNDES Investments in Latin America). IBASE. Available at: <http://issuu.com/ibase/docs/artigo_bndes_al_>.

agents and those that act on behalf of States or maintain close ties to them, such as private agents that receive financial support from public financial institutions.

Human rights are recognised by international instruments signed by States. Domestic laws and regulations, created with the purpose to comply with the international commitments made by States, recognise fundamental rights, which are nothing more than national versions of internationally-recognised human rights. In Brazil fundamental rights hold a constitutional status and most of them are set forth in Articles 5 through 8 of the Federal Constitution of 1988.

The most important instruments of international human rights law are the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), which, as a whole, constitute the International Charter of Human Rights. In addition to the documents listed above, several treaties that followed the Charter are sources of primary importance in the recognition that human beings possess minimum and inalienable rights, whether as individuals or as a collectivity. Among the rights recognised by such standards are the right to freedom of expression; the ownership of traditionally occupied lands; to health, culture, leisure, employment and decent housing; not to suffer discrimination on the basis of race, sex, colour, ethnicity or gender; and to a healthy environment.

When ratifying such instruments, States have a legal obligation not to violate the rights listed therein and to take positive measures to ensure that no public or private agent infringes on the human rights of third parties in their respective territories. The penalties for States that fail to comply with human rights standards vary from “naming-and-shaming” by its peers to an unfavourable judgement by an international court.

Box 1: Fundamental rights in the Constitution of 1988

Article 5 of the Brazilian Federal Constitution of 1988 (FC/88) extensively lists individual rights and guarantees, which are commonly referred to as fundamental rights. Among the rights protected by the Brazilian Constitution are the free expression of thought (section IV); prohibition of torture or inhumane or degrading treatment (section III); the inviolability of private life, intimacy, honour and image of persons (section X); the right to property and its social function (sections XXII and XXIII); and the right of petition (XXXIII), among others.

The fundamental rights recognised by Article 5 are civil and political rights. Other economic, social and cultural rights are in Articles 6 and 7 of the FC/88. Among these rights are education, health, food, housing, leisure, safety, social security, maternity and paediatric care, and assistance to the destitute (Article 6). Labour rights include minimum wage, thirteenth salary, paid weekly time off, annual vacation with the addition of at least one-third normal salary, retirement and insurance against work accidents (Article 7), free association of trade unions (Article 8) and the right to strike (Article 9), among others.

Other provisions of the Federal Constitution recognise rights considered fundamental to human beings, whether individual or collective. Among the most notable are the right to an ecologically-sound environment (Article 225) and the right of indigenous peoples to be consulted prior to taking legislative or administrative measures which may directly affect them, such as the exploitation of water resources, potential energy, research and mining of mineral resources on their lands (Article 231, §3º).

Other human rights not expressly provided for in the CF/88 can be incorporated into the Brazilian legal system by the signature and ratification of international human rights treaties by the Brazilian State. If approved by special rite described in the Constitution, such standards shall have constitutional status, and therefore be integrated into the fundamental rights to be respected, protected and promoted by the Brazilian State in all of its instances, including through the Executive bodies that act in the economic domain, as is the case of the BNDES.

When a financial or operational arm of the State commits a violation, is complicit or negligent in its duty to prevent third parties from committing human rights abuses, the State can be held directly responsible at the international level. Furthermore, any private agent that receives subsidies, technical assistance, financing or any other forms of technical and financial support from the State can also be held responsible for abuses in accordance with domestic constitutional, legal and administrative laws

established in order to comply with international standards.

Thus, state-owned companies such as the BNDES have a greater degree of responsibility to comply with human rights standards and should take concrete measures to prevent private agents from infringing on the human rights of third parties, such as the illegal usurpation of indigenous lands, pollution of rivers and lakes, forced displacement of communities without proper compensation (violation of their right to housing, for example), among other violations.

The greater degree of responsibility of the BNDES for protection of human rights is not a function of its ability to make disbursements, although it is evident that greater availability of funds for projects, companies and activities that have the potential to violate human rights results in a higher number of abuses, making solutions to address the problem more complex. The BNDES is therefore legally required to ensure that none of its loans will result in abuses, and may be required and demanded at any time, regardless of the economic variables.

3. Objectives and methodology

The overall aim of this publication is to present some essential elements that can contribute to the construction of a legal and institutional framework capable of redirecting the activities of the BNDES towards the full protection of human rights and people-centred development. Through this publication it is expected that the terms and grammar of the debate on the social dimension of BNDES activities be guided by respect for the fundamental rights guaranteed by the Constitution and international human rights standards. This document contains concrete recommendations which aim to ensure that development, in all its dimensions, is a process based on the active, free and meaningful participation of citizens, as established in the 1986 Declaration on the Right to Development adopted by the United Nations General Assembly.

More specifically, this publication aims to:

- i. Expose the main legal gaps and weaknesses in the institutional arrangements** that contribute so that the normative framework and operational mechanisms that guide the operation of the BNDES do not offer the maximum degree of human rights protection in accordance with applicable legal standards, nor permit a satisfactory level of access to information obtained and maintained by the Bank;
- ii. Compare and contrast the Brazilian institutional legal framework applicable to BNDES operations with the highest international standards of human rights protection**, and the policies and procedures of the BNDES with the most advanced practices of the financial sector in terms of transparency, social participation and management of social, environmental and human rights impacts;

iii. Explore institutional and legal solutions for the full protection of human rights within the scope of projects financed by the BNDES, and for greater transparency and stakeholder participation in the decision-making processes of the institution; and

iv. Succinctly present some State, private or hybrid standards that can be used to enhance the regulatory and institutional mechanisms that govern the actions of the BNDES.

The research methodology adopted tried to adjust to the aims of this publication. Interviews and analysis of primary and secondary documentary sources were prioritized. An exploratory visit to the Belo Monte Hydroelectric Power Plant and the city of Altamira were part of the research activities to develop this publication.

Twenty interviews were conducted with a broad spectrum of actors, so that various points of view about the BNDES in Brazilian economic and social development could be captured. Accordingly, formal and informal conversations were held with (i) representatives of non-governmental organisations with a strong history of advocacy regarding the BNDES and civil society organisations whose work was not directly related to the subject; (ii) interlocutors of private companies that receive financing from the BNDES, mainly from the departments of community relations, social and environmental responsibility and institutional relations; (iii) private banks that act as intermediary agents of BNDES loans and participate in structuring complex financial transactions, such as project finance³⁰; (iv) lawyers from law firms who specialize in structuring complex financial operations and investments involving the BNDES, intermediary financial agents and borrowing companies; (v) academics in the fields of law, economics and international relations, in particular those engaged in research on human rights and business, law and development, economic and social development, development finance and Brazilian foreign policy; (vi) experts not directly linked to any civil society organisation or university; (vii) representatives of the Federal Public Ministry, especially members of the Federal Prosecutor's Office of Mato Grosso do Sul (PR-MS), the Federal Prosecutor's Office of Pará (PR-PA), the State Prosecutor of Pará (MPE-PA) and the Citizens' Rights Federal Prosecutors (PFDC); and (viii) representatives of the BNDES, mainly high-level officers from departments responsible for social and environmental management, planning, access to information and institutional relations, in addition to the ombudsman of the institution.

The following documentary sources were used to support the conclusions and recommendations of this publication: (i) official documents from the BNDES, such as annual reports, information on

³⁰According to the Bank of International Settlements, "Project Finance" consists of "a method of financing in which the lender mainly considers the revenues generated by a single project, both as a source of repayment and as security against exposure to risk. This type of financing is generally used for large, complex and expensive facilities, which may include, for example, power plants, chemical manufacturing plants, mines, transportation infrastructure, the environment and telecommunications. The project financing may also serve to finance the construction of a new capital facility or refinancing an existing facility, with or without improvements. In these transactions, the lender is usually paid solely or almost exclusively with funds generated by the business contracts of the products of the facility, such as electricity sold by a power plant. The financed is usually a special purpose company (Special Purpose Entity-SPE) which is not authorised to perform any function other than the development, control and operation of the facility. The consequence is that repayment depends mainly on the project's cash flow as well as the value of the project assets pledged as collateral security". Cf.: Basel Committee on Banking Supervision. International Convergence of Capital Measurement and Capital Standards ("Basel II"), November 2005. Available at: <<http://bis.org/publ/bcbs118.pdf>>. Accessed on 01 Aug. 2013.

its website, memos and other internal documents, statistical data and official communications; (ii) investigative reports, articles, studies and letters on the BNDES prepared by civil society organisations, including contracts between the BNDES and private companies, because they are not disclosed to the public by the Bank as part of its active transparency; (iii) administrative investigative procedures undertaken by the Federal Public Ministry, decisions, judgements and legal rulings of lawsuits to which the BNDES was party, or that involved projects financed by the Bank; and (iv) normative sources, such as national and international regulations, international treaties and laws that are part of the Brazilian legal system.

The recommendations proposed in the publication were drawn from analysis of the failures of governance found in the case studies documented by other institutions and from the theoretical-regulatory framework chosen, which contains elements of the following: (i) international human rights law, including declarations, treaties and conventions on human rights; (ii) the recent UN document, “Protect, Respect and Remedy: a Framework for Business and Human Rights”³¹, (iii) Brazilian human rights legislation, including both laws and regulations designed to make the Brazilian state meet its responsibilities under international human rights instruments; and (iv) non-binding standards on finance and human rights, both national and international³², such as the Equator Principles and the Green Protocol, as well as the safeguard systems of multilateral banks such as the World Bank and its private sector arm, the International Finance Corporation (IFC).

4. Contents of the Publication

This publication is divided into three parts, in addition to the introduction and conclusion. In order to facilitate reading for different audiences according to their interests on the subject, each chapter was designed to enable “stand-alone” reading.

Part I, “**The BNDES – history, governance, activities and legal and administrative regimes**”, presents brief considerations on the importance of development banks in long-term financing policies of emerging economies. This is followed by a profile of the BNDES, its history, organisational structure, governance and the legal and administrative regimes applicable to the Bank.

In Part II, “**The BNDES and transparency**”, the issue of transparency of, and access to, BNDES information is analysed. The chapter discusses some instances of difficulty in accessing information from the BNDES by civil society, and changes are recommended based on the identification of information gaps throughout the project cycle of the Bank.

³¹ Ruggie, John. “Protect, Respect and Remedy: A Framework for Business and Human Rights.” Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Available at: <http://business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>

³² A study on voluntary pacts on the financial system and human rights may be found in Annex I. The social and environmental policies of MDBs used as reference in this study can be found in the comparative tables in Annex I.

Part III, “**The BNDES’ Policy on Social and Environmental Responsibility**”, provides a general overview of the Bank’s general and per-sector social and environmental responsibility policies, followed by a critical analysis of such policies, and recommendations for the development of operational mechanisms to prevent and redress human rights abuses.

The last part presents **Conectas’ recommendations** aimed at enhancing the legal and institutional framework and internal mechanisms of the BNDES and ensuring greater transparency, participation, social control and protection of human rights in all of its activities.



Part I: The BNDES - history, governance, activities and legal and administrative regimes

In this section you will find:

- A brief discussion on the existence of development banks and their functions;
- A brief background on the establishment and functions performed by the BNDES throughout its history;
- An overview of the main features of the BNDES, its funding mechanisms, organisational structure, corporate governance and activities;
- An overview of the legal and administrative regimes of the BNDES and how they relate to the protection of human rights.

I.1. Development banks

Banks are agents of the financial system that act as intermediaries between the surplus and deficit agents, and in this process, assume the credit risk arising from such operations. Banks differ from other financial institutions, especially those that work in the securities markets (also known as capital markets), because they receive deposits and provide credit, while in capital markets intermediary institutions advise private companies to issue securities directly to investors, and by doing so they receive a payment based on commission.

Banks can be classified into several different categories: commercial, multiple, public and private, among others. Development banks are just one of several types of development finance institutions, such as export credit agencies, development agencies, etc. A development bank such as the BNDES normally does not perform all the functions of a regular commercial bank. For example, the BNDES does not take deposits from individual clients, a basic form of fundraising for any commercial bank. On the other hand, the BNDES acts in specific niches, offers different financing instruments in relation to the market (especially subsidised rates) and adopts investment strategies based on government plans and policies.

Development banks have the traditional function to operate in markets neglected by private financial institutions, but which have strong economic and social impacts, such as housing for low-income clients and long-term credit for investments in infrastructure.

According to the World Bank, in 2012 there were 90 development banks in 61 countries³³. In 2009 the combined assets of these institutions totalled US\$ 2.01 trillion, while total combined loans totalled US\$ 1.59 trillion³⁴. The World Bank's research also found that development banks assume multiple roles and have different institutional designs. They are distinguished by variables such as: (i) corporate control: the bank may be partially or wholly owned by the government; (ii) target sectors and clients: broad focus or on specific sectors (agriculture, low-income housing, etc.); (iii) financing models: direct or indirect; (iv) interest rates: these may be subsidised (by the government or funding from international institutions) or market-based; (v) regulation and supervision: this may be subject to the regulatory and supervisory regimes common to other financial institutions or to a special regime; and (vi) corporate governance: its corporate bodies can be controlled or not by the government.

The main criticisms to greater State participation in the economy, especially through public banks, are that these have low operational, financial and administrative efficiency; are more prone to rent-seeking (i.e., providing its administrators and government officials with undue incomes at the expense of the private sector and families); crowd out the private sector; have too much discretion in allocating credit and may select economic groups (companies) linked to politicians or sectors that would contribute little to technological innovation; and are prone to corruption, cronyism and nepotism³⁵.

Because of the traditionally negative view of public banks by mainstream economic theory, the persistence of the BNDES as the monopolising mechanism of long-term financing in Brazil is severely scrutinised by segments of society that see the direct presence of the State in the economy and, more specifically, in financial markets as a distortion of the idea that the market is the ideal instrument to allocate the resources of society.

In opposition to this view, economists and analysts with a more favourable stance on the presence of the State in the economy emphasise that state-owned banks are a by-product of social arrangements and institutional singularities resulting from the interaction of interest groups, rules and historical movements. In this perspective the BNDES is “a constitutive agent of the economic history” of Brazil.³⁶

³³ Luna-Martinéz, José de and Carlos Leonardo Vicent. Global survey of development banks. The World Bank Policy Research Working Paper, 2012.

³⁴ Idem.

³⁵ Criticism of the presence of the State in the economy and, more specifically, in the financial sector, are frequent in literature closer to neoclassical economic theories, which regard State intervention as a possible source of distortions on the functioning of markets. In the 1990s a series of studies conducted by researchers associated with the World Bank acquired particular relevance in this debate. These studies, which sought to relate the level of protection of investors with company financing, became known as Law and Finance. According to the authors of this series, a country with a reasonable presence of public banks would have a lower level of “financial development”. See: La-Porta, Lopez-de-Silanes & Shleifer (2002).

³⁶ See: Schapiro (2012).

Box 2: Regulation of the National Financial System and the BNDES

Although a development bank differs from traditional commercial banks and other financial institutions in several aspects, the BNDES is subject to the entire regulatory framework emanating from the National Monetary Council (NMC) and the Central Bank, such as rules on minimum capital, prudential limits (such as credit limits and liquidity requirements), internal control standards, rules of risk management (operational, market, credit, etc.), social and environmental rules and regulations to combat money laundering, among countless other regulations applicable to financial institutions.

The normative body located at the top of the National Financial System (NFS) hierarchy is the NMC, created in 1964. With a broad legal mandate, the NMC is responsible for establishing general guidelines for monetary, exchange and credit policies and for regulating the establishment, operation and supervision of financial institutions, among other functions. The NMC has three members: the Minister of Finance as president, the Minister of Planning, Budgeting and Management and the president of the Central Bank.

The Central Bank of Brazil (BACEN) is responsible for implementing the regulations of the NMC. The functions of the BACEN, contained in the law that created it, include a myriad of exclusive functions, ranging from credit control and entry of foreign capital to the prerogative to establish relations with foreign authorities and international financial institutions. The BACEN is the principal executor of the determinations of the NMC, emanating in the form of resolutions. These resolutions are published by the BACEN, which relies on a number of regulatory instruments for their implementation. Given this institutional dynamic, the BACEN is the only institution of the NFS with the power to propose concrete measures aimed at making monetary policy operational, along with prudential regulation of the NMC.

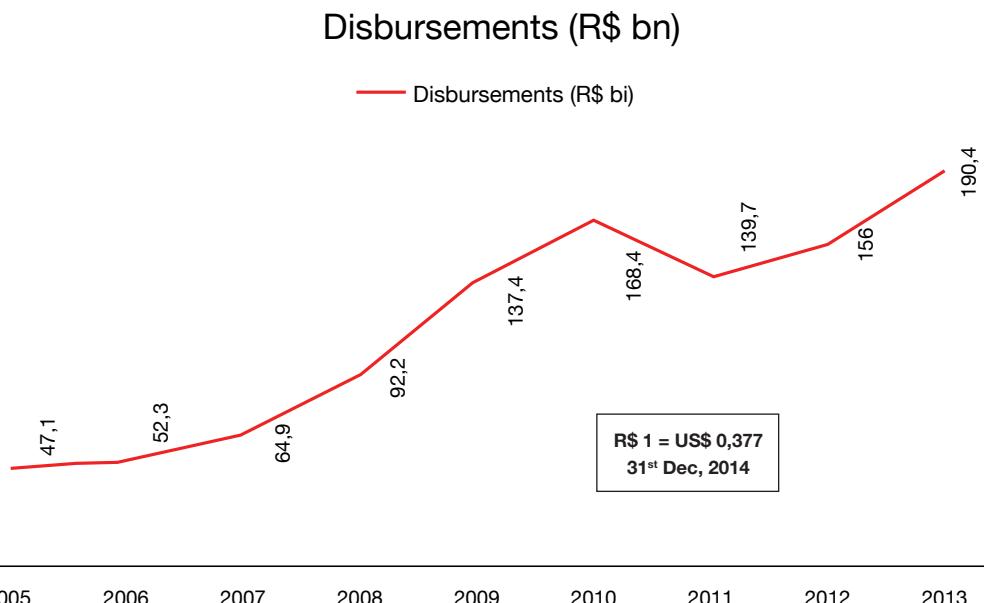
In Brazil the BNDES has a massive presence in the financial sector. Its investments amount to almost 20% of the country's Gross Domestic Product (GDP).³⁷ Although it was created sixty years ago, a period in which Brazil did not have a network of private financial institutions and agents as extensive and sophisticated as it does today, the BNDES has not ceased to be a major player in the financing of productive projects in the country. Rather, its relevance and centrality have only increased in the last decade.

³⁷ According to an article from the newspaper O Estado de São Paulo, titled "BNDES banca 20% dos investimentos" from September 9, 2013. Available at: <http://economia.estadao.com.br/noticias/geral,bndes-banca-20-dos-investimentos-imp-,1070708>.

The importance of the BNDES in long-term financing in Brazil is easily illustrated by numbers. Currently, the Bank is responsible for almost 75% of credit offered to Brazilian companies, mainly in the form of directed or long-term credit³⁸. In this portfolio the BNDES operates either as sole financier or jointly with the private financial sector or state-owned banks, especially the Banco do Brasil (BB) and the Caixa Económica Federal (CEF), the federal thrifts institution. There are also projects co-financed by the BNDES and multilateral development banks (MDBs) such as the World Bank, the Inter-American Development Bank (IDB) and the Andean Development Corporation (ADC).

In 1952, the year it was founded, the BNDES disbursed a few million dollars on projects in the area of electricity. In 2013 its disbursements totalled approximately R\$ 190 billion³⁹, surpassing only the volume of loans and investments made in 2010, when the annual sum peaked at R\$ 168 billion⁴⁰.

Graph 1: BNDES disbursements 2005-2013



Source: Annual reports and official statements of the BNDES.

³⁸ According to an article from the newspaper O Estado de São Paulo, titled “BNDES owns almost 75% of credit to businesses, says BC”, dated 27 September 2013. Available at: <http://economia.estadao.com.br/noticias/geral.bndes-detem-quase-75-do-credito-as-empresas-diz- bc,165844e>.

³⁹ According to the 2013 Annual Report. Roughly US\$ 80.5 bi (at an exchange rate of USD 1 = 2.35 BRL, of 31 December 2013).

⁴⁰ In today's values, 2010 disbursement today hits R\$ 190 billion. Source: BNDES 2012 Annual Report. Approximately US\$ 71.2 bi.

I.2. A brief history of the BNDES⁴¹

The BNDES is a product of the work of the Joint Brazil-United States Commission. The BNDES was created by Law No. 1,628 of 20 June 1952 and Ary Frederico Torres was the first president of the institution. The BNDES emerged as an important instrument both for conducting project analyses and for being the government arm in implementing policies deemed critical to industrial development. The Bank would act as formulator and executor of national economic development policy. Its role as a provider of resources for projects that required long-term financing was essential, since at that time, the national financial system operated with only short-term loans (as it still does today).

The initial funding of the BNDES was obtained from fiscal sources and money from foreign agencies, particularly the World Bank and the Eximbank (USA). Over the years the BNDES became the main official coordinating agency of public investments and the chief executor of the policies outlined in the economic plans for the sectors under the responsibility of the government, encouraging the formation of a national industry. For example, the Bank's support for investment in basic infrastructure from the 1950s to the 1970s resulted in cheaper inputs for the industrial sector and elimination of various bottlenecks of the economy.

The economic literature agrees that the creation of the BNDES was a decisive step for the development of Brazilian capitalism, from the point of view of allocation of financial resources, and the role of the Bank in fostering the creation of a modern bureaucracy able to conduct studies and operate new instruments essential for promoting economic development.

In the 1960s, marked by imbalances in the balance of payments and growth of the public debt (especially in the second half of the decade), the BNDES had a substantial presence in the expansion of the energy, railway and steel sectors, and was thus free to offer financing to various sectors of the economy, including projects related to the private sector.

In the 1970s the BNDES strongly supported the development and modernisation of the Brazilian economy. In 1974 the Bank established three subsidiaries to operate in capital markets in order to expand the forms of capitalisation of Brazilian companies. These subsidiaries were Mecânica Brasileira SA (EMBRAMEC), Insumos Básicos SA Financiamentos e Participações (FIBASE) and Investimentos Brasileiros SA (IBRASA). At that time the Bank had already realised the importance of a strong capital market. In 1982 the three companies listed above were merged into one called BNDES Participações SA (BNDESPAR).

In the 1990s, a decade marked by the impeachment of President Fernando Collor and establishment of the Plano Real⁴², conceived by then Minister of Finance Fernando Henrique Cardoso, the BNDES was chosen to manage the National Privatisation Fund, thereby assuming responsibility for the

⁴¹ Reconstitution based on the 2012 BNDES document, "BNDES 60 anos: perspectivas setoriais (60 years of the BNDES: sectoral perspectives)."

⁴² The Plano Real was implemented under the administration of Itamar Franco, when Fernando Henrique Cardoso de Melo served as Treasury Minister. It consisted of a set of measures taken to stabilise the Brazilian economy in 1994 and fight the endemic inflation that had persisted in the economy since the 1980s. The Plano Real had three pillars: 1) commercial liberalisation; 2) fixed currency; and 3) de-indexation of the economy, as well as a strong commitment to fiscal discipline through austerity measures.

administrative, financial and technical support of the privatisation programme. This period is characterised by a significant leap in the Bank's disbursements and its restructuring to expand operations to support exports. The Bank also started financing operations to small and medium-sized enterprises in all sectors of the economy and all regions of the country through the development of direct aid programmes such as the Programme for Capitalisation of Small Companies (CONTEC) and Investment in Emerging Companies and Support for New Private Companies. In terms of indirect activities, the Bank created closed investment funds managed by third parties: Regional Funds for Emerging Companies and Funds for Emerging Technology-Based Companies. Based on this experience, investment programmes were created in private equity funds⁴³, in liquidity/governance funds and the oil and gas sector.

Also in the 1990s, loans began to be classified according to relevance of environmental impact, conditioned on three main areas: compliance with environmental legislation; projects to adapt companies to environmental standards; and projects for environmental recovery and conservation with economic return. Another striking aspect of the performance of the BNDES in that decade was the creation of a line of microcredit, called the Popular Productive Credit Programme. Microcredit has since become one of the activities of the BNDES to support social and urban development.

In the second half of the decade of the 2000s, the financing policy of the BNDES began to prioritise the formation of large national industrial conglomerates, on the grounds that the country should rely on international competitors in sectors considered most promising, such as food (i.e. meatpackers and poultry) and basic supplies. With financing from the BNDES for mergers and acquisitions, some Brazilian companies gained unprecedented international prominence, significantly expanding their productive capacity.⁴⁴ The policy of creating "national champions", as the strategy of consolidating selected Brazilian conglomerates became informally known, was officially abandoned by the BNDES in 2013.⁴⁵

Infrastructure has also received considerable investments from the BNDES, particularly construction of ports, airports, highways and hydroelectric and thermoelectric power plants. In 2013 the BNDES invested R\$ 62.2 billion in the sector, a figure that represented 33% of the Bank's disbursements that year and an increase of 22% compared to the previous year.⁴⁶ According to IBASE, investments by the BNDES in infrastructure are related to the need to export basic raw materials produced locally and this type of investment is also significant in the Bank's international portfolio. Between 2001 and 2011, BNDES investments into Brazilian companies abroad increased by 1,185%.⁴⁷

⁴³ Private equity refers to the type of equity investment in companies not listed on stock exchanges, usually with the aim of appreciating them to then proceed with opening its capital or market alienation by buying and selling. Private equity funds manage the capital of individuals or entities interested in this type of investment.

⁴⁴ See: Colombini, Iderley. A atuação internacional do BNDES como parte do Novo Modelo Desenvolvimentista (The international activities of the BNDES as part of the New Developmentalist Model). IBASE seminar on BNDES investments in Latin America. Available at: <http://issuu.com/ibase/docs/artigo_bnades_a_l>.

⁴⁵ As reported in the newspaper O Estado de São Paulo, titled "BNDES decide abandonar a política de criação de 'campeões nacionais' (The BNDES decides to abandon the policy of creating 'national champions')", 22 April 2013. Available at: <<http://economia.estadao.com.br/noticias/geral,bndes-decide-abandonar-a-politica-de-criacao-de-campeoes-nacionais,1513566>>.

⁴⁶ See: 2013 Performance. Evolution of disbursement from the BNDES. Available at: <http://www.bnDES.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/Relacao_Com_Investidores/Desempenho/Desempenho_2013.html>.

⁴⁷ See: Colombini, Iderley. The international activities of the BNDES, 2013, op. cit.

According to the BNDES, the institution currently performs a number of functions in the Brazilian economy.⁴⁸ The first is to correct market failures and the imperfections of the Brazilian capital markets by, among other measures, offering subsidised rates to cope with high interest rates for long-term financing from the private banking sector. The second is to modernise the economy through the creation of new comparative advantages and vertical policies. The third is its countercyclical role, i.e., the BNDES has been used by the federal government as an instrument for maintaining investment levels in an adverse international economic scenario.

I.3. Funding of the BNDES

The main sources of funding of the BNDES are: (i) funds transferred from the National Treasury; (ii) institutional resources such as the Worker Assistance Fund (FAT); (iii) international loans (from multilateral agencies such as the World Bank, among others); (iv) issuance of debt in capital (mainly international) markets; and (v) return on projects (investments).

Table 1: Funding of the BNDES

| FUNDING SOURCE | DESCRIPTION | SUBSIDISED RATE |
|-------------------------------------|--|--|
| Return on projects | Earnings from loans | No |
| National Treasury | Loans from the National Treasury | Yes. LTIR ⁴⁹ |
| FAT | CF/88 guarantees 40% of the resources of the FAT (payroll taxes between 1% and 1.5%) | Yes. LTIR if in R\$ and LIBOR if in US\$ |
| PIS-PASEP | Funds from the PIS-PASEP ⁵⁰ | Yes. LTIR |
| International loans | Loans from other IFIs such as the World Bank, IDB etc. | Depende |
| Domestic funding (debt) | Bonds issued on the national market | No |
| International funding (debt) | Bonds issued on the international market | No |

Source: Colby (2013)

Reliance of the BNDES on taxpayers' money is a determinant in the composition of assets of the Bank and, in fact, has only increased in recent years. The Bank's capital structure denotes the almost exclusive presence of national public sources (97%), distributed among the National Treasury (15.4%), resources from the FAT (4%) and other forms of public funding⁵¹. Capital reinvested from returns on its credit operations also fits in the nature of public funds, because

⁴⁸ BNDES (2011).

⁴⁹ Long-term interest rate.

⁵⁰ Contribution by employers and employees.

⁵¹ Includes the PIS-PASEP, the Merchant Marine Fund, the Audiovisual Sectoral Fund and the National Fund on Climate Chang

there are no private partners in the corporate composition of the BNDES, and fundraising among private investors accounts for a low percentage of the capital structure of the Bank. Reinvested capital accounts for 77.4% of the Bank's assets⁵².

In order to support the increase of disbursements from the BNDES, the Brazilian National Treasury granted it loans of R\$ 105 billion in 2009, R\$ 107 billion in 2010, R\$ 50 billion in 2011, R\$ 55 billion in 2012, R\$ 15 billion in October 2013 and R\$ 30 billion in July 2014.

I.4. Corporate governance of the BNDES

The BNDES is a development bank wholly owned by the federal government. It is subordinate to the Ministry of Development, Industry and Foreign Trade (MDIC). According to its bylaws⁵³, the BNDES "is the main instrument of implementation of the federal government's investment policy and has the paramount objective to support programmes, projects, works and services that relate to the social and economic development of the country" (Art. 3º). The main corporate bodies of the BNDES are the board of directors (BD) and the directorship.

The BD is the top body of the corporate structure of the Bank. It is composed of the president of the BNDES, who is vice president of the BD; ten members appointed by the President of the Republic, with a mandate of three years, including the president of the BD; and four members appointed by the Ministry of State for Planning, Budgeting and Management, the Ministry of Labour and Employment, the Ministry of Finance and the Ministry of Development, Industry and Foreign Trade. (In practice there is one seat for the Central Única dos Trabalhadores (CUT), one of Brazil's largest labour unions, and another for Força Sindical (a labour union umbrella organisation); and one seat of the BD is reserved for a representative of BNDES employees, elected by a vote of their peers.)

The functions of the BD of the BNDES include: (i) provide advice, when requested by the Ministry of Development, Industry and Foreign Trade, on issues relevant to Brazilian economic and social development, especially in regard to the work of the BNDES; (ii) advise the president of the BNDES on the general guidelines of his work; (iii) examine and approve, through proposal of the president of the Bank, general policies and long-term programmes; (iv) approve the overall budget for resources and expenditures and monitor their implementation, as well as examine annual auditing reports and information about the results of Bank activities; (v) approve the balance sheets and financial statements of the institution; (vi) authorise the creation of reserves; (vii) provide opinion on allocation of profits; (viii) deliberate on capital increase; and (ix) designate the head of the Auditor's Office.

⁵² Data extracted from the BNDES Annual Report of 2012, pp. 48-50. In 2012 foreign capture/earnings and other obligations/debts, which may include private creditors, accounted for 9.9 percent of the Bank's funding. It is notable that some of these resources is captured through multilateral development agencies. According to the BNDES, since 2009 the Brazilian National Treasury has become one of the most important sources of funding.

⁵³ The BNDES bylaws were approved by Decree No. 4,418, of October 11, 2002.

Of the twelve members of the BD, the highest hierarchical deliberative body of the BNDES, eleven are appointed by the President of the Republic at the recommendation of ministers of state and only one of them represents the employees of the institution. Yet the executive directorship is composed of nine members: the president, vice-president and six directors of the BNDES, all appointed by the President of the Republic. The audit committee is composed of up to six members appointed by the BD, while the fiscal board consists of three members: two appointed by the Ministry for Development, Industry and Foreign Trade and one by the Finance Minister.

The directorship consists of the president, vice-president and six directors. The mandate of the president is indefinite, while that of the directors is three years, with renewal permitted for an equal period. The deliberations of the BD are taken by a simple majority and the president has the casting vote. Moreover, the president can veto resolutions of the directorship, submitting them to the BD. In general, the president of the BNDES has executive and administrative functions.

The BNDESPar, the subsidiary of the BNDES for the capital market, has the BNDES as its sole shareholder⁵⁴. Thus its investment decisions in equity, securities and other capital markets operations are entirely subject to approval by the president of the BNDES, although in practice the portfolio management and investment strategies of the BNDESPar may be the responsibility of their own corporate bodies. The composition of these bodies reflects the exclusive control of the BNDES. The BNDESPar Board of Directors is composed of the president of the BNDES and five members also appointed by its controller. Its directorship is composed of nine members of the directorship of the BNDES and all three of the members of the fiscal board are appointed by the sole shareholder.

I.5. Forms of financial support

The BNDES provides financial support to companies⁵⁵ in three different modalities: loans, grants (non-reimbursable financing) and investments through the capital markets (i.e., securities underwriting, acquisition of funds units).

Financing from the BNDES may be granted through direct, indirect or mixed operations. Direct operations are loans carried out directly by the BNDES after formal submission of request by the interested company.

Indirect operations are subdivided into automatic indirect operations (AIOs) and non-automatic indirect operations (NAIOs). AIOs are performed through intermediary financial institutions and do not need prior approval from the BNDES. Operations of any value that have as their purpose the acquisition of equipment will always be direct and automatic, drawing on the products BNDES

⁵⁴ Article 9 of the BNDESPar bylaws. Available at: http://www.bnDES.gov.br/SiteBNDES/bnDES/bnDES_pt/Institucional/O_BNDES/legislation/estatuto_bndespar.html

⁵⁵ Funding can also be for government entities, individuals resident in the country and associations and foundations.

Finame⁵⁶, Finame Agrícola, Finame Leasing or BNDES Card. The main product offered by the BNDES in AIOs is BNDES Automático, which aims to finance projects with values less than or equal to R\$ 20 million, with a time limit of twelve months for each recipient company.

Non-automatic indirect operations (NAIOs) are performed by accredited financial institutions, and the projects need to be framed and approved by the BNDES. Included in this category are operations over R\$ 10 million (except in the cases mentioned in the previous item which, regardless of value, must be made via automatic indirect operation), and operations of up to R\$ 20 million per company and with a time limit of twelve months. The systematic procedure for this mode of operation includes the following steps:

- The sending, by accredited financial institutions, of the recommendation of non-automatic indirect operation, filed in accordance with the guidelines for the development of proposals of non-automatic indirect operation;
- Appraisal of the documents submitted by the planning department, in conjunction with the operational department responsible for the respective project. Proposals that do not meet the required standards may be cancelled by the responsible departments.

Financial support via the securities markets (or capital market) is a more recent and sophisticated form of investment by the BNDES in private companies and enterprises. Capital injection from the BNDES occurs through three main mechanisms: (i) securities underwriting⁵⁷, (ii) participation in investment funds and (iii) purchase of investment certificates. These mechanisms include securities underwriting in initial public offers (IPOs) of shares in the listed segment of the stock exchange and acquisition of shares in private equity funds or investment funds in emerging companies (venture capital), among others.

I.6. BNDES support for the internationalisation of Brazilian companies

The internationalisation of Brazilian companies is a relatively new process in the economic history of the country. It began in the 1990s and deepened after stabilisation of the economy post-Plano Real. The trend is currently the object of intense reflection, with regard to the peculiar characteristics of expansion of Brazilian companies abroad, and as part of a broader discussion on cross-border activities of companies from emerging countries, their role in reshaping the global economic order and possible establishment of a multipolar regime as opposed to a unipolar order.

⁵⁶ "Finame" is the credit line for the acquisition of machinery and equipment produced in Brazil.

⁵⁷ Securities include: shares; debentures convertible into or exchangeable for shares; warrants; options and other derivative products; as well as other securities provided for by law, provided that they are convertible or exchangeable into shares or any mode convertible, redeemable or backed in shares.

At all stages of the country's opening to foreign trade and the successive developments that led Brazil to create authentic transnational companies, the BNDES provided various forms of financial support. The internationalisation of the BNDES, that is, its international presence, is therefore a phenomenon closely related to internationalisation of Brazilian companies.

In the last ten years, the BNDES established three foreign subsidiaries in London, Johannesburg and Montevideo. In London, United Kingdom, the BNDES Ltd. was established to perform advisory services regarding the relationship of the Bank with foreign investors. Thus, the subsidiary has two main roles: first, fundraising from international investors to strengthen the Bank's capital; second, strengthening relationships with investors and foreign companies in order to promote Brazilian industry and facilitate the growth of exports and the international expansion of Brazilian companies into other markets. In Montevideo, Uruguay, the objective of the Bank is to enable Brazilian investment in South America. More recently the BNDES also opened a representative office in Johannesburg, South Africa with the aim of expanding its relationships with regional and local institutions, as well as deepening its knowledge of the African business environment⁵⁸.

The forces that lead the BNDES to internationalise are complex and varied. Depending on the country and the project, the Bank, companies or the Brazilian government may take the lead in exploring opportunities and customers abroad. Normally, first a business committee approaches the government of the other country, maps investment opportunities and then the Brazilian government acts through diplomatic channels. In this scenario Brazilian diplomacy would follow the country's companies, but diplomacy with an economic bias also exists. Therefore, policy is the key to understanding the transnationalisation of Brazilian capital with financial support from the BNDES. The strategy of internationalisation of Brazilian companies is therefore a phenomenon to be understood in conjunction with the country's foreign policy strategies.

Regarding the operational side of BNDES support for the export of Brazilian goods and services, the Bank commonly portrays itself not as the financier of the project, but merely the provider of financing in the pre- and post-shipment phases, so that Brazilian goods and services are sent overseas. In practice the BNDES provides a range of advisory and consulting services to attract foreign investors seeking to purchase national goods, products and services, and to map strategic markets where Brazilian companies can act.

⁵⁸ According to a press release published on the BNDES website titled, "BNDES inaugurates its representative office in Africa," from 6 December 2013. Available at: http://www.bnDES.gov.br/SiteBNDES/bnDES_en/Institucional/Press/Noticias/2013/20131206_africa.html.

Figure 1: International presence of the BNDES: Montevideo, London and Johannesburg



Source: Elaborated by the authors.

I.7. The legal and administrative regimes of the BNDES and protection of human rights

The BNDES falls into an intermediate category between the entities of public law, subject to “public law”, and private companies governed by “private law”. Its legal status is that of a federal public enterprise, a type of company incorporated by the State, but which engages in economic activities in competition with the private sector, except for some monopolies that exist under the imperatives of sovereignty and national security.

According to Article 1 of its bylaws, the BNDES is a “public corporation endowed with legal personality under private law”⁵⁹. Since the BNDES is owned by the Union (the Federal sphere of the Republic), the institution falls into the category of “federal public enterprise”, linked to the Ministry of Development, Industry and Foreign Trade.

Federal public enterprises are part of indirect federal administration, composed of entities created by the Union for the decentralised exercise of administrative activities and linked to the Ministry in whose jurisdiction their main activity is framed⁶⁰. Among all types of federal government entities, public companies and semi-public corporations are closer to private companies. Due to their

⁵⁹ Decree No. 4,418, from 11 October 2002. In accordance with Article 173, Paragraph 1 of the Federal Constitution of 1988, the creation of State-owned companies in Brazil is a reserve of law. “Art. 173. [...] (1) the law shall establish the legal status of the State-owned company, joint stock company and its subsidiaries which exploit economic activity of production or marketing of goods or services, dependant on: I-its social function and forms of supervision by the State and society; II-subject to the legal regime of private companies, including civil, commercial, labour and tax rights and obligations; III-bidding and procurement of works, services, purchases and disposals, the principles of public administration observed.” The statutes that shall give legal validity to the existence of the BNDES are laws No. 5,662, of 21 June 1971, and paragraph 1,628, of 20 June 2002.

⁶⁰ Decree-Law No. 200, from 25 February 1967, adopts provisions concerning the organisation of the Federal Public Administration. “Art. 4º The Federal Public Administration includes: I-Direct Administration, which provides integrated services in the administrative structure of the Presidency of the Republic and the ministries. II-Indirect administration, which comprises the following categories of entities, endowed with autonomous legal personality: a) municipalities; b) public companies; (c) hybrid enterprises (with public and private ownership); d) public foundations. § 1º Entities included in indirect administration shall be linked to the Ministry whose area of competence its main activity is framed. Art. 5 for the purposes of this law: II-Public Company-an entity endowed with legal personality under private law, the capital and patrimony of which are exclusively of the Union, established by law for economic activity that the Government may exercise by contingency force or administrative convenience, and may be of any of the forms permitted in law. Sole paragraph: The entities included in indirect administration are linked to the ministry in which its main activity is framed.

current legal and administrative regimes, such entities have a hybrid character, as they are subject to the rules of public and private law.

The main reason why public enterprises (and semi-public corporations such as Banco do Brasil) are primarily governed by the rules of private law is competition. Because public enterprises are legal categories which the State uses to operate directly in the economic domain (the State as an entrepreneur), they have their activities governed by the same laws as private companies, so as not to infringe upon the principle of free competition enshrined in Article 170, paragraph IV of the Federal Constitution⁶¹.

However, there are several circumstances in which the rules of private law governing the activities of public companies are superseded by the rules of public law, either because of the public interest at stake, the primacy of fundamental rights in the Brazilian legal system or due to any other laws or constitutional principles and values, implicit or explicit, that should prevail over private interests.

The exceptions to the prevailing regime of private law of federal public companies can be identified by examination of the BNDES. As a federal public enterprise with the core purpose to provide financial services, the BNDES is subject to the same rules that govern the activities of private financial institutions in Brazil, most of which emanate from the National Monetary Council and its regulatory body, the BACEN. Its regime of hiring personnel, however, differs from the labour regime applicable to private banks operating in Brazil. Although BNDES employees are public sector employees, access to this type of public job requires prior approval in public examination, as per Article 37, II of the Federal Constitution⁶². The BNDES is also subject to rules on bidding for the procurement of goods, services and supplies that are not related to its end-activity, such as the acquisition of software or office supplies⁶³.

⁶¹ O“Art. 170. The economic order, founded on valuing of human labour and free initiative, is intended to assure dignified existence for all, according to the dictates of social justice, observing the following principles: IV-free competition”.

⁶² Federal Constitution. “Art. 37. The direct and indirect public administration of any of the powers of the Union, the states, the Federal District and the municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency and, also, the following: [...] II-the investiture in public office or employment depends on prior approval through public tender exams, or exams and titles, according to the nature and complexity of the Office or employment, as provided for by law, subject to the appointments to Office in Commission declared in law of free appointment and dismissal”.

⁶³ Law No. 8,666, from 21 June 1993.

Box 3: The legal and administrative regime(s) of the BNDES and protection of human rights

Just as categorisation of the BNDES as a federal public enterprise makes it subject to public laws regarding its regime for employment of staff and purchase of products and services, it is not possible to equate federal public enterprises to other private companies as regards their legal binding to human rights standards. Although it is part of indirect administration and charged with exploring an economic activity in competition with private agents, the BNDES is an entity of the Executive Branch and any actions of the three branches of the Republic encounter their limits and legal validity in the constitutionally-guaranteed fundamental rights.

International human rights standards, especially the Universal Declaration of Human Rights, treaties and conventions ratified by Brazil, and international customs and the legal regime of human rights, which has the Constitution as highest standard, treat the Brazilian State as a single and indivisible entity for purposes of protection of human rights and any State entities exercising public functions that act on its behalf must fully comply with such norms.

With regard to the observance of human rights, therefore, private law rules governing the actions of the BNDES are “trumped” by human rights standards, equating its liability towards such rights to the same level of other entities of public administration, as well as its liability regime for possible abuses.

As regards external governance structure, the BNDES, as previously observed, is a financial institution subject to supervision and regulation by the BACEN and the Securities and Exchange Commission (CVM) (as a result of the subsidiary BNDESPar). As a public company, the BNDES reports to the federal Comptroller General’s Office and the Union Court of Auditors⁶⁴.

The BNDES also follows specific guidelines from the Department for Coordination of Federal State Companies (DEST) of the Ministry of Planning, Budgeting and Administration (MPOG) and, because it is responsible for application of resources from the Workers’ Assistance Fund (FAT), remains under the guidance and oversight of the deliberative council of the FAT (CODEFAT), made up equally by members of the federal government and representatives of business and trade unions⁶⁵.

The administrators of the BNDES, especially the president, can be requested to attend committee hearings in the two legislative houses of the National Congress (the Senate and the House of Representatives). Parliamentarians can make inquiries to administrators of the BNDES within the scope of parliamentary committees, among which are the Committees for Economic Affairs and Foreign Relations, both of the Senate, and the Financial Supervisory Committee of the House of Representatives.

⁶⁴ According to information extracted from the management report for the financial year 2012. Available at: <http://www.bnDES.gov.br/SiteBNDES/export/sites/default/bnDES_pt/Galerias/Arquivos/empresa/download/2012_Relat_Gestao_BNDES_BPAR_FINAME.pdf>.

⁶⁵ Idem.

Because of its budgetary powers, the National Congress makes decisions to increase contributions to the BNDES from the National Treasury and, on these occasions, the democratically-elected representatives can establish conditions for access by the BNDES to this source of funding. The imposition of conditions or human rights criteria as a requirement for obtaining money from the Treasury has already been put into use. Law No. 11,948/2009, by allowing the increase of the operational limits of the BNDES through the channelling of Treasury resources, forbade BNDES lending to companies in the private sector whose administrators have been convicted of sexual or moral harassment, racism, child labour, slave labour or crime against the environment.

The BNDES has its financial statements audited by external auditing firms, in addition to its own internal auditing department.

The BNDES does not fall under the concept of dependent state-owned company and therefore is not governed by the Law of Public Finance (Law No. 4,320/64). Its accounting and financial management conforms to the precepts of Brazilian Corporate Law (Law No. 6,404/76)⁶⁶.

⁶⁶ *Ibidem*.



Part II: The BNDES and Transparency

In this section you will find:

- A brief discussion of the importance of transparency in the BNDES for the concretization of fundamental rights and enhancement of Brazilian democracy;
- A detailed view of the social and environmental analysis employed in the BNDES project cycle;
- A critical analysis of the main barriers to transparency of the BNDES;
- Recommendations for improvement of the transparency standards and practices of the BNDES.

II.1. Why talk about transparency in the BNDES?

The BNDES is one of the largest development banks in the world. In 2013 its disbursement portfolio totalled more than R\$ 190.4 billion (US\$ 79 billion)⁶⁷. In comparison, in 2012 the World Bank disbursed about US\$ 19.8 billion⁶⁸, while the IDB lent US\$ 6.9 billion⁶⁹ in the same period.

The astonishing volume of BNDES disbursements in 2013 can be seen as the culmination of an economic policy strategy initiated at the end of the first term of former President Luiz Inácio Lula da Silva and intensified during the administration of President Dilma Rousseff, in which.

Brazil's largest State-owned bank increasingly became a protagonist of the development model adopted in the country. In turn, the growth curve of BNDES assets became steeper in 2008, when the Bank started to play a countercyclical role in the face of an adverse international economic environment in the immediate aftermath of the global financial crisis, when the credit markets froze after the collapse (or threat thereof) of major global financial institutions. After that turbulent period,

⁶⁷ Estado de São Paulo, "Desembolsos do BNDES crescem 22% em 2013", 4 February 2014. Available at: <http://economia.estadao.com.br/news/economy-general/disbursements-the-bndes-grow-22-in-2013,177085,0.htm>.

⁶⁸ World Bank, "Management's Discussion & Analysis and Financial Statements," 30 June 30 2013. Available at: <http://siteresources.worldbank.org/EXTANNREP2013/Resources/9304887-1377201212378/9305896-1377544753431/FinancialStatements.pdf>.

⁶⁹ Inter-American Development Bank Annual Report 2012. Available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37615138>.

the effects of the international crisis evolved to a stage of volatility in the inflows and outflows of foreign capital as a result of expansionist, heterodox economic policies launched by countries like the US and Japan. In this context the use of the BNDES as an instrument to direct resources from the National Treasury to productive projects was justified by the need to assist sectors considered strategic to the surplus of Brazil's balance of payments (such as agribusiness) and to maintain the pace of economic activity and consolidate the high employment level attained at the end of the first decade of the 2000s.⁷⁰

The need to meet the government's goals of economic growth, the international economic situation and the historical chronic deficiency of capital for long-term investments in the country were the main factors that converged so that the BNDES resumed the crucial role that it had once played in Brazilian development. At the same time, international agencies which provided a significant portion of long-term financing, such as the World Bank, suffered a decline in relevance for several reasons.

This protagonist role of the BNDES sparked the attention of political analysts, the media and civil society, which began to question the criteria of transparency adopted by the BNDES in various stages of analysis, disbursement and monitoring of projects in its portfolio. In particular, some strategies adopted by the Bank, such as the formation of national "megaconglomerates" (with their respective foreign subsidiaries) to compete at the international level, attracted criticism, especially the lack of public motivation in choosing companies and beneficiary sectors and the absence of data on the financial and social returns of the construction of these so-called "national champions".⁷¹

As a direct result of the sharp increase in the volume of disbursements in such little time, complaints of environmental damage and human rights violations caused by companies benefiting from the financial support of the BNDES became more frequent. Emblematic cases of human rights violations in projects financed by the BNDES include violations of labour rights and degrading working conditions in the Santo Antônio-Jirau Hydroelectric Power Plant (HPP); violation of the right of indigenous peoples to free, prior and informed consultation according to the procedures set by international standards in the case of the Belo Monte HPP; and various loans disbursed by the BNDES to meat producers in the Midwest region that did not track the origin of cattle to certify that they were not being raised on indigenous lands or environmental conservation areas, especially in the states of Mato Grosso and Mato Grosso do Sul.

Segments of civil society concerned with the protection of the rights of individuals and peoples affected by projects financed by the BNDES and government regulatory agencies began to demand that the Bank make public its policies and mechanisms to mitigate social and environmental impacts. It was immediately observed that the Bank's safeguards (as they are commonly called) were non-existent or at best, generic, without effective operational mechanisms, and incapable of effectively requiring companies to adopt preventive and compensatory plans for possible adverse impacts.

⁷⁰ In addition to the more "traditional" strategies for fostering technological innovation, reducing social inequalities and regional development.

⁷¹ Note that this policy was officially abandoned in 2013. The financial data of investments made, however, remain unknown. Estado de São Paulo, "BNDES abandona política de criar 'campeões nacionais'", 22 April 2013. Available at: <http://economia.estadao.com.br/noticias/economia-geral,brdes-abandona-politica-de-criar-campeoes-nacionais,151373,0.htm>.

Due to its great ability to allocate resources to sectors with activities that may carry significant social and environmental costs, the BNDES also came under questioning about the democratic character of its decision-making bodies. As a federal public enterprise under the auspices of the Ministry for Development, Industry and Foreign Trade (MDIC), the BNDES is, by statutory provision, the main instrument for implementing the investment policy of the federal government, its main objectives being support to programs, projects, works and services related to the economic and social development of Brazil.⁷² The rationale for a greater participation of parties directly and indirectly affected by BNDES operations is as follows: while on the one hand, the BNDES is a governmental financial institution with the purpose, as per the law that created it, to implement programs and projects for the economic development of the country, on the other hand, the Bank is an entity of the federal indirect administration, with almost all of its funds coming from public sources. Thus, the insulation of the Bank is incompatible with Brazilian democracy, as there is an inalienable right of citizens to monitor and influence decisions that involve the spending of public funds. Such a claim is sustained mainly on the dependence of the BNDES on the resources of the National Treasury, which between 2008 and 2014 transferred more than R\$ 400 billion to the Bank.

In 2007 a coalition of civil society organisations and movements known as Plataforma BNDES [BNDES Platform]⁷³ emerged and managed to establish a high-level dialogue with the Bank, which brought changes in the transparency of the institution. Thus emerged the Portal BNDES Transparente [Transparent BNDES Portal], in which some information on the Bank's portfolio of projects is available, such as beneficiary companies (or government agencies), loan amounts and dates. Based on the first achievements, civil society continued to pressure the Bank to disclose some information that remained confidential, such as financing contracts⁷⁴ and technical documents produced along the project cycle.⁷⁵

Yet the dialogue between the BNDES and civil society did not result in many advances beyond those listed above. Around 2010-2011, legislative changes, new investment strategies of the BNDES and mobilisation of new actors brought the issue of transparency back onto the agenda of the debate.

The first legislative change was enactment of the Freedom of Information Law (Law No. 12,257/2011), also known as the “Access Law”, which established the principle of disclosure as a rule and secrecy as the exception and inaugurated a new era in the relationship between government and citizens, in which the latter have more clear and institutionalised instruments to access information produced by public bodies. It is in this context that the mechanism of passive transparency of the BNDES is inserted. Currently the Bank has not only mechanisms of active transparency, but also a mechanism

⁷² E See Article 3 of the BNDES bylaws. Decree No. 4,418, of 11 October 2002.

⁷³ Regarding the BNDES Platform, see: <http://www.plataformabndes.org.br/site/>; Spink, Peter. The Art of Getting in the Way: Five Years of the BNDES Platform. International Budget Partnership, Study No. 13, June 2013.

⁷⁴ The BNDES argues that the loan agreements have always been available to the public in the registries where they were registered. Given the geographic coverage of the Bank, however, obtaining such contracts has always been a challenge for the communities affected, their representatives, NGOs and the press in general. Even after the advent of the Freedom of Information Law, there are difficulties in obtaining access to these contracts. Access requests for the same content by different parties may receive different responses. An example of this information disparity is the second contract of the Belo Monte HPP, which was provided to a civil society organization before the BNDES officially released it.

⁷⁵ The “project cycle” as referred to herein relates to the analysis stages of the social and environmental feasibility undertaken by the BNDES, according to the procedures laid down in the “Social and Environmental Analysis of Projects”. Financing requests made by interested companies and public entities undergo internal processes and governance rules not fully described in this policy. However, for purposes of the aim of this publication, the steps included in the scope of social and environmental analysis are sufficient for discussing the lack of transparency of the BNDES.

of passive transparency, which becomes operational through individual requests submitted based on the Freedom of Information Law, usually by civil society organizations and the press.

The second development was an increase in the international activities of the BNDES abroad, through increased disbursement for the export of goods and services of Brazilian companies to countries in Latin America and Africa, including some with which Brazil had few economic ties, such as Tanzania. Finally, and as a consequence of the second development, civil society in countries targeted by investments in Brazilian companies (especially Chile, Bolivia, Colombia, Ecuador, Argentina and Peru) organised into networks, aiming to understand the profile of the BNDES and its institutional channels and to create strategies and obtain commitments to curb human rights abuses verified in projects such as the TIPNIS highway in Bolivia, a project being undertaken by the OAS with financing from the BNDES, which threatened to expel indigenous peoples from their traditional lands.⁷⁶

As another example of articulation by civil society actors, three workshops were held in 2013 and were attended by various civil society organizations from Latin America, two of which were in Rio de Janeiro and one in Brasília. The purpose of the seminars was to discuss obstacles to greater transparency of the BNDES and possible solutions to these issues. On two occasions during these meetings, the BNDES met with representatives of civil society. In late 2013 the Bank established the “BNDES-Civil Society Forum”. At its first meeting, which had representatives of some twenty civil society organisations, it was agreed that the topic of “transparency” would be addressed in February 2014, based on leads from the organisations that were present and other organisations interested in the issue.⁷⁷

Amid all the discussion about greater transparency of the BNDES, especially in its project cycle, is the issue of banking secrecy. This has frequently been the justification invoked by the BNDES to avoid disclosure of information that is surely not protected by this constitutional guarantee. In some cases, the exceptions provided for in the Freedom of Information Law, such as national security and commercial confidentiality clauses, have prevented the disclosure of documents relating to negotiations involving Brazilian public agencies and foreign governments regarding BNDES financing for the export of goods and services of Brazilian companies, according to bilateral agreements between diplomatic bodies. All documents that relate to the Bank's financing for Brazilian companies in Cuba and Angola are classified by the MDIC as “secret”, and will only be disclosed in 2027 (if the classification is not renewed).

Because transparency is an indispensable requirement for the control and accountability of public officials, the exercise of citizenship, protection of fundamental rights, reparation for rights violations and for improving the country's democratic institutions and their partners, the issue of the BNDES' transparency is a matter of singular importance, the debate over which should bring,

⁷⁶ See: DAR et al. Casos Paradigmáticos de Investimento do BNDES na Amazônia [Paradigmatic Cases of BNDES Investments in the Amazon], 2014.

⁷⁷ The 2013 meetings resulted in the document: Lineamientos para Discusión: Implementación de una Política de Acceso a la Información para el Banco Nacional de Desarrollo Económico y Social de Brasil (BNDES) [Lines of Discussion: Implementation of a Policy for Access to Information for the Brazilian Development Bank], edited by Derecho, Ambiente y Recursos Naturales, a civil society organization based in Peru. For dialogue between the BNDES and civil society, in February 2014, the document Transparencia no BNDES [Transparency in the BNDES] was produced, which featured contributions from the entities that attended the events described above throughout 2013.

in addition to the diagnosis – the restrictive interpretation of the BNDES regarding its obligation to disclose information – the real meaning and scope of the exceptions to disclosure of information in line with the Brazilian legal framework.

The main obstacles to the transparency of the BNDES are presented below, along with some of the justifications used by the Bank to refuse access to information. To this end, this document analyses the evaluation cycle of projects financed by the BNDES as well as the arguments of banking secrecy or protection of State interests, both in its operations in Brazil and abroad. Finally, the potential access to information in the different stages of the project cycle of the BNDES will be presented.

II.2. Unravelling how the BNDES works: project evaluation cycle

As regards the BNDES' active mechanisms of transparency, the Bank currently makes most of its information available on the BNDES Transparency Portal⁷⁸ linked to its website. The portal features the social and environmental responsibility policy of the BNDES, sectoral policies, corporate ethics policy, capital markets policy, information on the Bank's program for gender equity, operational statistics of the system, guides for requesting loans in direct and indirect operations, information on the implementation of financial resources obtained from the National Treasury and information on projects approved, presented in spreadsheet format and containing the names of beneficiaries and loan amounts.

In addition to the Transparency Portal, the Bank also makes public information about its investments, investment strategies and technical and financial accounting data (financial statements, balance sheets, among others) in its annual report, as well as in some texts and news posted on its Web page. Thus institutional information such as organizational structure, members of the board of directors and executive directorship, administrative management practices and internal files can be found through the BNDES Transparency Portal's means of communication between the Bank and the external public.

In 2010 the BNDES changed its website and included new information about national investments. In April 2012 information regarding the Bank's international operations were included, in which data regarding beneficiary companies, dates of loans and the categories covered by loans are listed. Not included, however, is information regarding the amounts of disbursements, nor the contracts and social and environmental impact studies, as further explained below⁷⁹.

In regard to mechanisms that guarantee the passive transparency of the BNDES, specific information about projects, in addition to those available in the BNDES Transparency Portal, can be obtained by the access to information service (e-Sic), established based on the Freedom of Information Law. Among some of the documents that were disclosed by the BNDES by this channel are project

⁷⁸ Available at: http://www.bnDES.gov.br/SiteBNDES/bnDES/bnDES_pt/Institucional/BNDES_Transparente/

⁷⁹ Fórum de diálogo BNDES e sociedade civil: transparéncia no BNDES [BNDES dialogue forum and civil society: transparency in the BNDES]. Document prepared by civil society organizations for the dialogue forum on "Transparency and access to information". January 2014.

financing contracts, such as the Belo Monte HPP and projects financed abroad. Data relating to cross-border investments, however, are incompletely disclosed, without reference to the projects themselves, but only to the beneficiary companies.

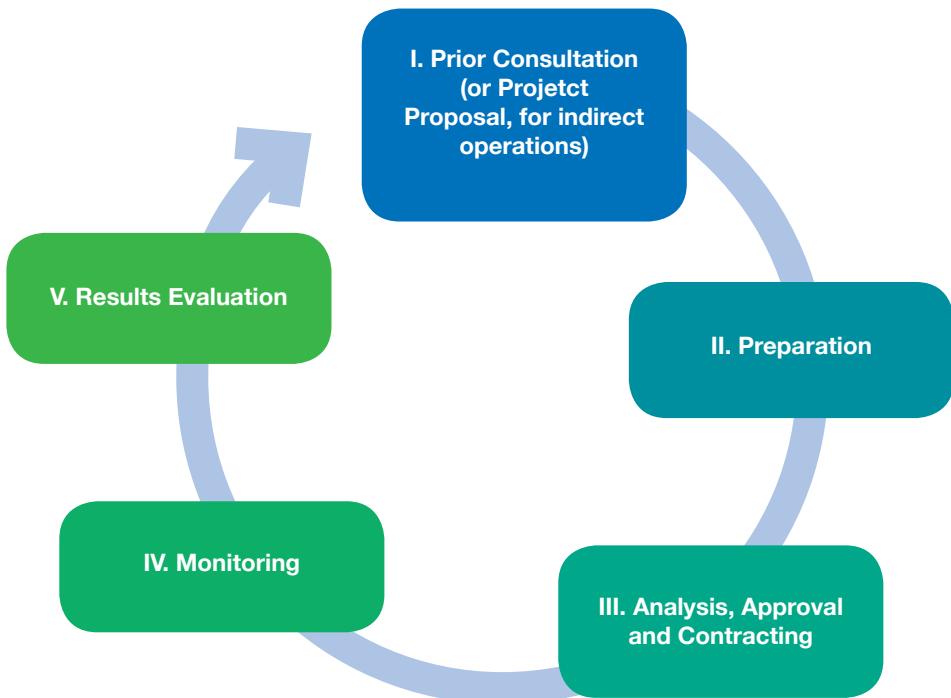
Despite the existence of active transparency practices (BNDES Transparency Portal) and passive practices (requests for access to information), in order to understand the exact degree of transparency of the BNDES and where the major gaps in information disclosure processes exist, it is necessary to first have an overview of its project evaluation cycle, know which documents the BNDES requires from beneficiary companies, as well as know what evaluation documents are produced by the Bank itself.

Information about the project cycle that we present here was systematised based on the analysis of public documents from the BNDES as well as consultations by Conectas directly with the Bank, essentially to clarify issues that were opaque given that much information is still not made publicly available.

III.2.1. Project evaluation step-by-step

The diagram below depicts the stages in the project evaluation cycle of the BNDES. The phase of Prior Consultation on Financing and the last phase of Results Evaluation, which are not officially among the stages disclosed by the Bank on the project cycle, are included in the diagram. These were added to provide a better understanding of all the documents produced and received by the BNDES, and every instance in which a policy of transparency/information disclosure may be demanded.

DIAGRAM 1: Social and environmental analysis in BNDES projects



Source: Conectas.

During the phase of Prior Consultation or Forwarding Phase (I), the company seeking a loan sends the formal request for financing along with the required documentation, as per the specific guidelines for each credit line offered by the BNDES (e.g. FINEM, FINAME, EXLM, the Amazon Fund, equity, among others).

According to the “Guidelines for Preparation of Proposal for Indirect Non-Automatic Operation”⁸⁰, which also applies to direct operations, the intermediary financial institution must submit to the BNDES documentation with six types of information, including: 1) summary of the operation; 2) information pertaining to the corporate governance and organizational structure of the company; 3) specific data on the project; 4) information about the market in which the prospective company operates; 5) economic-financial information such as audited financial statements; 6) legal information, including cadastral analysis, certificates and relevant documentation (including, but not limited to, licenses and social and environmental permits).

The candidate company must also complete a questionnaire on its social and environmental practices, which seeks to clarify issues such as:

(A) Management and social aspects of the company: internal aspects of the corporate management of the company, such as treatment of its employees,

⁸⁰ BNDES, “Roteiro para a Elaboração de Proposta de Operação Indireta Não Automática [Guidelines for Preparation of Proposal for Indirect Non-Automatic Operation]”. Available at: http://www.bnDES.gov.br/SiteBNDES/bnDES_pt/Ferramentas_e_Normas/Roteiros_e_Manuais/.

management of social programs, practices required of suppliers, including respect for human rights, volunteering programs, work environment, among others;

(B)Social aspects linked to the external context where the company operates: the company's relationship with the surrounding community and its activities in what the BNDES calls "region of influence" or "scope of activities". The financial institution must question, among other things, if the company has a recruitment and training policy for local residents; if it performs social investments/actions and monitors their results; if it understands the social reality where it is inserted; if it has established a focus for social investments; if it has a formal channel of communication with the community; if it has partnerships with NGOs and public institutions for the realisation of social investments or actions; and if it has partnerships with universities;

(C)Social impacts of the economic project: If the company has means to identify the positive and negative social impacts of the project in its area of work; if it has envisioned social investments as part of the project; if it has envisioned a migratory flow, displacement of populations or expropriations; if the company visualises impacts in the areas of housing, health, education and welfare involved in the municipalities; if there are plans for the future use of the job site and contracting of suppliers, services and local labour; if there is any specific planning for hiring temporary workers from local communities, and the development of leisure activities, health and education, among others.

In the **Preparation (II)** phase, the Bank carries out, on the basis of the assessment of social and environmental aspects of the beneficiaries, the "Environmental Category Classification" of the enterprise.

Table 2: Classification of social and environmental risks

| CLASSIFICATION | CRITERIA |
|----------------|--|
| A | Activities intrinsically related to risks of significant environmental impact, in which the licensing requires impact studies, preventive measures and mitigating actions. |
| B | Activities involving lighter or local environmental impacts, and that require evaluation and specific measures. |
| C | Activity that does not, in principle, involve significant environmental risk. |

Source: Social and Environmental Policy of the BNDES.

In addition, the following activities are performed:

- Preliminary assessment of the main social and environmental aspects of the beneficiaries and enterprises, as per the guidelines for prior consultation.
- Cadastral research of the beneficiary, including verification of documents regarding work analogous to slavery (consultation of data from the Ministry of Labour and Employment) and environmental crimes.
- Development of possible social and environmental recommendations for the analysis and monitoring phases of the project.

The environmental category established for the enterprise determines, in turn, distinct procedures in the **Analysis, Approval and Contracting Phase (III)** and **Follow-Up/Monitoring (IV)** phases of the project.

In the **Analysis, Approval and Contracting Phase (III)**, the Bank claims to perform an “evaluation of the recipient on its regularity with environmental agencies requirements, pending legal matters and effectiveness of environmental performance”. According to the Bank, in this phase, the operational departments makes use of instruments and tools, such as social and environmental guides and sectoral guidelines (livestock, sugar and alcohol, thermoelectricity and fossil fuels), which offer specific guidance on social and environmental issues related to specific sectors. If necessary, the Bank states that the operational departments can rely on the support of technical teams dedicated to the social or environmental theme that deserves further analysis.

According to the BNDES, this phase comprises both the “evaluation of enterprises in terms of main social and environmental impacts, including on its surroundings, its correspondence, if applicable, with preventive and mitigating actions proposed in the environmental licensing”, as well as the “inclusion of possible social and/or environmental conditions established based on the analysis undertaken (by the client and enterprise), in addition to the requirements laid down in law, if applicable”.

As a tool to support the analysis of operations, the BNDES takes into account the result of the social and environmental capital evaluation, in the scope of the Company Evaluation Methodology (CEM), the objective of which is to evaluate the intangible assets of companies. Eventually, social and environmental indicators for monitoring and evaluation of the loan beneficiary and the project can also be established.

In addition, during the analysis, approval and contracting phases, tasks are performed such as evaluation of the beneficiary as to its social and environmental policies, practices, management and compliance with social and environmental agencies; evaluation of the project and its social and environmental impacts; and its compliance with legal requirements such as ecological-economic

and agro-ecological zoning, and verification of the absence of criminal acts against the environment; definition of social and environmental indicators for monitoring and evaluation of the beneficiary and the project; and the possible inclusion of social and environmental loan conditions.

In the **Operations monitoring or Disbursements Phase (IV)**, the fulfilment of possible mitigating measures, obligations in terms of adjustment of conduct and contract conditions and environmental permits, if applicable, are verified. During this phase, the Bank claims to monitor compliance with the conditions established in the contract and social and environmental licenses, in addition to social and environmental indicators.

The **Results Evaluation and Post-disbursement (V)** phase is not considered by the BNDES. This phase exists in the project cycle of the China Development Bank⁸¹. In general this phase exists to assess the medium and long-term social and environmental indicators of the project and the impact it has generated in the affected community, both in economic and social terms.

II.2.2. Lost steps: lack of information on BNDES activities abroad

Other investments by the BNDES are less clear with respect to their stages, like the Bank's investments abroad. For this modality, there is no proper "project cycle", because various legal and financial arrangements can be made in this type of financial support. The analysis of social and environmental impacts for projects financed abroad, in fact, follows procedures that do not match the stages for assessing the social and environmental aspects of projects and companies financed in Brazil. Even explanation of the social and environmental safeguards and criteria applicable to the operations to support the international expansion of Brazilian companies are not publicly available; this was obtained through a questionnaire sent to the international department of the Bank⁸².

According to information provided by the BNDES, the analysis of social and environmental risks of projects outside Brazilian territory begins only in the phase of Project Analysis and Approval (III), in which the risks identified result in conditions provided with instruments appropriate for their management. The social and environmental conditions, according to the Bank, are converted into contractual terms which simultaneously condition the release of funds and function as coercion mechanisms for compliance with environmental and social obligations, to the extent that the Bank has the prerogative to suspend disbursements or cancel the contract, in case it deems that there is non-compliance with environmental and social obligations by the Brazilian company or importer.

It should be emphasised that the repertoire of contracts, bilateral agreements and documents containing business features of such international transactions, which precede this phase of analysis and approval of the transaction, extrapolates the list of documents produced by the

⁸¹ IBASE. National Development Banks. November 2013. In the press.

⁸² Questionnaire sent by Conectas Human Rights to the departments of planning and international operations of the BNDES. The answers were sent by the ombudsman of the institution on 26 September 2013.

BNDES. In most cases, the contract signed by the BNDES, either with the foreign government or the Brazilian company that will receive the funds for pre- or post-shipment, is preceded by a diplomatic agreement in which the signatory countries (Brazil and the investment recipient) formalise their intentions to carry out investment and other forms of international cooperation through the provision of financial services from the BNDES⁸³.

As an additional safeguard, the BNDES claims that “the release of funds (for export of goods and services of Brazilian companies) is subject to the presentation of an opinion prepared by a qualified legal advisor in the country where the work project is based”⁸⁴. Such an opinion should contain information that, in the view of the Bank, is satisfactory and certifies compliance with all environmental requirements of the recipient country, especially the necessary licenses and permits. In case of revocation or suspension of any government authorisation, including those relating to social and environmental laws of the country where the project is based, the contracts provide that such events can constitute causes of breach of contract and the BNDES may halt the disbursements or declare the contract terminated.

Finally, the borrowing company and the importers of Brazilian goods and services must “certify that the project that has the financial support of the BNDES complies with all applicable environmental regulations in force in the country”⁸⁵.

II.3. Barriers to transparency of BNDES operations

Once the project evaluation cycle of BNDES projects has been presented, the first thing to note is that almost all of the documents produced in the stages of the “project cycle” listed above are not made public. Moreover, the construction of policies and the design of mitigation and compensatory solutions to social and environmental impacts, which should exist according to the formal rules of the BNDES, are not preceded by public consultations with the parties that will be directly affected by the projects, even though forced displacements, deforestation and diversion of river courses, with reduced capacity for survival, may result. Likewise, the Impacts Assessment Study/Impacts Assessment Report (mandatory according to Brazilian law) for both completed projects and projects in the pipeline are not made public⁸⁶. Although such studies may be obtained from environmental agencies, best practices of development finance institutions facilitate access to such documents on the institution’s webpage, in a space dedicated to information on projects.

In concrete situations in which there was consultation by government agencies with the affected communities, these were untimely, in advanced stages of the project cycle, or did not fully meet the

⁸³ Except for documents classified as secret by Brazilian public bodies, such as those relating to negotiations between Brazil, Cuba and Angola, others are available in the International Acts System of the Ministry of Foreign Affairs (MRE). Available at: <http://dai-mre.serpro.gov.br/>.

⁸⁴ BNDES response to the questionnaire sent by Conectas Human Rights on safeguards and environmental analysis of projects abroad.

⁸⁵ BNDES response to the questionnaire sent by Conectas Human Rights on safeguards and environmental analysis of projects abroad.

⁸⁶ Fórum de diálogo BNDES e sociedade civil: transparéncia no BNDES [BNDES and civil society dialogue forum: transparency in the BNDES]. Document prepared by civil society organizations for the dialogue forum on “Transparency and access to information”. January 2014.

legal parameters set by international human rights standards and Brazilian legislation⁸⁷.

Furthermore, the information provided in foreign languages such as English and Spanish are not consistent with the information provided on the Portuguese version of the BNDES website, hindering access by communities and organizations that have an interest in obtaining such information⁸⁸.

The information submitted by companies about their internal tools for social and environmental impacts screening and management and that produced by the Bank throughout the project cycle, such as analysis reports, social and environmental reports, opinions of technical departments on potential social and environmental impacts and monitoring reports prepared in the implementation phase, have been considered information subject to banking or commercial secrecy, or information that could jeopardize diplomatic negotiations between Brazil and other countries (in the case of cross-border loans).

With respect to the passive transparency of the BNDES, by analysing requests for access to information submitted to the Bank between 2013 and 2014, civil society organizations found that banking secrecy is used as the default response to most of the requests, regardless of their nature (whether financial, environmental, etc.). Moreover, great difficulty was encountered in obtaining access to documents produced in the course of the phase of project monitoring, such as those concerning fulfilment of the contractual, social and environmental obligations of the borrower. Another important element has been the contradictory responses from the BNDES to identical requests submitted by different organisations, for example, requests for information on loan conditions and the source of funding to a given loan⁸⁹.

Denials of requests for information about BNDES operations have been based on different arguments. Using the exceptions provided for in the Freedom of Information Law, the BNDES has refused to provide different kinds of information, claiming that these are covered by banking, commercial and industrial secrecy, and that their disclosure may violate capital markets disclosure rules or threaten national security⁹⁰. In addition, denials have been grounded on the assertion that certain data cannot be made public as the gathering of the requested information would require “additional efforts of systematization”, one of the exceptions to the principle of publicity enshrined in the Freedom of Information Law. Moreover, the MDIC, as seen above, classified as “secret” documents involving

⁸⁷ The most emblematic case of prior consultation performed in a manner incompatible with the legal dictates that protect affected peoples is the Belo Monte HPP. Although carried out with the presence of government agencies, the consultations did not provide a genuine debate about the impacts of the project on the lives of the people who would be affected by it. See: Moraes, Gabriela Bueno de Almeida. Participation for what? Public hearings, discourses and the Belo Monte Dam. Yale Law School Working Paper Series, 2012. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2071429. Accessed on 3 February 2014.

Fórum de diálogo BNDES e sociedade civil: transparência no BNDES [BNDES and civil society dialogue forum: transparency in the BNDES]. Document prepared by civil society organizations for the Dialogue Forum on “Transparency and access to information”, January 2014.⁸⁸ Em resposta a uma solicitação de acesso feita por entidade da sociedade civil aos estudos de impactos ambientais dos projetos de risco em andamento, o Banco respondeu, em 23/12/2013: “Com relação aos projetos em andamento, esclarecemos que o BNDES está impedido de divulgar informações referentes às etapas prévias à contratação, em razão do sigilo bancário a que está obrigado, por força do artigo 1º da Lei Complementar nº 105, de 10.01.2001, combinado com o artigo 22 da Lei 12.527, de 18.11.2011, e com o artigo 6º, inciso I, do Decreto 7.724, de 16.05.2012”.

⁸⁸ Idem.

⁸⁹ In response to a request for information made by one civil society organisation for environmental impacts studies of projects with risk in the pipeline, the Bank responded on 23 December 2013: “With respect to projects in the pipeline, we clarify that the BNDES is prevented from disclosing information regarding the phases prior to contracting, on the grounds of the banking secrecy to which it is obliged, by virtue of Article 1 of complementary law No. 105 of 10.01.2001, combined with Article 22 of law 12,527, of 18.11.2011, and with Article 6, Subparagraph 1, of Decree 7,724, of 16.05.2012”.

⁹⁰ Federal Prosecutor's Office in the Federal District. “[MPF/DF recorre para garantir transparéncia a financiamentos do BNDES] [MPF/DF refers to ensure transparency of financing from the BNDES]”, 27 June 2013. Available at: <http://www.prdf.mpf.mp.br/impressa/27-06-2013-mpf-df-recorre-para-garantir-transparencia-a-financiamentos-do-bndes>.

negotiations between Brazil and the governments of Cuba and Angola for lines of credit via the BNDES. If kept confidential, such information will be disclosed only in 2027.

II.3.1. Bank secrecy vs. Freedom of Information Law

Given the refusal of the BNDES to make public a series of documents requested by civil society and the press by reference to the Freedom of Information Law, a clash of interpretations with respect to the scope of this law on the operations of the BNDES is growing. It is a dispute that remains unresolved and that has reached the judiciary.

By using the Freedom of Information Law, the press, government control bodies (especially the Federal Public Prosecutors) and civil society began to challenge the position of the BNDES more frequently via legal lawsuits. The results are mixed. In one lawsuit by the Public Prosecutor's Office of the Federal District, the court understood outright that the BNDES is not subject to the Freedom of Information Law because the decree that regulates its application exempts from the law State-owned companies that act in the regime of market competition (Decree No. 7,724/2012, Article 5, Par. 1)⁹¹. The ruling was reversed a few months later, and the courts changed their interpretation on the law to state that private parties engaged in business relationships with the state are subjected to the regime of public law and therefore the principle of publicity would apply to such contractual relationships. In another lawsuit filed by the newspaper Folha de São Paulo, the Regional Federal Court of the second region (TRT-2) ruled that the information in the Bank "assessment reports" do not contain "sensitive banking data or which compromises the security of the company and the State", and moreover, the court understood that the refusal of the BNDES to provide access to information not protected by banking secrecy is part of a system of "planned secrecy"⁹².

Still on this case, in 2014, in a constitutional complaint (a type of remedy) presented by the BNDES to the Supreme Court (STF) against Folha de S. Paulo⁸⁴, the vice president of that court, Justice Ricardo Lewandowski, granted an injunction in favour of the newspaper, stating that "the widespread refusal to provide the said reports, even with respect to parts that do not contain information covered by fiscal and banking secrecy, would be an offence, beyond any doubt, against the right to information and freedom of the press". In this way, the Justice granted a partial injunction to the Folha de S. Paulo, preserving the banking and fiscal data protected by secrecy until the judgement of the merits of the issue⁹³. According to the decision, the information subject to banking secrecy should be retained by the BNDES and the rest should be disclosed to the said newspaper.

⁹¹ Folha de S. Paulo, "TRF manda BNDES liberar relatórios internos sobre empréstimos feitos pela instituição [Supreme Court demands BNDES disclose internal reports on loans made by the institution]", 10 October 2013. Available at: <http://www1.folha.uol.com.br/poder/2013/10/1354375-justica-manda-bndes-liberar-documentos.shtml>.

⁹² Federal Supreme Court "BNDES questiona decisão sobre acesso a relatórios de análise de crédito [BNDES questions ruling on access to credit analysis reports]". Available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=257920&caixaBusca=N>.

⁹³ Federal Supreme Court. "Ministro Ricardo Lewandowski garante acesso da Folha a relatórios do BNDES [Judge Ricardo Lewandowski ensures access by Folha to BNDES reports]". Available at: <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=261147>. As regards material published by the newspaper o Estado de São Paulo, titled "Senado aprova aporte de R\$ 30 bilhões do Tesouro no BNDES [Senate approves contribution of R\$ 30 billion from Treasury to the BNDES]", of 28 May 2014. Available at: <<http://economia.estadao.com.br/noticias/geral/senado-aprova-aporte-de-r-30-bi-do-tesouro-no-bndes,186306e>>.

Underpinning these conflicts lies a conflict between the reach of the Freedom of Information Law and the protection of banking secrecy.

The BNDES is a federal public enterprise functionally linked to the MDIC. Despite being a public bank, the BNDES is regulated by the Central Bank and is subject to the same laws that apply to the rest of the financial sector in Brazil (at least the banks). Thus the Bank must keep confidential the information acquired through its provision of services, as per Complementary Law No. 105/2001; however, this legal obligation could also be weighted, in certain cases, against the right of access to information.

In the view of the Federal Supreme Court, banking secrecy is a constitutional guarantee derived from rights to intimacy, privacy and confidentiality of data. On the other hand, Article 37 of the Constitution establishes public information as one of the principles of government and this principle was strengthened with the enactment of the Freedom of Information Law No. 12,527/2011.

Thus when a conflict exists between those constitutional principles, it is possible that banking secrecy (or fiscal, commercial and industrial) be restricted or repealed, as in cases where society wants to exert control over the use of public funds through access to documents relating to the operations of the BNDES.

It is notable that between 2007 and 2014, the National Treasury contributed more than R\$ 400 billion to the Bank⁹⁴. These values were injected into the BNDES in addition to its traditional funding sources: resources from the FAT and its own reinvested profits. For handling public funds, the BNDES is subject to the general principle of “publicity”, pursuant to Article 37 of the Constitution.

In some cases the BNDES justifies the denial of requests for access to information on the grounds of Paragraph 1 of Article 5 of the decree that regulated the Freedom of Information Law (Decree No. 7,724/2012). This device exempts from the scope of the law “state-owned companies, joint stock companies and other enterprises controlled by the Union that act in a competitive regime, subject to the provisions of Art. 173 of the Constitution”. In these cases, the Brazilian securities and exchange commission standards relating to the disclosure of information by agents of the capital markets would prevail.

However, exemption from the general rule of publicity as per the Access Law to public entities that operate in the capital markets is a clear example of misuse by the BNDES of exceptions to the principle of disclosure, undermining its mission. Only the information that can effectively affect the value of securities or jeopardize the interests of minority shareholders should be subject to the confidentiality rules of the Brazilian securities and exchange commission. In this sense it is necessary that the information under control of the BNDES (or its subsidiary for the capital markets, BNDES Participações S.A.) meet the requirement of “materiality”, that is, that the information is effectively

⁹⁴ Reinvested profits are not technically a source of capture, but the Bank's capital base. In any event, they are values derived from the operational return of the Bank, which has the nature of public funds, since its other sources of funding originate, for the most part, from domestic public sources.

capable of causing an oscillation in the values of securities issued by companies that are clients of the Bank. Nonetheless, even that information should be disclosed to the market as, according to the CVM (the Brazilian securities regulator) rules, material information must be disclosed to allow for an evaluation by investors and analysts on the attractiveness of the investment.

II.3.2. The smoke around international investments

With respect to the loans for the export of goods and services of Brazilian companies, the first barrier to transparency is the project evaluation cycle, which is not made publicly available by the BNDES and was only obtained after direct request from the Bank.

The Bank also falls short of disclosing the list of projects financed outside Brazilian territory. Civil society entities and the press have confirmed this through systematisations of information available in newspaper articles, requests to the BNDES for access to information and pressure on local governments. The incongruence of information and randomness of responses from the BNDES to requests for information about its support for internationalisation of Brazilian companies demonstrate that, in this sphere, the Bank is still in the early stages of transparency and needs to make significant steps forward, including in what relates to the language in which the information shall be disclosed.

In addition, the very manner by which the processes of the BNDES' international financial support are conducted creates barriers to a greater access to information. The communities affected by the projects are deprived of access to basic information, even in cases where their impacts are envisioned with a certain degree of certainty, such as forced displacements, restrictions on the use of their lands and drastic changes to ecosystems by diversion of rivers and flooding, among other rights violations.

With respect to the classification of some international operations of the BNDES as "secret", as in the case of Cuba and Angola, it is important to clarify that the Freedom of Information Law allows that information essential to the security of society or the State remain under secrecy if the disclosure may harm or endanger the continuance of negotiations or affect the international relations of Brazil or has been provided in secrecy by other States and international organizations, among other hypothetical situations listed in Article 23 of the Law. The Access Law also provides that public agencies can classify the information in accordance with varying degrees of secrecy and safeguarding of industrial secrets resulting from the direct exploitation of economic activity by the State, or by an individual or private entity that has any link with the government.

However, as far as international operations are concerned, secrecy remains the rule, not the exception. Criteria are still needed for the disclosure of information on BNDES financing to Brazilian companies abroad, but the general principle is that the Brazilian standards that protect the publicity and access to information apply also to the international activities of the BNDES.

II.4. How to create a policy of transparency in the BNDES? Access to information on the project cycle.

The BNDES should make additional efforts towards enhancing its accountability to society and providing more information on its activities, as well as sharing with the public part of its expertise on project analysis, development of markets and economic and industrial policy formulation.

This would require that the Bank review its culture of transparency and disclose documents that are evidently safeguarded by the laws that protect banking, commercial and industrial secrecy. Therefore transparency is one of the priority items on the agenda, and only by gaining access to the information produced by the Bank can feasible, effective and lasting solutions be proposed.

The box below provides examples of documents that should be disclosed by the BNDES in order to advance its transparency. These recommendations were made by civil society organizations and shared with the Bank on the occasion of the 1st work meeting of the BNDES - Civil Society Dialogue Forum in February 2014.

Box 4: Recommendations to enhance transparency of the BNDES

Among the documents that should be regularly disclosed by the BNDES, the following are highlighted:

- Analysis and preparation operations;
- Review, approval and contracting (including “assessment reports” addressing issues of feasibility and risks, decisions of the directorship about the approval or not of projects and loan agreements), documents related to the approval of investment instruments, environmental and social assessments of projects and monitoring procedures and mechanisms, social and environmental monitoring and audits conducted by the Bank, and its investment programs.

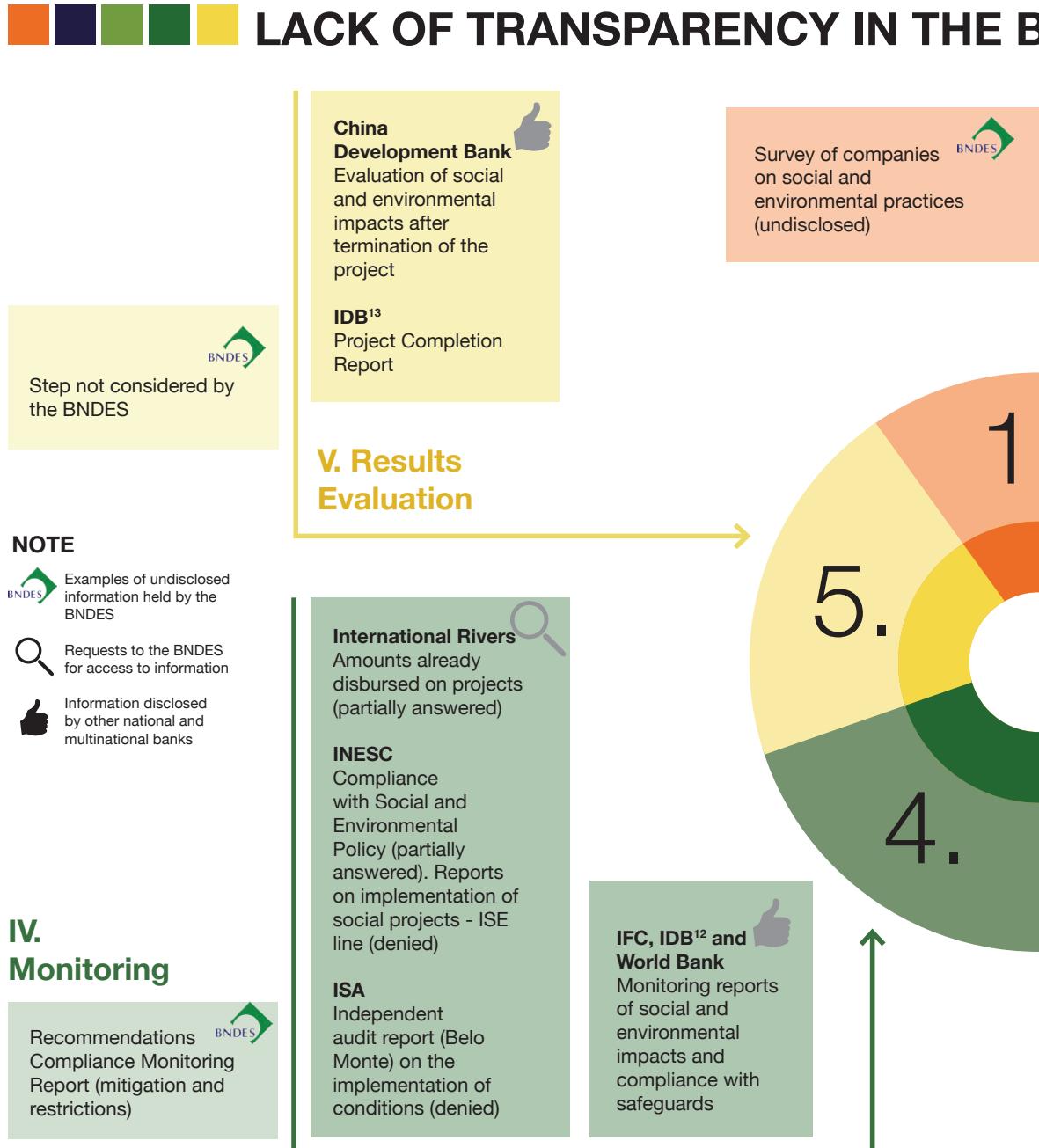
Other documents that should be disclosed about the project cycle without being exhaustive are:

- Decision-making process for approving projects (e.g. assessment report, loan agreements, etc.);
- Information about the financial viability of projects (analysis of environmental, social and economic risks of investment projects);

- Information about the environmental and social impacts of projects financed by the Bank (reports from internal or external evaluations);
- Form of monitoring of companies and projects financed by the Bank (semi-annual monitoring of the Bank and/or by third parties and information sent by the client to the Bank).

The following diagram provides an overview of the BNDES project cycle and the documents to which society does not have access, in contrast to multilateral banks, which disclose this information.

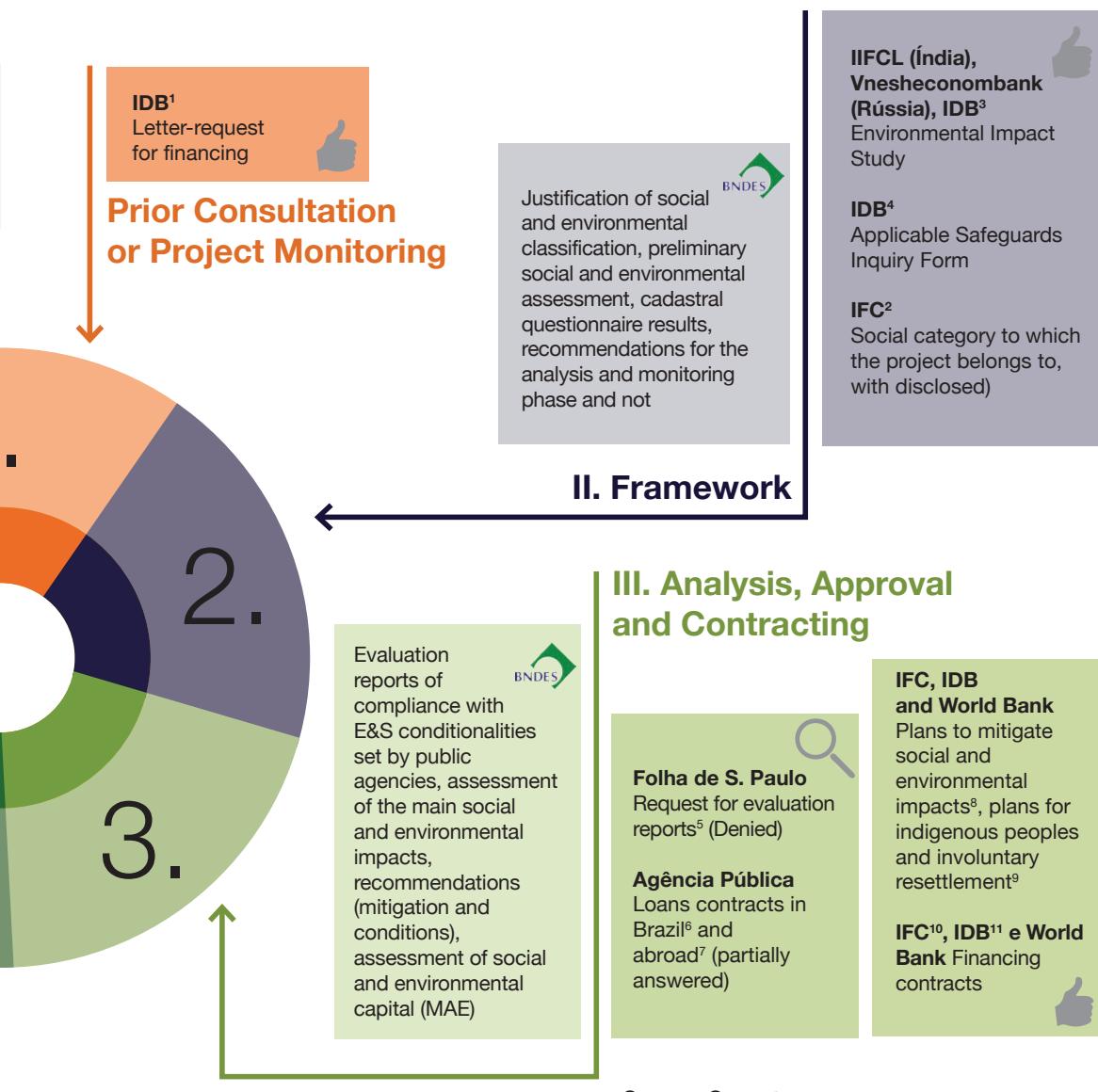
Diagram 2: Lack of transparency in the BNDES project cycle



*Notes from Diagram 2:

- [1] Sample letter of request for funding: Inter-American Development Bank. Certification (Linking Climate Change Mitigation to Community Forest Management in Amapá). Available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38210734>.
- [2] Example of social/corporate classification of project: International Finance Corporation Environmental & Social Review Summary (USJ). Available in: <https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcdba85257a8b0075079d/8887c3373f70f9ef852576ba000e2ba5?opendocument>. Or even: International Finance Corporation Environmental & Social Review Summary (ERSA Energias). Available at: <https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/78e3b305216fcdba852576ba000e2dd?opendocument>.
- Example of environmental impact study: Inter-American Development Bank. Project Description (BR-L1296: Mario Covas Beltway Project - Northern Section). Available at: http://www.iadb.org/en/projects/project-description-title_1303.html?id=BR-L1296.
- [4] Sample safeguard form: Inter-American Development Bank. Certification (Linking Climate Change Mitigation to Community Forest Management in Amapá). Available at: <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38210734>.
- [5] Example of request for access to information denied by the BNDES, with a lawsuit: Folha de S. Paulo, "TRF manda BNDES liberar relatórios internos sobre empréstimos feitos pela instituição [Supreme Court demands BNDES to release internal reports on loans made by the institution]", 10 October 2013. Available at: <http://www1.folha.uol.com.br/poder/2013/10/1354375-justica-manda-bnedes-liberar-documentos.shtml>.

BNDES PROJECT CYCLE



Source: Conectas

[6] Example of request for access to information granted by the BNDES: Agência Pública, “A Amazônia que o BNDES financia”, 5 December 2013. Available at: <http://www.apublica.org/2013/12/amazonia-bndes-financial/>. As well, Agência Pública, “Novos contratos do BNDES tornados públicos”, 16 January 2014. Available at: <http://www.apublica.org/2014/01/novos-contratos-bndes-tornados-publicos/>.

[7] Sample of confidential documents of the BNDES: Agência Pública, “Dois repórteres na pista dos bilhões do BNDES”, 28 November 2013. Available at: <http://www.apublica.org/2013/11/dois-reporteres-na-pista-dos-bilhoes-bndes/>.

[8] Examples of mitigation plans: Inter-American Development Bank, project profile (II Fortaleza Urban Transport Program) Available at: <http://idbdocs.idb.org/wsdocs/getdocument.aspx?docnum=38313962>. As well, International Finance Corporation. Available at: [https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/08887C3373F70F9EF852576BA0010E2BA5/\\$File/ESAP%20-%20Final%20Version%20-28MAR2008.pdf](https://ifcndd.ifc.org/ifcext/spiwebsite1.nsf/08887C3373F70F9EF852576BA0010E2BA5/$File/ESAP%20-%20Final%20Version%20-28MAR2008.pdf) [9] Example of resettlement plan: Consórcio Cobrap/ Appe to the Inter-American Development Bank, and Master Plan for Resettlement and Compensation (Mário Covas Beltway Northern Section Project). Available at: <http://www.iadb.org/projectDocument.cfm?id=37419115>.

[10] Example of loan agreement: International Finance Corporation. Environmental & Social Review Summary (Odebrecht Surety). Available at: <http://www.iadb.org/projectDocument.cfm?id=36379930>.

[11] Example of loan agreement: Guarantee Agreement between the Federative Republic of Brazil and the Inter-American Development Bank - Loan to State of São Paulo (Mário Covas Beltway Project - Northern Section). Available at: <http://www.iadb.org/projectDocument.cfm?id=36379930>. [12] Example of monitoring report of impacts and safeguards compliance: Inter-American Development Bank. Report on environmental and social management of the program (Mário Covas Beltway Project - Northern Section). Available at: <http://www.iadb.org/projectDocument.cfm?id=36314189>.

[13] Sample project completion report: Inter-American Development Bank. Project completion report (State of Santa Catarina Highway Project-Phase V). Available at: <http://idbdocs.idb.org/wsdocs/getdocument.aspx?docnum=38176370>.

[14] Example of request for access to information denied by the BNDES, with a lawsuit: Federal Prosecutor's Office in the Federal District, “MPF/DF recorre para garantir transparéncia a financiamentos do BNDES”, 27 June 2013. Available at: <http://www.prdf.mpf.mp.br/imprensa/27-06-2013-mpf-df-recorre-para-garantir-transparencia-a-financiamentos-do-bndes>.



Part III: The BNDES Social and Environmental Responsibility Policy

Part III covers the following topics:

- A brief background and overview of the development of guidelines of the BNDES Social and Environmental Responsibility Policy;
- An analysis of the strengths and weaknesses of existing social, environmental, operational and contractual safeguards of the BNDES;
- Proposals for improving safeguard policies and operational mechanisms for the prevention of social and environmental impacts of projects financed by the BNDES.

III.1. The BNDES Social and Environmental Responsibility Policy

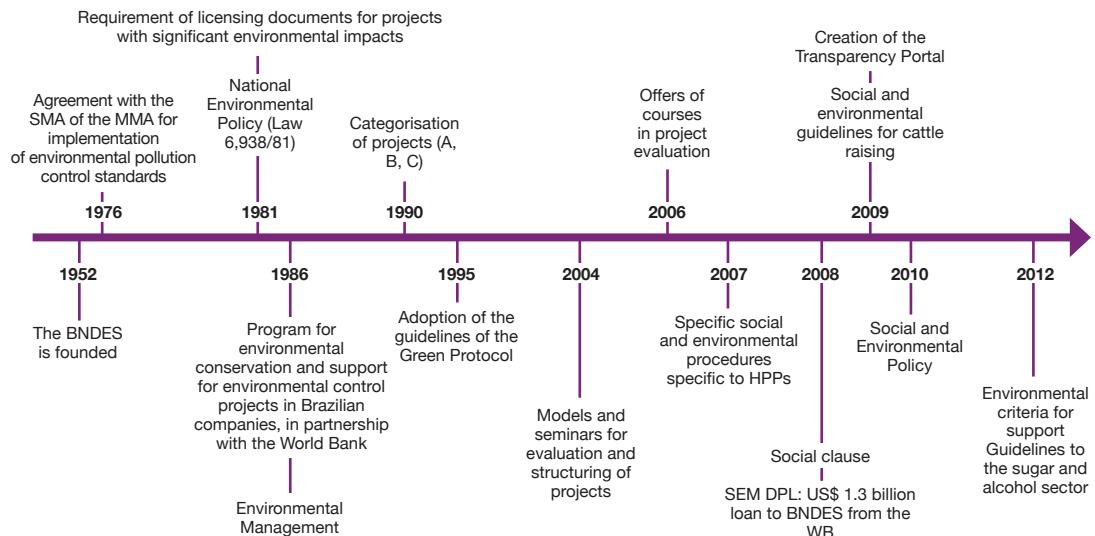
The internalisation of environmental criteria for concession of financing by the BNDES dates back to the 1970s⁹⁵, but it was only in 2010 that the Bank developed a Social and Environmental Responsibility Policy that included a social and environmental analysis of beneficiaries and projects as an instrument for the implementation of social and environmental responsibility. The creation of this policy was designed as part of the terms of a loan of US\$ 1.3 billion to the BNDES by the World Bank, under the scope of the Sustainable Environmental Management Development Policy Loan (SEM DPL) to Brazil⁹⁶.

According to the BNDES, its Social and Environmental Responsibility Policy directs its activities to promote sustainability. According to this policy, social and environmental responsibility aims to “value and ensure the integration of social and environmental dimensions into its strategy, policies, practices and procedures, in all activities and relationships with its various stakeholders”.

⁹⁵ In 1976, the BNDES signed an agreement with the Secretary of the Environment of the Ministry of Environment, with the objective of implementing regulations for industrial pollution. In 1986 the BNDES partnered with the World Bank to exchange experiences, resulting in the Program for Conservation of the Environment and support for environmental control projects in Brazilian companies. For a history of the social and environmental issues at the BNDES, cf. Conceição, Maria Zilda da. Bancos e Responsabilidade Socioambiental no Financiamento de Projetos de Usinas Hidrelétricas no Brasil - Um Estudo de Casos de 1981 a 2009 [Banks and social and environmental responsibility in the financing of hydropower plant projects in Brazil – A case study from 1981 to 2009]. Doctoral thesis. Centre for Sustainable Development, University of Brasília, 2010.

⁹⁶ Pinto, João Roberto Lopes (org.), Ambientalização dos Bancos e Financeirização da Natureza: um debate sobre a política ambiental do BNDES e a responsabilização das Instituições Financeiras [Environmentalisation of banks and Financialisation of nature: a debate on the environmental policy of the BNDES and accountability of financial institutions]. Brasilia: Rede Brasil sobre Instituições Financeiras Multilaterais, 2012

Diagram 3: Timeline of social and environmental issues in the BNDES



Source: Conectas.

The BNDES Social and Environmental Responsibility Policy has ten guidelines related to the strategic and operational performance of the Bank, its relationship with stakeholders and its role in inducing and promoting sustainability. Among them are:

- Strengthen public policies associated with sustainability and social and environmental responsibility;
- Strengthen the culture of social and environmental responsibility in the institution's planning, management and operational processes;
- Induce and recognise best practices of social and environmental responsibility in the Bank's suppliers, customers, accredited financial institutions and other partners, contributing to the advancement of sustainability in Brazilian society;
- Permanently develop and refine methodologies and other instruments for monitoring and evaluation of social and environmental impacts and results generated by the Bank, and the activities it finances;
- Develop partnerships and share experiences with other organizations in order to promote social and environmental responsibility and strengthen transparency, dialogue among stakeholders and citizen participation in public administration;
- Adopt policies towards employees and their personal and professional development, with an emphasis on social and environmental commitment and respect for human rights.

According to the BNDES, in the operational sphere these guidelines and principles are translated in the form of a social and environmental policy which details procedures to identify and deal with the social and environmental aspects and impacts of projects funded, in direct and indirect non-automatic ways and in the various stages of the process of financial support.

Box 5: Sectoral and specific social and environmental criteria

One of the initiatives that the BNDES pledged to pursue with the institution of its Social and Environmental Responsibility Policy was the creation of specific resolutions, policies and social and environmental guidelines for different sectors to guide the Bank's staff during the project evaluation stage.

Some of these sectoral policies were developed following complaints by civil society organisations, such as the report by the NGO Repórter Brasil⁹⁷ on the invasion of indigenous lands for planting sugarcane for the production of biofuels. Other policies were developed in response to legislative changes: for example, the requirement to track the production chain of Brazilian cattle.

Three sectors have specific guidelines and/or social and environmental criteria: (i) cattle farming/meatpacking; (ii) sugar and alcohol; and (iii) electrical power generation.

Social and environmental guidelines for cattle farming

Guidelines for financing and equity participation by the BNDES in companies that engage in cattle farming/meatpacking were established in 2009⁹⁸. This initiative is a consolidation of social and environmental criteria for the entire production chain for breeding and slaughtering cattle, which began with the establishment in 2008 of social and environmental restrictions on support for meatpackers through shareholding, which required: (i) the formation of a database of suppliers with social and environmental criteria; (ii) implementation of social and environmental certifications; and (iii) the improvement of social and environmental performance indicators.

The social and environmental guidelines for the production chain of cattle stipulated that the company applying for BNDES financing, or that had already obtained financial support, must keep a record of direct suppliers and a system with procedures for the purchase of cattle. For example, direct suppliers cannot be listed in the registry of employers caught exploiting workers in conditions analogous to slavery, nor have been found guilty of violation

⁹⁷ Repórter Brasil. O BNDES e sua Política Socioambiental: uma crítica sob a perspectiva da sociedade civil organizada (The BNDES and its social and environmental policy: a critique from the perspective of organised civil society). Repórter Brasil, February 2011.

⁹⁸ BNDES. Social and environmental guidelines for cattle-raising. Available at: http://www.bnDES.gov.br/SiteBNDES/bnDES/bnDES_en/Institucional/Social_and_Environmental_Responsibility/environmental_guidelines_cattle_raising.html

of labour laws or discrimination of race or gender, child or slave labour, or invasion of indigenous lands. The companies are also required to adhere to the tracking system of the cattle production chain and to verify the regularity of rural land properties involved, as well as prepare a plan to obtain environmental certificates and develop the chain of suppliers.

Compliance with the cattle sector policy guidelines must be attested to by an independent audit every six months, according to criteria accepted by the BNDES.

Guidelines for support for the sugar and alcohol sector

Established in 2012, the guidelines and environmental criteria for the BNDES' support for the sugar and alcohol sector require the recipient company to declare that the planting, renovation and financing of sugarcane occur entirely in permitted areas and to maintain an updated database of all properties owned and leased.

For agroindustrial support the recipient companies have to declare that the installation or expansion of the distillery, as well as the production of sugarcane, occur in permitted areas and submit updated records of suppliers and all owned or leased properties.

Social and environmental criteria for the electrical power generation sector

Social and environmental criteria for thermoelectric power generation from coal, oil or diesel fuel and natural gas establish technological and environmental performance standards for companies interested in obtaining financing from the BNDES, including control of air pollutant emissions, prior licensing from the competent environmental authority, studies on the restriction of supply to local populations and an offset plan for greenhouse gas emissions.

III.2. Social and environmental analysis in the BNDES project cycle

The project cycle begins when a company formally submits its request for financing to the BNDES or an intermediary financial agent. The project cycle can be understood as the series of steps from delivery of the proposal for financial support to the payment of the last instalment by the borrower and evaluation of the results of the project.

The various phases of the project cycle in financial institutions aim to evaluate all the risks and opportunities of the beneficiary and project being financed. Throughout the cycle the Bank verifies the customer's ability to pay through analysis of accounting and financial information (cash flow, level of indebtedness and social capital, among others), the economic viability of the project and the presence of other criteria for granting credit in accordance with the policies of the institution or those imposed by law. Among these criteria are project sustainability and the social and environmental practices of the beneficiary company, which began to be considered in the

decision-making process for financing by financial institutions in large part due to the mobilization of civil society against environmental degradation and violation of human rights caused by projects financed by internationally active banks in developing countries.

The assessment of social and environmental aspects inherent to the client and project is referred to by the BNDES as the “social and environmental analysis of projects”, which was dealt with in detail in Part II, about the transparency of the BNDES.

III.3. Critical analysis: the BNDES Social and Environmental Responsibility Policy and protection of human rights

One of the purposes of the BNDES Social and Environmental Responsibility Policy is to determine the social and environmental criteria to be considered by the Bank in the stages preceding the signing of financing contracts, and in the phases of project execution. In these phases the Bank carries out social and environmental risk assessments, and imposes conditions for the provision of financial support, in addition to monitoring the impacts of the projects.

Despite the existence of the Social and Environmental Responsibility Policy and internal mechanisms for evaluation and measurement of social and environmental impacts, investigations conducted by non-governmental organizations and the Federal Public Ministry⁹⁹ have identified social and environmental damages and human rights abuses within the scope of projects funded directly or indirectly by the BNDES.

Among the examples of human rights violations that these cases have evidenced are degrading work conditions at the construction site of the Santo Antônio and Jirau dams for the Madeira River hydropower plant complex¹⁰⁰, the lack of adequate free, prior and informed consultation among the indigenous peoples affected by the construction of the Belo Monte hydroelectric plant¹⁰¹ and financing of meatpackers that buy cattle from farms accused of hiring labour in conditions analogous to slavery in the Brazilian Cerrado.¹⁰²

Analyses of the BNDES Social and Environmental Responsibility Policy and the instruments that the Bank uses for its implementation show that, at least in formal contractual and operational policies, the Bank seeks to protect some fundamental rights throughout the project cycle.

Labour rights, especially the right to non-discrimination by race or gender, the prohibition of working conditions analogous to slavery and child labour, as well as the rights of children, rights of persons with disabilities and environmental rights, are explicitly listed in the operational policies of the Bank and in clauses of its financing contracts.

⁹⁹ Please refer to cases cited in the Introduction.

¹⁰⁰ See: Plataforma Dhesca Brasil (2011).

¹⁰¹ See “Guia dos Bancos Responsáveis” [A Guide to Responsible Banks], by the Instituto Brasileiro de Defesa do Consumidor and Bueno (2012).

¹⁰² See Repórter Brasil (2010).

Therefore it should be pointed out that although the BNDES does not have a stand-alone policy on human rights, human rights criteria are formally present in its analysis of projects and are converted into legal obligations, and contractual mechanisms are used as a tool of enforcement. The project analysis tools, in turn, require companies to provide detailed information about their social and environmental practices, especially the social questionnaires used in direct and indirect non-automatic operations. The Bank also adopts methodologies for the evaluation of companies' corporate social responsibility and conditions based on project risks and analysis of the beneficiary company's social responsibility.

Considering the set of tools that the BNDES has to prevent and mitigate social and environmental impacts, one question inevitably arises: what are the possible shortcomings and gaps in the social and environmental impact assessment tools of the BNDES that allow companies and projects financed by the Bank to violate the human rights of individuals and communities?

1. Lack of independent assessment: Although the BNDES has various instruments for social and environmental analysis of projects and to assess the corporate social responsibility of companies, little is known about the real effectiveness of these instruments in practice. There are no independent evaluations of the procedures used by the BNDES to ensure that the immense amount of information delivered by beneficiaries for the approval of projects translates into effectively fulfilled routines and operational processes, especially during the implementation phase.

2. Lack of transparency: The lack of transparency of the social and environmental impact reports produced by the technical departments of the Bank, which support the decisions of the credit approval committees, makes it impossible for society to evaluate the BNDES' real level of concern with social and environmental issues beyond what is written in its internal policies. The BNDES does not disclose the areas of expertise of those responsible for the social and environmental analysis of projects nor provide information on the size and training of staff responsible for monitoring projects in their implementation phase. It is known however that the BNDES has a small number of staff (around 2,500 employees) and in indirect operations, project monitoring is the primary responsibility of the intermediary financial institution that intermediates resources from the BNDES to the recipient.

The social and environmental analysis of projects conducted by the BNDES is among the steps of the project cycle for which the format and content remain little known by society. For example, evaluations of the technical departments and content of decisions of the deliberative bodies of the internal structure of the Bank are not made public, and until recently, the flow that a project should follow to be approved in accordance with internal governance rules was not disclosed. In its 2012 Annual Report, the BNDES announced for the first time its internal procedures for the approval of an application for financial support; however, it was unclear which documents are produced during the process, from receipt of

the request for financing to disbursement of the approved loans.

3. Lack of adaptation to human rights commitments: The social and environmental analysis of projects, though a widely used tool for evaluating project impacts on social and environmental rights, is not able to adequately measure impacts on human rights. The evaluation of human rights impacts requires the use of compliance tools consistent with the human rights recognised in domestic law and international standards, and that project governance is able to act quickly in the event of a human rights abuse, under penalty of contract revision.

Social and environmental analysis based on **corporate social responsibility (CSR)**, a method of evaluating social and environmental impacts used by the BNDES, can even conflict with the normative content of fundamental rights by making use of corporate or industry sector codes of conduct that are at variance with laws and international human rights treaties.

The lack of tools for managing impacts on human rights becomes clear through examination of the governance and policies of the BNDES. **Rights that are constantly under threat in complex projects** (e.g., energy infrastructure and biofuels production), such **as the rights of indigenous peoples, are completely ignored in the operational policies of the Bank**. Many other economic, social and cultural rights recognised in the Constitution – such as the right to decent housing and health and nutrition – also do not find echo in the BNDES' tools for social and environmental analysis of projects, despite the potential impacts of the projects on the livelihoods of communities, especially in cases where there is displacement of populations, changes to ecosystems, changes in the flow of rivers, flooding of large areas and massive migration of large numbers of workers to a sparsely inhabited region, without building adequate urban infrastructure, and other cases that emerge during implementation of these types of projects.

Corporate Social Investment (CSI), a mechanism that the BNDES supports and that is related to the Bank's approach to the areas surrounding its projects, should not be a replacement for assessments of potential impacts on human rights. Several experiences demonstrate that companies can spend hefty resources on building a social infrastructure to offset impacts from their activities, such as schools and housing, without these initiatives being consistent with the social and legal criteria that ensure a minimum level of respect for fundamental rights. Social conflicts can arise from the mismatch between the expectations of businesses and affected communities.

In addition, **specific social and environmental guidelines have not prevented companies financed by the BNDES from violating social and environmental laws and human rights**, especially when the financing is through indirect operations. Overall, the additional criteria established for financing in the three sectors mentioned above (electricity, cattle and biofuels) meet the minimum requirements of current legislation, given the history of environmental degradation, social impacts and human rights violations caused by such activities. Yet not one social and

environmental safeguard or additional criterion for human rights was added by the BNDES as a condition for financing projects in these three sectors.

In May 2013 the Federal Public Prosecutors of Mato Grosso, through the Federal Prosecutor's Office of that state, issued recommendations to the BNDES after discovery of the illegal sale of cattle raised on areas embargoed by IBAMA to meatpacking plants by farmers that exploit slave labour and illegally occupy indigenous lands in that state.¹⁰³ The allegations were investigated in the course of a public civil inquiry opened by the Prosecutor.

The recommendations listed at the end of this publication contain proposals to assist the BNDES to recognise its legal obligations to protect human rights, develop tools for compliance and mitigation of impacts on human rights and increase operationally complaint mechanisms.

III.4. What is the responsibility of the BNDES for human rights violations in the projects it finances?

Determination of the degree of responsibility of the BNDES for human rights abuses committed by private companies that benefit from its financing must be done on a case-by-case basis, taking into account specific factors, including:

- (i) The form of financial assistance or service provided (e.g., financing for the purchase of capital goods, guarantees for the export of goods and services, activities in the securities markets, etc.);
- (ii) When the Bank provides financial support through the provision of credit (e.g., financing contracts through the provision of credit lines), the modality of the operation and the percentage of capital of the Bank in any company formed for the purpose of absorbing the borrowed resources (e.g., special-purpose entities incorporated in project finance operations), in addition to the clauses signed between the Bank and all parties directly involved or intervening in the contractual relationship;
- (iii) In cases in which the Bank operates in the capital markets, the type of investment performed (e.g., acquisition of units of investment funds and direct investment through equity instruments by BNDESPar), the percentage of economic interest acquired and the legal capacity to exercise powers of control and appoint officers to the corporate bodies of the enterprises should be considered, in addition to voting powers at shareholder meetings;

¹⁰³ The full text of the recommendation can be found at: http://www.prmt.mpf.mp.br/pecuaria-sustentavel/Recomendacao_BNDES_Pecuaria%20Sustentavel.pdf. Accessed on 15 May 2013.

(iv) In any of the cases mentioned above, and in others not specifically listed, if the impacts on human rights were caused, exacerbated or increased by non-compliance on the part of the BNDES with the agreed contractual terms, its own social and environmental responsibility policy and any applicable regulatory, legal and constitutional provisions.

Each contractual relationship between the BNDES and private companies should be examined individually in order to establish the degree of responsibility of the Bank for possible human rights abuses and the corresponding applicable penalty. Project finance, for example, is the most widely used modality for complex infrastructure projects, which can have an adverse impact on various human rights. In such cases, the adoption of advanced tools for evaluation of impacts on human rights and specific contractual clauses are justified. In turn, the provision of guarantees for the purchase of machinery can be subject to the general conditions set forth in a human rights policy.¹⁰⁴

The nature of human rights violations can also result in direct or indirect complicity of the BNDES. Reparation for environmental damages, for example, can be more easily demanded from the BNDES due to the principle of “polluter pays”, according to which all agents located along a chain can be held liable for environmental damages, under a vicarious liability.¹⁰⁵

Yet the liability of the BNDES for other human rights abuses with legislation that is not as clear as environmental law, in terms of potentially accountable agents, requires individual analysis of previous requirements.

III.5. The BNDES Social and Environmental Responsibility Policy: changes for compliance with the UN Guiding Principles on Business and Human Rights

The current BNDES Social and Environmental Responsibility Policy and its respective instruments, outlined above, are not sufficient to ensure that the Bank will not finance projects and companies that violate human rights, because such mechanisms are not suited to the language and norms of human rights nor were they designed to allow independent external evaluations to test their effectiveness.

Overall, **society knows very little about the ways in which the BNDES converts the social and environmental analysis of projects into effective contractual clauses that can potentially stop projects accused of human rights violations.** Furthermore, little is known about the functioning, in practice, of the monitoring mechanisms employed by the Bank to ensure that companies comply with applicable legal and contractual parameters.

¹⁰⁴ Missbach, Andrea. Human Rights are Banking Risks. Geneva: Banktrack, 2007, pp. 3-4.

¹⁰⁵ Brazilian National Environmental Policy (Law No. 6,938/81), Article 14, § 1.

The BNDES is very conservative as to decisions regarding the early cancellation of contracts and termination of business relationships on the basis of complaints of violations of fundamental rights. Using a distorted interpretation of the meaning of presumption of innocence and the distribution of responsibilities among government bodies, the Bank allegedly determines the suspension or cancellation of contracts only after a judicial ruling or after the application of an administrative penalty for business abuses that are often visible and undeniable¹⁰⁶. By acting in this way, **the BNDES takes a passive stance that is incompatible with its role in financing sustainable development based on the protection of human rights**, ignores the fact that many of the social conflicts generated or exacerbated by violations of human rights in Brazil occur in the context of projects it finances and distances itself from its legal duty to require businesses to refrain from committing human rights violations.

Brazilian law and international human rights standards require that the BNDES and its administrators observe and require that borrowers in all of its investment and financing modalities also meet human rights standards. Failure to adopt preventive operational, monitoring and contractual mechanisms compatible with the multiple ways in which its business and products can negatively impact human rights constitutes a breach of the BNDES' legal duty.

The UN Guiding Principles on Business and Human Rights clarify that states should take additional measures to protect human rights potentially affected by the activities of state-owned companies such as the BNDES¹⁰⁷ (Principle No. 4).

These principles bring three operational elements that can help the BNDES to comply with its obligations to human rights law by reformulating its policies, processes, routines and systems. These are:

¹⁰⁶ See: Response from the president of the BNDES to BNDES Platform, 13 February 2009; Spink, Peter. The Art of Getting in the Way: Five Years of the BNDES Platform. International Budget Partnership, 2013.

¹⁰⁷ According to comments on Principle No. 4, "When a company is controlled by the State or when its actions can be assigned for some other reason to the State, a violation of human rights by the company may imply a violation of obligations under international law by the State itself. Moreover, the closer to the State a company is, or the more it depends upon a public body or taxpayer support, the more justified it is that the State ensure that the company respects human rights. [...] Several entities officially or unofficially linked to the State may provide support or services to business activities. Such services may be official export credit agencies, official agencies for investment insurance or guarantee, development agencies and development finance institutions. If these organizations do not explicitly consider the actual or potential negative impacts on human rights caused by the activities of the beneficiary companies, they place themselves at risk - their reputation and in financial, political and possibly legal terms - for contributing to this violation, and may worsen the human rights problems of the receiving State."

1. A public statement of commitment to human rights (Principle 16)¹⁰⁸;
2. Human rights due diligence (Principle 17)¹⁰⁹;
3. Operational-level grievance mechanisms (Principles 22 and 29)¹¹⁰;

The incorporation of these three elements can help the BNDES to prevent, mitigate and remedy the impacts on human rights resulting from the provision of its products and services. Each of these is briefly discussed below.

III.5.1. Public statement of commitment to human rights

Through a broad public consultation process, the BNDES should develop a human rights policy that will establish criteria and conditions for companies to access its credit lines or receive financial support through capital markets operations.

The BNDES Policy on Human Rights and any sectoral policies to address specific issues (e.g. indigenous peoples, involuntary displacement/resettlement, climate change, etc.) should establish the human rights criteria to be observed by private companies in order to obtain credit or financing via the capital markets. The procedures adopted through the Bank's policies, such as requirements for obtaining financial support, should adhere to the international standards and the Brazilian legislation on human rights.

¹⁰⁸ UN Guiding Principles on Business and Human Rights: "PRINCIPLE 16 - In order to incorporate their responsibility to respect human rights, companies must express their commitment to this responsibility through a policy statement that: a) is approved at the highest level of company management; b) is based on expert internal or external advice; c) establishes what the company expects in relation to human rights, its staff, its partners and other parties directly linked to its operations, products or services; d) is published and disseminated internally and externally to all staff, business partners and other stakeholders; e) is reflected in the policies and operating procedures necessary to incorporate the commitment assumed within the entire company."

¹⁰⁹ UN Guiding Principles on Business and Human Rights: "PRINCIPLE 17 - In order to identify, prevent, mitigate and repair the negative impacts of their activities on human rights, companies should conduct audits (due diligence) on human rights. This process should include an assessment of the actual and potential impact of activities on human rights, the integration of the findings and their performance in this regard; response tracking and communication of how negative consequences are faced. Audit (due diligence) on human rights: a) Should cover the negative impacts on human rights that was caused by, or was contributed to by, the company for its occurrence through its own activities, or that have a direct relationship with its operations, products or services provided by its trade relations; b) complexity will vary depending on the size of the company, the risk of serious negative consequences on human rights, and the nature and context of their operations; c) it should be a continuous process, given that the risks to human rights can change over time, depending on the development of operations and the operational context of the companies."

¹¹⁰ UN Guiding Principles on Business and Human Rights: "PRINCIPLE 22 - If companies find that they caused or contributed to adverse impacts, they should repair or contribute to reparation through legitimate means."

Box 6: Why should the BNDES have its own human rights policy?

In principle, the federal government's adoption of a code of conduct for human rights to be observed by companies that wish to receive official grants and loans could exempt the BNDES from adopting an autonomous human rights policy.

However, a public statement of commitment to human rights through the creation of a human rights policy offers a number of advantages to the Bank and all stakeholders, including:

1. Improvements in relations with civil society. An autonomous policy on human rights, developed through a participatory public consultation process, would be a significant public demonstration of the BNDES respect for human rights. The establishment of such a policy would resonate positively in constructive and honest dialogue between the Bank and civil society, especially social groups that currently see the Bank with suspicion due to abuses by companies that receive its financial assistance. A human rights policy would open avenues for obtaining “social licensing” for BNDES operations, especially with civil society in Latin America and Africa, which is already organised in networks to investigate the human rights impacts caused by BNDES-financed projects in communities in their regions;

2. Reduction in funding costs with institutional investors. Institutional investors, especially those from developed countries, increasingly value investment analysis tools that use human rights variables for decision-making on allocation of resources available for investment¹¹¹. The existence of an autonomous human rights policy is a key component of analysis of human rights impacts undertaken by these investors, so that its existence at the operational level can reduce the perception of risk and consequently lower the rate of return these institutions charge for investment in the BNDES;

3. Consistency in relation to private companies. The UN Guiding Principles for Business and Human Rights are gaining momentum in the business world. The formulation of a human rights policy is a practice that undoubtedly will gain increasing acceptance among companies that wish to stand out as leaders in respect for human rights and thus increase the financial and non-financial returns of their operations. By not having its own human rights policy, the BNDES positions itself in an uncomfortable situation, as it lacks tools to undertake a non-economic analysis of firms interested in its financial support, especially those that may establish advanced mechanisms for managing impacts on human rights. Additionally, with a human rights policy, the BNDES can clearly communicate to private companies the terms that will govern their business relationship with regard to the protection of human rights.

¹¹¹ Institute of Human Rights and Business (IHRB). Investing the Rights Way: A Guide for Investors on Business and Human Rights, 2013.

4. Fulfilment of its duty to protect human rights and minimize legal risks. By establishing its own human rights policy with criteria for granting credit and the provision of funds via the securities market, based on national and international human rights frameworks, the BNDES will avail itself of a greater legal certainty, since its legal personality under private law is distinct from that of the Brazilian state, an entity under public international law. As a legal person, the Bank can be demanded individually for reparation of human rights abuses, even if there is no corresponding liability of Brazil in international courts.

In accordance with Principle No. 16 of the UN Guiding Principles on Business and Human Rights, the BNDES policy for human rights should be approved at the highest level of the company, i.e., its board of directors, and preferably should be based on expert external advice, since the institutionalisation of human rights has still not been fully embraced by the Bank.

Once established, the BNDES policy for human rights should be reflected in all other operational policies and procedures of the Bank. Among the processes and rules that should be changed are:

a. Social and Environmental Responsibility Policy: The policy for human rights may replace the current BNDES Social and Environmental Responsibility Policy and additional policies could be established to address human rights issues, such as policies on indigenous peoples, involuntary displacement/resettlement, gender and the protection of children and adolescents;

b. Social and environmental analysis of projects: Such a mechanism should focus on the impacts of projects on human rights and become a real tool for the evaluation of human rights impacts; the risk classification (A, B or C) should be performed based on the human rights impacts of projects submitted for analysis by the Bank;

c. Guidelines for prior consultation of direct and indirect operations: Its questionnaires should be updated to incorporate tools for evaluation of human rights practices and procedures in lieu of the evaluation of corporate social responsibility of borrowers and incorporate issues that can enable mapping of all possible impacts on human rights that may be caused by companies interested in receiving financing from the BNDES;

d. Social and environmental guidelines: In their place, guidelines for the operationalisation of the human rights policy should be instituted, which will serve as a practical reference for project assessment by the technical departments of the Bank;

e. Policy for investment through equity instruments: This policy should be redesigned to include among its objectives the promotion and protection of human rights, through the creation of a portfolio of securities issued by companies with policies and practices that demonstrate unequivocal respect for human rights, adhere to the human rights code of conduct of the federal government (if it exists) and are not prohibited from receiving credit or other financial support from the government and official financing agencies due to their inclusion on a blacklist of companies with a history of human rights abuses;

f. Project execution monitoring processes: The BNDES should train and empower its technical teams responsible for assessing compliance with conditions set forth during the project design and contracting phases to ensure that the impacts on human rights can be properly measured and that mitigation plans can be adequately developed. If necessary the BNDES should refer to independent specialists to prepare tools to assess impacts on human rights.

Other policies, such as the BNDES Procurement Policy and Code of Ethics, should also be reformulated in order to implement the guidelines and requirements set forth in the human rights policy.

Box 7: The human rights policy in practice: how should the BNDES proceed in cases where the free, prior and informed consent (FPIC) of indigenous peoples must be obtained?

By conditioning its financial support upon full respect of international human rights standards and Brazilian human rights law through internal policies, the BNDES may find itself in complex situations in which non-compliance with its human rights criteria cannot be attributed solely to private companies responsible for the project, but also to action or inaction by public officials, which are the primary guardians of fundamental rights.

For example, ILO Convention 169 (ratified by Brazil) and the UN Declaration on Indigenous Peoples ensure indigenous peoples the right to free, prior and informed consent (FPIC) before the adoption of legislative and administrative measures that may affect their material and intangible assets. The FPIC should be obtained through proper procedures that make available all information necessary to form an opinion by the indigenous people, in a language and format that enables its comprehension.

If the BNDES receives a request for financing of a project with potential impacts on the rights of indigenous peoples, and the government fails to fulfil its duty to obtain the FPIC or ceases to consult with the affected indigenous people during the project

execution phases, the fulfilment of the BNDES' duty to protect these people requires it to suspend any disbursements until it is convinced that the FPIC was obtained in the manner prescribed by international standards.

At the same time, it is the responsibility of the BNDES to exert its influence over government agencies and private businesses in order to fully demonstrate its practical and political commitment to fulfil its internal rules and standards of human rights.

III.5.2. Human rights due diligence

Human rights due diligence is the tool by which the BNDES can understand and manage the positive and negative impacts on human rights caused by its credit and investment lines, products and business relationships¹¹². By financing activities, companies and projects that may cause adverse impacts on human rights, the BNDES is subject to various legal and financial risks as well as risks to its reputation¹¹³, which can even be extended to individual employees and administrators.

Despite the existence of risks to the BNDES, a basic feature of human rights due diligence, as set forth in the UN framework “Protect, Respect and Remedy”, is that it has the primary objective to assess and mitigate impacts on human rights that businesses can cause to people (third parties). In this way human rights due diligence differs substantially from traditional processes of due diligence, which typically aim to prevent risks to the company itself.

The process of conducting due diligence on human rights should follow four steps:

Step 1. Assessment of adverse human rights impacts, whether present (already materialised) or potential (might take place in the future), which can arise from BNDES activities. This assessment should be conducted periodically, rely on internal or external analysis by specialists with expertise in human rights and ensure substantial engagement and consultation with potentially affected groups¹¹⁴;

¹¹² According to the Danish Institute of Human Rights, “due diligence processes consist of the range of positive measures required to identify, prevent and mitigate human rights abuses in business operations. The precise content of due diligence, or the exact steps the company manager must take, depends on the company and the challenges that the company faces. At a minimum, due diligence should include actions such as adopting policies, carrying out impact assessments, integrating policies into work processes, and monitoring and auditing performance”. Danish Institute of Human Rights, Values Added: The Challenge of Integrating Human Rights into the Financial Sector, 2012, p. 16.

¹¹³ In a report presented to the Human Rights Council, the UN Special Representative on Business and Human Rights noted that the principles of the audit (due diligence) on human rights and its elements must be internalised by all businesses, regardless of their nature or size, but the specific activities that companies must undertake to fulfil their responsibilities may vary in ways not yet fully understood. With specific regard to auditing (due diligence) undertaken by banks, the Special Representative stated the following: “Banks’ human rights due diligence for a project loan will differ in some respects from that of the company operating the project. Nevertheless, banks do have human rights due diligence requirements in this context, and human rights risks related to the projects are also risks to banks’ liability, returns and reputation. Beyond banks lies an even more complex array of other lenders, investors, and asset managers”. Despite the explicit reference to corporate loans, the Principles are clear about the need for auditing (due diligence) for mapping human rights impacts in all activities and products of companies.

¹¹⁴ UN Guiding Principles on Business and Human Rights: “PRINCIPLE 18 - In order to assess the risks to human rights, companies should identify and evaluate the actual and potential negative effects on human rights that may be involved, either through their own activities or as a result of their business relations. This process should: a) employ internal and/or independent specialists on human rights; b) Include substantial consultations with potentially affected groups and other stakeholders, depending on the size of the company and the nature and context of the operation.”

Step 2. The results of the human rights impact assessment must be integrated with internal controls, oversight and monitoring of the implementation of Bank projects¹¹⁵;

Step 3. The effectiveness of the policies and procedures adopted as a result of the human rights impacts assessment should be tested by means of quantitative and qualitative performance indicators and should take into account considerations of internal and external sources (such as communities affected by projects financed by the Bank). The internal departments of the Bank should be evaluated in terms of compliance with established policies and procedures, and the internal audit units should include in their reports the performance of the operating departments and the results of human rights indicators.¹¹⁶

Step 4. The conclusions of performance evaluations of policies and processes should be made public through communication tools, such as annual reports of the Bank, and reporting by specific departments, such as the corporate Ombudsman. The information provided must be in a format and language understandable to the public in order to enable dialogue and not create risk to individuals who have made complaints to the Bank nor damage banking or commercial secrecy laws, within the legal limit for confidentiality of each type of information.¹¹⁷

Human rights due diligence is an ongoing process that must be revisited and updated at each stage of the project cycle, notably after the disbursements have been initiated. Especially after the beginning of project implementation, the BNDES should establish a direct channel of communication for affected individuals and communities to submit complaints and express grievances¹¹⁸, in addition to mechanisms for reparation of negative impacts caused by its provisions of products and services.

III.5.3. Operational level complaint mechanism

It is to be expected that the internal controls and monitoring tools of an institution the size of the BNDES, which has intricate business relationships and a large portfolio of loans and investments, may fail to identify potential impacts on human rights or mitigate the impacts already identified in the most comprehensive way possible.

¹¹⁵ UN Guiding Principles on Business and Human Rights: "PRINCIPLE 19 - In order to prevent and mitigate the negative impacts on human rights, companies must integrate the findings of their impact evaluations within the framework of relevant internal functions and procedures, and take appropriate measures."

¹¹⁶ UN Guiding Principles on Business and Human Rights: "PRINCIPLE 20 - In order to verify that measures are being taken to prevent adverse impacts on human rights, companies should monitor the effectiveness of their response. This monitoring should: a) Be based on appropriate qualitative and quantitative indicators; b) Take into account information coming from both internal and external sources, including the affected stakeholders."

¹¹⁷ UN Guiding Principles on Business and Human Rights. "PRINCIPLE 21 - To explain the measures taken to address the impacts of their activities on human rights, companies must be prepared to communicate this externally, especially when those affected or their representatives demonstrate their concerns. Companies whose operations or operating contexts entail serious risks to human rights should formally inform the measures they take in this regard. In any case, the communications must meet the following conditions: a) Have a form and frequency that reflect the consequences of the company's activities on human rights, and are accessible to their recipients; b) provide sufficient information to evaluate whether the response from a company to real consequences on human rights is adequate; c) does not jeopardize, in turn, affected parties or their employees, and does not violate the legitimate requirements of commercial confidentiality."

¹¹⁸ Missbach, Andrea. Human Rights are Banking Risks, Geneva: Banktrack, 2007.

In these situations it is important that the Bank make available to the victims a channel for them to express their suffering caused by Bank-financed projects or report and request measures for impacts that are already taking place.

The most common grievance and complaint mechanism in Brazil is the ombudsman [ouvidoria], which, in the case of financial institutions, is subject to specific regulations in accordance with regulations set forth by the Central Bank.

Although the ombudsman can significantly contribute so that problems arising from business activities (and also from public agencies, especially service providers) are identified in their early stages, preventing the escalation of conflicts that often translate into human rights violations¹¹⁹, there is a stark difference between them and operational grievance and conflicts-resolution mechanisms, especially in the scope of multilateral development banks.

Ombudsmen have a more timid role in resolving disputes between the company and stakeholders, usually identified only as the universe of clients, suppliers and contractors with which it maintains commercial relationships. Therefore the ombudsman often serves more as a channel of interaction between the institution and customers, with the aim of receiving critiques, suggestions, complaints and even compliments. Although the ombudsman often holds the ability to mediate conflicts arising between the institution to which it is linked and the other party, it alone is not able to investigate and resolve conflicts that are referred to it.

Normally the function of the ombudsman is to mediate conflicts between individuals and a particular organization. From analysis of the comments received, the ombudsman makes recommendations to the senior management of the agency, institution or company to improve the services provided, without the goal of resolving the conflict.

In most countries the law requires that complaint mechanisms and ombudsmen are independent from the organizations they serve, in order to ensure the efficiency and credibility of the mechanism. In Brazil the ombudsman offices of financial institutions are regulated by Central Bank Resolution 3,849 from 2010.

In turn, grievance mechanisms generally have a structure and differentiated governance in order to ensure their independence and impartiality and to nurture greater reliability and credibility with stakeholders. Such mechanisms are not affiliated with the institution to which they belong, submitting their evaluations and reports directly to the upper management of the institution.

Because grievance mechanisms deal with issues that go beyond the strictly commercial, they are usually made up of professionals with extensive knowledge of solutions to controversies involving social, environmental and human rights issues and experience with multicultural issues.

¹¹⁹ Report of the working group on human rights and transnational corporations and other companies, called "Business Impacts and Non-judicial Access to Remedy: Emerging Global Experience". Workshop held in Toronto in 2013 (A-HRC-26-25-add3).

According to the UN Guiding Principles on Business and Human Rights, operational level grievance mechanisms can help to prevent negative impacts on human rights because they identify these impacts early, when workers, unions, communities and consumers bring their concerns directly to the companies.¹²⁰

III.5.3.1. Grievance mechanisms of multilateral development banks

Grievance and complaint mechanisms of multilateral development banks (MDBs) are a particularly sophisticated structure within the scope of development finance institutions. Historically, MDBs provided explanations and reporting only to the member states, clients and private institutions with which they maintained business relations. Communities and non-state actors adversely affected by a project, but who did not have a contractual relationship with the MDBs, had enormous difficulties in accessing the mechanism, bringing complaints and requesting measures related to impacts generated by the projects financed by these institutions.

In September 1993, as a result of strong pressure from civil society in the form of denunciations of sizeable impacts on human rights by projects, the World Bank established the first independent grievance mechanism in an MDB, with the aim of expanding communication with victims of projects it financed. The Inspection Panel¹²¹, as the World Bank's mechanism for complaints and conflict resolution is called, started its activities on 1 August 1994. It is the institutional body that determines whether the World Bank is complying with its own policies and procedures developed to ensure that the projects it finances generate social and environmental benefits and avoid harming humans and the environment.

The Inspection Panel was designed to be independent of the World Bank's management and report directly to senior administration. It is thus a channel of communication between the people affected and the directorship of the Bank. The Inspection Panel was a model for the design of independent mechanisms of other MDBs, such as the Compliance Advisor/Ombudsman of the International Finance Corporation (the World Bank's private sector arm) and the Independent Consultation and Investigation Mechanism of the IDB. Annex II contains a comparative table with the essential elements of the grievance mechanisms of some multilateral financial institutions.

The Inspection Panel of the World Bank operates in three distinct but related "circles". It is made up of three members of different nationalities who serve a non-renewable term of five years. The members select from among themselves a chairperson for a period of one year. The second "circle" consists of permanent members of an Executive Secretariat that assist the panel in carrying out its obligations. The third "circle" consists of consultants hired by the Panel to assist its members in investigations.

¹²⁰ UN Guiding Principles on Business and Human Rights. Principle No. 29.

¹²¹ The Web page of the Inspection Panel of the World Bank is: <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx>.

To initiate an investigation, it is necessary that two or more individuals who feel harmed by a project financed by the World Bank, or any local organization representing the affected people, send a simple letter called a Request for Inspection that contains the following information: (i) names and addresses of who is sending the letter; (ii) a concise description of the project financed by the World Bank; (iii) a description of the damage or likelihood of damage caused by the project; (iv) if known, the policy adopted by the World Bank for the project; (v) attempts made to warn employees of the World Bank and level of satisfaction with the response; (vi) a clear statement asking the Inspection Panel to investigate the problem described in the letter.

After receipt of the Request for Inspection by the Inspection Panel, a process is initiated to verify its legitimacy. If the letter contains all the pertinent information, the request is registered, and the Executive Directorship of the World Bank must provide information in up to 21 days. In its response, the Directorship must demonstrate that

- (i) It complied with the procedures and policies of the World Bank; or
- (ii) There are exclusive failures of the World Bank in compliance of its policies, which it intends to rectify; or
- (iii) The possible failures to comply are the responsibility of the borrower or caused by factors external to the Bank; or
- (iv) The compliance failures are the fault of both the World Bank and the borrower or also caused by external factors.
- (v) After receipt of the response, the Inspection Panel has twenty-one days to opine as to whether the request is legitimate and whether or not it should be investigated.

¹¹⁷ Princípio nº 29 dos Princípios Orientadores para Empresas e Direitos Humanos da ONU.

Box 8: Cases brought to the grievance mechanisms of MDBs

Case study of the Inspection Panel of the World Bank: Private Power Generation Project, Uganda (2007)

The Bujagali hydropower plant project in Uganda, valued at approximately US\$ 750 million, aimed at producing low cost energy, which, when completed, would supposedly end the problem of energy scarcity in the region. The loan was contracted by the Government of Uganda and the private sector.

The Panel received a Request for Inspection from local organizations and the Union of Professional Environmentalists in Uganda on 05 March 2007 that denounced non-compliance with the social and environmental policies of the Bank.

The Inspection Panel conducted the inspection and investigation of the project, preparing a report that, after approved by the Board of Directors, resulted in an action plan to minimize impacts that began to be implemented in 2008. The final report was published on 25 April 2012.

Case study of the complaint mechanism of the Inter-American Development Bank (IDB): Cana Brava Hydroelectric Power Plant Project, Brazil (2002)

The project was partially financed by the IDB in order to build a hydroelectric dam with a capacity of 450MW and a transmission network 50 km long, located on the Tocantins River between the cities of Minaçu and Cavalcante in the state of Goiás, in the midwest region of Brazil.

The request for an investigation was presented to the IDB in 2002, by a group of individuals represented by the Movement of People Affected by Dams, alleging non-compliance with the Bank's own policies.

The Independent Consultation and Investigation Mechanism concluded in 2005 that the IDB failed in not closely monitoring the project nor ensuring compliance with its policies, and made recommendations that minimized damage to persons affected by the project.

In response, the IDB's management, although not fully in compliance with the recommendations made by the Mechanism, said "it had already taken significant actions together with the Cana Brava Project to ensure that negative impacts to people affected by the project were adequately mitigated"¹²².

¹²² Independent Investigation Mechanism: Cana Brava Hydroelectric Power Project.

III.5.3.2. The BNDES Ombudsman

Established in 2003, the BNDES Ombudsman is the internal body of the institution that mediates conflicts between the Bank and its clients or between the Bank and citizens. The BNDES Ombudsman, the channel of communication between the institution and its internal and external public, has the mission to interpret the population's concerns with the Bank and to act autonomously, impartially and confidentially. In 2010 the ombudsman was redesigned to meet the requirements of the Central Bank for the functioning of these bodies within the scope of financial institutions operating in Brazil¹²³.

In 2012 the BNDES Ombudsman received approximately 2,400 cases; of these, nearly 2,100 were investigated¹²⁴. Although exact statistics are not available, most requests for action and other types of requests aimed to clarify questions regarding procedures prior to submitting credit application to the Bank or products specifically tailored to small entrepreneurs, such as the BNDES Card¹²⁵.

According to the ombudsman, while there are records of general and specific complaints related to Bank-financed projects (such as building stadiums for sporting events to be held in Brazil), most of the cases brought to and treated by the BNDES Ombudsman relate to the interests of clients and their business relationship with the Bank.

The BNDES Ombudsman meets the regulations of the Central Bank on the operation of this type of structure; however it is far from playing an active role in the treatment of cases where there are allegations of human rights violations and environmental damages by borrowers.

The experience of the multilateral development banks demonstrates that grievance and dispute resolution mechanisms can serve as a powerful tool for the development of institutional capacities for mediation and resolution of social conflicts and for timely detection of impacts on human rights before they worsen to the point that the institution is legally demanded to provide reparation of damages, negatively affecting its image and financial assets.

In the final part of this publication, recommendations are made for the BNDES to adapt its ombudsman so that it becomes a real mechanism for dealing with complaints arising out of non-compliance with policies or, alternatively, to establish a new body with such powers.

¹²³ IBACEN Resolution No. 3,849, of 25 March 2010.

¹²⁴ As informed by the BNDES Ombudsman, some requests were not assigned to the ombudsman or lost their aim.

¹²⁵ Information obtained in an interview with the BNDES Ombudsman.



Recommendations

The **BNDES is one of the largest development banks in the world**. In 2013 the BNDES disbursed more than two and a half times the amount disbursed by the World Bank and the IDB combined¹²⁶.

From an economic perspective, the success of the BNDES puts it among the leading development finance institutions in the world. This position contrasts with the insufficient progress of the BNDES in the fields of i) transparency and access to information; ii) ensuring participation of communities directly affected by projects in Brazil and abroad in phases of design and monitoring of measures to mitigate social and environmental impacts; and iii) the incorporation of the highest standards of human rights into its social and environmental policies and guidelines.

The protection and promotion of human rights, which should be the basis of any model of truly human-centred development, is still not in the essence of the policies and processes of the BNDES, which has been taking a passive and formal stance in determining measures to curb human rights violations in projects it finances.

It is fundamental that the BNDES make additional efforts to increase its accountability to society for its activities and share with the public its expertise on project analysis, development of markets and economic and industrial policy formulation in order to combine its mission of economic and social development with the protection and promotion of human rights. This requires that the Bank review its culture of transparency and disclose documents that are not under protection of laws that protect banking, commercial and industrial secrecy. Transparency is now one of the priority items of the BNDES agenda, even if it is clear that a higher level of transparency alone is not enough for an overhaul of the existing governance gaps. Dissemination of information produced by the Bank is essential to enable control by society and for feasible, effective and lasting solutions to be proposed.

It must also be noted that increasing the regulatory capacity of Brazilian public bodies is essential for the BNDES to operate in a coherent institutional environment that is conducive to the prevention of human rights abuses. Likewise, the establishment of internal controls, processes and mechanisms for effective management of impacts on human rights by borrowers must become the sine qua non for obtaining loans from the Bank.

¹²⁶ In 2013 the IDB disbursed US\$ 10.6 billion. The same year, the World Bank disbursed US\$ 19.65 billion (including the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA)). Using the dollar exchange rate as of 31 December 2013 (US\$ 1 = R\$ 2.3593), together the World Bank and IDB disbursed R\$ 71.37 billion in 2013, while the BNDES disbursed R\$ 190.4, or 2.66 times the amount of disbursements of the two multilateral banks combined.

In order to contribute to the improvement of BNDES policies and procedures and the laws and regulations that shape the conduct of private companies that receive its financial support, Conectas presents the following proposals and recommendations:

To the BNDES

- **Public statement of commitment to human rights.** The BNDES should initiate an ample process of public consultation to develop a human rights policy, which will set forth human rights criteria and conditions that borrowers must adhere to in order to access its credit lines or receive financial support via capital markets operations.
- **Human rights due diligence.** The human rights due diligence is the tool by which the BNDES can understand and manage the impacts on human rights caused by its business lines, products and relationships. Human rights due diligence is an ongoing process that must be revisited and updated at each stage of the project cycle, especially after the start of disbursements.
- **Grievance mechanism.** The BNDES should undertake reforms of its ombudsman in order to convert it into a direct channel of communication between the Bank, individuals and affected communities and receive complaints and any other type of claims, notably those related to breach of its own policies. The ombudsman should have the power to investigate and request information from operational departments. Alternatively, the BNDES may establish a new governance body with these characteristics. The body should be provided with the necessary financial resources to perform such tasks and given powers to request information from other departments of the institution. The operation of the mechanism must be guided by the principle of transparency, establishing clear deadlines and procedures, possible outcomes of investigation and means for stakeholders to monitor the implementation of decisions. The names of those responsible for the mechanism should be made public and their professional profiles, attributes and contact information should be included on the Bank's webpage.
- **Update of the Social and Environmental Responsibility Policy (SERP).** In accordance with Resolution No. 4,327/2014 of the National Monetary Council (CMN), the BNDES should review its current SERP. The new policy should be developed after consultation with all stakeholders, including communities affected by the projects, interested civil society, clients of the BNDES, government agencies and controlling bodies, and all those who may be impacted by Bank activities. The SERP must be approved by the Board of Directors of the BNDES.

- **Consultation with individuals and communities affected by BNDES projects and interested civil society.** The BNDES should ensure that the voices of all those who are directly impacted by its activities can be heard during the planning and execution stages of projects. Institutionalised spaces should be created for dialogue with affected parties and interested civil society, in which their complaints, claims and suggestions will be heard. The BNDES should incorporate this feedback into the process of design and application of mitigation measures for social, environmental and human rights impacts.
- **Transparency and access to information.** In consultation with civil society, the BNDES should adopt an autonomous policy of transparency to address specific issues that arise in various aspects of its provision of services. The BNDES transparency policy should establish the obligations of borrowers to disclose documents on the assessment and mitigation of impacts on human rights that must be produced as a requirement for obtaining financing, including the creation of an independent transparency policy.

To Congress

- **Human rights policy as a condition for the transfer of funds by Treasury.** Condition the renewal of funding of the BNDES by the Union on the Bank's implementation of a human rights policy and periodic demonstration of its effectiveness, using qualitative and quantitative indicators for measuring impacts on human rights and actions taken to mitigate them;
- **Exceptions to Bank Secrecy.** The Law of Bank Secrecy (Complementary Law No. 105, of 10 January 2001) should be amended to explicitly state that bank secrecy does not apply to certain documents produced by the BNDES in its credit operations, such as internal reports on social and environmental impacts, monitoring reports on compliance with existing social and environmental conditions, and any other documents (negative list) where disclosure will not damage the secrecy "active and passive operations";
- **Convening administrators of the BNDES by Congress.** Establish a process for the periodic convening of BNDES administrators to be heard by committees of both legislative houses. The BNDES representatives should present explanations not only on financial matters but also in regard to measures taken to promote human rights and mechanisms to prevent, mitigate and remedy violations committed by companies benefiting from the institution's loans and investments.

To the federal government

- **Code of conduct on human rights and official credit.** The Federal Government should establish a code of conduct on human rights to be observed by private companies that wish to access the credit lines of public financial institutions, including those offered by the BNDES, as provided in the Third National Human Rights Plan. Policies adopted by companies in accordance with the code of conduct should be compatible with the size and complexity of their business and should be accompanied by internal processes and controls to mitigate impacts on human rights resulting from their activities;
- **List of companies with a history of human rights violations.** The federal government should prohibit private companies that have a history of violations of any fundamental rights recognised by the Constitution from accessing public credit lines. The law should also provide the criteria for rehabilitation and forms of full compensation of the damages caused;
- **Procurement laws.** The legal framework of public procurement and bids for projects should be redesigned so that evaluation of impacts on human rights is conducted in the early stages of public procurement procedures and administrative concessions. Especially in the energy sector, the government should ensure that bidders are barred from contracting with the government or receiving official financing and benefits due to their inclusion on the black list of companies with a track record of human rights violations. The environmental and human rights impacts of energy projects should be measured prior to the publication of requests for bids which will grant the right to energy resources exploration.

The Central Bank

- **Human rights policy and engagement with independent auditors.** In coordination with other agencies of the federal government, the Central Bank should require that financial institutions authorised to operate in Brazil implement a human rights policy containing human rights criteria for granting loans and financing. Regulation by the Central Bank should require financial institutions to engage with external human rights experts to assist them in preparing tools for assessment of human rights impacts. The Central Bank should be informed by the third-party audit on the effectiveness of the mechanisms adopted by institutions to fulfil their obligations.
- **Internal compliance systems.** The Central Bank should monitor compliance with Resolution No. 4,327/2014 of the CMN and periodically assess compliance by financial institutions authorised to operate in Brazil with the obligation to implement systems, routines, procedures and internal controls for the assessment, evaluation, mitigation and

reparation of human rights impacts resulting from their products and services, including risks to human rights, to be considered in the calculation of the minimum capital that the institutions should hold as a result of the Basel Accords.

- **Transparency of internal controls for the prevention and mitigation of impacts on human rights.** The Central Bank should require that financial institutions authorised to operate in Brazil are more transparent in relation to their human rights impact assessment tools, including internal decision-making procedures and the way in which they consider human rights in granting credit. All these mechanisms should be made public through the banks' communication channels with society, such as annual sustainability reports, which should be regulated by the regulatory body.



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