



ACCESS TO INFORMATION IN THE XXI CENTURY:

CURRENT SITUATION AND LESSONS LEARNED FROM LATIN AMERICA

MARCH 2021

CONTENTS

ACCESS TO INFORMATION IN THE XXI CENTURY: CURRENT SITUATION AND LESSONS LEARNED FROM LATIN AMERICA

INTRODUCTION	01
I. CURRENT SITUATION	
<i>1.1 Strength of regulatory frameworks</i>	04
<i>1.2 The right of access to information in practice</i>	06
II. LESSONS LEARNED FROM REGIONAL EXPERIENCE	
<i>2.1 Progress</i>	20
<i>2.2 Challenges</i>	23
<i>2.3 Lessons and recommendations</i>	25
CONCLUSION	30

ACCESS TO INFORMATION IN THE XXI CENTURY: CURRENT SITUATION AND LESSONS LEARNED FROM LATIN AMERICA


Elaborated by Luis Esquivel
for the Alianza Regional por la Libre
Expresión e Información¹

INTRODUCTION

At the beginning of the XXI century in Latin America, no country had adopted an Access to Information (ATI) law. This changed in 2002 when Mexico and Panama approved their laws, launching a transparency wave in the region, leading to most countries following suit in the next 14 years. This wave took place against the backdrop of the democratic transitions from authoritarian regimes in Latin America, and was pushed by a growing social demand to open governments. ATI laws are, to a great extent, the result of changes in the relationship between the State and the citizenry, as well as the advocacy efforts led by civil society organizations (CSOs). Civil society-led efforts to promote this agenda at the country level, and coordination with regional initiatives were key in reaching the current status where all Latin American countries, with the exception of Bolivia, Cuba and Venezuela have regulatory frameworks for ATI.

It has been 19 years since Mexico and Panama approved their ATI laws, on average, each country in the region possesses 12 years of experience in implementing said laws. In this period there have been reforms that aim to consolidate the Right to Information (RTI), as was the case of Mexico, there has been significant progress regarding implementation, such as the widespread use of active transparency, or the development of ATI-related jurisprudence, as in Argentina or Costa Rica. Regionally there have been positive developments, mainly the approval of the OAS ATI Model Law in 2010 and its makeover resulting in the 2.0 Model Law in 2020.

¹ The author would like to thank the following persons for their collaboration in the preparation of this report with valuable inputs and comments: Daniela Urribarri and Sofía Rua from the Executive Secretariat of the Alianza Regional por la Libre Expresión e Información; Sebastián Pilo and Clara Lucarella from the Asociación Civil por la Igualdad y la Justicia (ACIJ) in Argentina; Denise Dora and Julia Rocha from Artigo 19 Brasil; Andrés Hernández, Ángela Rodríguez, Camilo Peña, Mario Blanco, and Sandra Martínez from Transparencia por Colombia; Alejandro Delgado y Raúl Silesky from the Instituto de Prensa y Libertad de Expresión (IPLEX) in Costa Rica; Javier Castro De León from the Fundación Salvadoreña para el Desarrollo (FUSADES) in El Salvador; Manfredo Marroquín from Acción Ciudadana in Guatemala; Amada Ponce from the Comité por la Libre Expresión (C-Libre) in Honduras; Haydeé Pérez Garrido and Anaid García from FUNDAR Centro de Análisis e Investigación in México; Guillermo Medrano from the Fundación Violeta Barrios V. de Chamorro in Nicaragua; Federico Legal and Natalia Gagliardone from the Instituto de Derecho y Economía Ambiental (IDEA) in Paraguay; and Fabián Werner from the Centro de Archivos y Acceso a la Información Pública (CÁinfo) in Uruguay. This report would have not been possible without their insights, opinions, ideas and suggestions.



Unfortunately, implementation is not a straightforward process, this years have also shown setbacks, such as the dismantling of the ATI regime in Nicaragua, the approval of legislation in direct conflict with AT, for example the Public Documents Classification Law in Honduras, or simply changes in government that lead to greater opacity and less commitment with RTI, as it happened in Brazil, El Salvador and Mexico.

These positive and negative developments generate an interesting scenario to conduct a regional balance regarding the implementation of ATI Laws in Latin America. A recent study by the Alianza Regional por la Libre Expresión e Información found that only 25% of its member organizations perceive that RTI is exercised in full in their respective countries. Due to this, understanding the key factors that produce both positive and negative developments in implementation is quite relevant to develop new strategies to advance the ATI agenda. In addition, the period since the early stages of this transparency wave provides a clear perspective to identify regional trends not only geographically but also over time. There is a rich cumulative experience built during the past 20 years from which lessons learned can be extracted. These lessons are helpful for countries that are already in the implementation process of their ATI Law, but more important, these can inform the efforts in countries where the ATI agenda is just taking off, for example countries that lack this kind of legislation and the advocacy process is starting.


The objectives of this report prepared by the Alianza Regional por la Libre Expresión e Información are, on the one hand, to present the current status of ATI Laws' implementation, while on the other, to identify the main lessons learned in these years. Hopefully the key findings in this report will become inputs to strengthen efforts by CSOs, public officials and other practitioners aiming at promoting ATI in Latin America and the Caribbean, and beyond.

This report focuses on 11 countries that are members of the Alianza Regional para la Libre Expresión e Información that already have ATI Laws in place: Argentina, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay and Uruguay. The report also includes Costa Rica, because although there is no an ATI Law, it has a working ATI regime based on other laws and its judiciary.

The framework to analyze ATI Laws and its implementation is based on the different categories proposed by the RTI-Rating index. This framework is useful as it divides ATI legislation in its main components: right of access; scope; requesting procedures; appeals; exceptions and refusals; sanctions and protections; and promotional measures. In addition to these categories, the report also includes active transparency, given the salience it has gained in recent years and its inclusion in the OAS ATI Model Law.

.....

² Alianza Regional por la Libre Expresión e Información. Estudio regional: acceso a la información en el contexto de la emergencia sanitaria. Mayo 2020



The methodology to gather information for this report consisted of in-depth interviews with member organizations of the Alianza in the aforementioned countries. In addition, an online questionnaire was distributed among other relevant organizations in each participating country. Finally, a literature review was conducted, including official reports, documents by civil society, academic articles, among others.

The structure of this report is as follows: first, it presents the current situation regarding ATI implementation in the participating countries. This considers both the regulatory framework and ATI in practice from the perspective of citizens and the State. Second, the report will analyze progress made and main challenges faced these days. Finally, the report will focus on the lessons learned from the experiences in these countries.

.....
³ www.rti-rating.org

1. CURRENT SITUATION

1.1 STRENGTH OF REGULATORY FRAMEWORKS

The first issue to analyze is the strengths or weaknesses that ATI Laws have in their texts. In general terms there is a positive perception regarding the contents of ATI laws. The RTI-Rating index indicates that in average the 11 ATI laws reviewed is 98 points (out of 150), only two points below the threshold for laws to be considered strong. The exceptions are Paraguay (62 points), Ecuador (74 points), and to a lesser extent Honduras (84 points), the remaining countries have more than 90 points, and even five of them are above the 100 point threshold, Brazil (108), Colombia (102), El Salvador (122), Mexico (136), and Nicaragua (111). This is aligned with CSOs' perceptions. They mentioned that, with the exception of specific issues they perceive as missing from the final text, they are satisfied with their respective laws. In this regard, Acción Ciudadana mentioned that Guatemala has a very complete law, close to the standards established in the OAS ATI Model Law; while CAinfo said that the ATI law in Uruguay is correct in general terms but there are some issues to improve.

“ ECUADOR: SETBACKS AFTER BEING AT THE FOREFRONT.

Ecuador's ATI Law was one of the earliest laws in the region, approved in 2004. However, after being a pioneer in this agenda, there are now setbacks. The Law has not been updated since its approval. Currently there are conflicting issues with specific aspects of the new Constitution of 2008, given that there are now two different appeals mechanisms. "Although the new constitutional action to appeal in case of information denial was simplified, its use has not permeated due to the reluctance by citizens to interact with the judiciary, which is not perceived as independent" mentioned Mauricio Alarcón from Fundación Ciudadanía y Desarrollo.

It is worth mentioning that the participating organizations highlighted the importance of experience exchanges in order to strengthen the ATI Laws' contents. Early efforts in countries such as Mexico and Chile provided inputs for regional exchanges that allowed CSOs and practitioners in other countries to promote adequate legislation. Another event that contributed significantly in such efforts was the approval in 2010 of the OAS ATI Model Law. The contents of the Model Law provided additional favorable arguments to CSOs and other actors in the negotiations leading to the final texts of country ATI Laws. The Model Law established international standards that elevated the political cost for decision-makers of deviating from said standards. FUSADES stressed the benefits seen in El Salvador after incorporating in their advocacy efforts experiences from other countries and the contents of the OAS ATI Model Law; support from other members from the Alianza Regional was helpful in bringing experiences and technical expertise to the discussions.

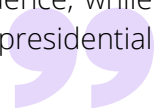
As mentioned, while the perception is that ATI Laws in the region are adequate, there are some weaknesses that are more common than others. There are two that emerged from both the interviews and the RTI-Ratings index: appeals mechanisms, and weaknesses regarding sanctions. The RTI-Rating index shows that these two aspects of ATI laws are the most deficient on average in the region.⁴In the case of appeals, this means that there is no administrative mechanisms through which citizens can ask for a revision of a denial of information or an incomplete response; or that the mechanism established by the law is weak, for example if the revision is conducted by the same authority to which the information request was submitted, as is the case of Paraguay, mentioned IDEA. Organizations in countries with an ATI Law that does not include an independent oversight body noted that this shortcoming in the institutional design generates deficiencies in appeal mechanisms.⁵With regards to sanctions, there were mentioned various weak aspects. There are cases where the oversight body does not have the mandate to issue sanctions to public officials that do not comply with the Laws; in addition, there are cases where the motives for issuing sanctions in the Laws are rather vague.

Also related to the regulatory framework, however not directly linked to the contents of ATI Laws is the adoption of legislation that limits the citizens' RTI. Usually this kind of legislation focuses on classification of documents or national security issues, as Honduras is experiencing nowadays with the Law for the Classification of Public Documents related to National Security and Defense, from 2014.



COSTA RICA: ATI WITHOUT A LAW

Costa Rica is still indebted with its citizens on the ATI agenda, as it has not approved an ATI Law. “Currently there are efforts pushing for the adoption of the ATI Laws” mentioned Alejandro Delgado from IPLEX. Notwithstanding this, it is still possible to highlight the Costa Rican case given that without an ATI Law progress has been made in exercising the RTI. As a starting point, their overall normative framework enables information requests to government agencies, and appeals through the judicial system. Furthermore the judiciary is familiar with ATI cases, thus generating a solid body of pro-transparency jurisprudence, while the executive branch has taken steps through presidential decrees to promote ATI and open data.



⁴ For appeals, the average of the participating countries is 15 points out of 30, while the average for sanctions is 3 points out of 8 in the RTI-Rating.

⁵ Interviews with ACIJ and CAinfo.

1.2.- THE RIGHT OF ACCESS TO INFORMATION IN PRACTICE

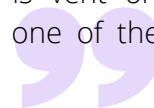
The adoption of a solid ATI Law is unquestionably a step in the right direction, yet, once this takes place, the process moves to the implementation phase, which by itself produces a series of challenges of different magnitudes. On the one hand, the RTI and its benefits, as well as the features and processes of the regulatory framework must be promoted among citizens and potential users. Through this, citizens will get to know the existence, usefulness and procedures to access information. However, in countries where trust in public institutions and historical tensions in the relationship between Society and the State there are important challenges, mainly to break the culture of silence and encourage the exercise of RTI.

There are also significant challenges from the perspective of the State, as it is critical to: eradicate the culture of secrecy and foster cultural shifts in the bureaucracy; ensure awareness and training about responsibilities under ATI legislation for public officials; build an infrastructure of processes and mechanisms to ease ATI both through information requests and active transparency; among others. It is at this point where countries determine whether the ATI Law remains as good intentions or if it truly becomes a powerful tool for citizens to exercise other rights. In as much as these challenges are addressed, the impact of RTI will be greater.



NICARAGUA: ATI IN THE CONTEXT OF DEMOCRATIC SETBACKS

The collapse regarding ATI seen in Nicaragua must be put against the backdrop of the severe democratic setbacks in the past decade under the rule of president Daniel Ortega. This also includes subjugation of the judiciary branch. As Guillermo Medrano from the Fundación Violeta B. De Chamorro describes, “the systematic erosion of the ATI regime began in 2012, when Ortega started to consolidate his position in power”. These days the situation is dire, the State not only is not responding to information requests nor publishing relevant information through its websites, but it is also harassing citizens and organizations that submit information requests. When a government is vent on dismantling democratic checks and balances, ATI is one of the victims.



In order to have a general view about the implementation of ATI Laws in the countries included in this report, aspects related to social demand for ATI are first presented.

This will be followed by an analysis of the implementation processes that States have put in place to guarantee the RTI. In order for an ATI Law to reach its objectives and generate real impact in society it is important that certain conditions during its implementation are met. While considering the criteria included in the RTI-rating index, the following aspects of ATI Laws will be reviewed in the coming paragraphs. First, the information request procedures: whether these are simple or complicated in practice, the extent to which deadlines established by law for the State to respond to requests are met, and the quality of responses. Second, the exceptions and

refusals used by bodies mandated by the ATI Law to avoid releasing information and if overuse of these practices hinder the exercise of RTI. Third, trends regarding compliance by different kinds of bodies mandated by the ATI Law. Fourth, appeals mechanisms for cases when bodies mandated by the ATI Law deny, do not respond or respond in an incomplete fashion to information requests and the requester is not satisfied. This includes the accessibility of the mechanism, institutional design, main features, and capabilities of the agency responsible for processing the appeal. Fifth, the implementation of sanctions established in the ATI Laws for bodies mandated by the Law that do not comply with their responsibilities. Sixth, promotional measures on the one hand to foster effective implementation and compliance with the ATI Law (training for public officials) and on the other to encourage the use of RTI (awareness raising and capacity building for citizens).⁶ Finally, and to complement the RTI-rating categories, this report incorporates active transparency, given the salience this has for an effective ATI regime, as well as progress made in this regard in the last few years.

1.2.1.- CITIZENS' DEMAND FOR ATI:

The adoption of ATI Laws in the region stems from citizens' demands and efforts led by CSOs that promoted this issue in the public agenda and that were instrumental in the negotiations that resulted in the approval of these Laws. Nonetheless, this has not translated into a widespread use of ATI Laws in the countries participating in this analysis.


The perception among organizations in these countries is that while awareness about RTI has increased, this has not been substantive. C-Libre mentioned that the fact that everyday citizens are not familiar with the usefulness of ATI is still a challenge in Honduras. According to official statistics from Uruguay, in 2014, 26 percent of the population knew about the ATI Law, and in 2020, it was 27 percent.⁷ In Mexico, considering that the ATI Law was approved in 2002, from 2015 to 2019 the increase of population that knew of the existence of a government body to guarantee RTI was from 50.6 to 54.8 percent.⁸

In addition, another challenge related to awareness and promotion of RTI oftentimes mentioned is how to mainstream it beyond the capital cities and big urban centers, as ATI use is mainly concentrated there, as the organizations participating in this report noted. In Mexico, during 2019, 30.6 percent of information requests originated in Mexico City. RTI is still mainly being used by citizens in urban centers, particularly those where the central government is located. Transparencia por Colombia stressed that reaching rural populations to promote the use of ATI is critical to guarantee transparency in the implementation of the peace accords.

⁶ The RTI-rating also includes another aspect: the definition of ATI in the laws. This category was not included in the analysis of ATI Laws implementation as it does not impact directly said implementation. In some cases this could have a potential impact if the Laws deviate considerably from international standards. However this is not the case, the average of countries participating in this report in such category is 5 points out of 6, and this was not mentioned by the interviewees as a problem.

⁷ AGESIC. Estudio de conocimientos, actitudes y prácticas de ciudadanía digital. 2020

⁸ INGEI. Encuesta Nacional de Acceso a la Información Pública y Protección de Datos Personales. 2020



Notwithstanding the slow pace in promoting ATI within society at large, there are certain sectors where this Right has become a powerful tool. The first group identified is, naturally, CSOs that use ATI Laws for their own work around social accountability, advocacy for public policies, among others. Another group is academia, as they rely on RTI to strengthen their research projects. Finally, a real transformational impact has been seen among investigative journalists as they use these Laws more and more. Even in cases where there was initial reluctance by journalists to the approval of ATI Laws, as in Paraguay, as time passed they started to incorporate into their journalistic practices the use of RTI. The general perception among interviewed organizations is that ATI Laws have had a major impact on investigative and data journalism.

Furthermore, it is possible to see a constant increase of information requests overtime. For example, in Mexico in 2003 the executive branch received 22,885 requests, while during the first nine months of 2019, there were 217,191 requests.

This suggests that in participating countries there are a minority of groups that are submitting more and more information requests. However, as seen in Nicaragua according to the Fundación Violeta B. De Chamorro, there are instances where the use of this tool can decrease given harassment by government against CSOs and activists. While a constant increase in the use of RTI, even if it is among a minority of groups, there are no guarantees for this trend to be sustainable when there is significant democratic backsliding. ATI regimes, as tools that contribute to accountability, are affected like any other democratic institution when the State deliberately dismantles its institutions.

1.2.2.- REQUESTING PROCEDURES:

A key element of ATI Laws in general is the process through which citizens can submit information requests. International standards such as the OAS ATI Model Law promote simplicity for these processes in order to ease the exercise of RTI.


Among participating countries in this report it is possible to note different levels of simplicity for these procedures as established in their respective laws. Nonetheless, when taking into account how these work in practice, it can be seen how weaknesses in the text of the Law can be ameliorated during implementation. Even Costa Rica, a country without an ATI Law, establishes the possibility for citizens to submit information requests in other regulations. The trend, as per comments by the organizations interviewed for this report, is to decrease formality and to establish relatively simple information request procedures.

The main channels to submit information requests are: dedicated online platforms to submit the request and receive the response; email; postal service; and in person. These mechanisms in principle appear simple, yet some organizations highlighted that these require on the one hand that the requester possesses basic knowledge of the functioning of the State, and in the case of electronic channels, it must also have internet access. In reality, these conditions constrain the exercise of RTI among vulnerable groups, and contribute to the concentration of information requests in urban centers and among specialized sectors such as CSOs and journalists.

“ URUGUAY: STEP FORWARD, STEP BACK

“Uruguay's ATI Law is correct when compared to international standards, except regarding the lack of an independent oversight body” mentioned Fabian Werner from CAinfo. There have also been progress regarding the information request processes. In the early days of the Law, civil society, through its platform “¿Qué Sabés? (What do you know?) received and redirected information requests from citizens. As implementation progressed, government agencies started to implement their own information request mechanisms. Although these are important steps, currently Uruguay is facing setbacks given the Urgent Law on Security. The new government is more frequently arguing national security issues to avoid releasing information.”

A critical aspect in every information request process is the deadline for government agencies to issue their response. As per the comments by participating organizations, there are no uniform trends. In Argentina, Colombia, El Salvador, Guatemala, Mexico and Paraguay, interviewees did not see major issues with compliance with these deadlines (yet there are issues regarding the quality of responses), while in Brazil, Costa Rica, Honduras, Nicaragua and Uruguay meeting these deadlines is seen as an area for improvement.



The quality of responses was highlighted by various interviewees as a challenge. In this regard there were also no homogeneous trends among various government agencies, as mentioned by IDEA in Paraguay: the Ministry of Finance usually provides relevant responses, while other areas do not. However, establishing the quality of responses is a complex task given that there are various factors in play, mostly related to the requesters' perception and satisfaction.

In the region there have been interesting efforts to measure the quality of responses from the point of view of the requester. In Mexico, the National Institute of Statistics and Geography (INEGI), in collaboration with the National ATI Institute (INAI), conduct a biannual survey, the Encuesta Nacional de Acceso a la Información Pública y Protección de Datos Personales (National Survey on Access to Public Information and Personal Data Protection). Said survey includes a question about satisfaction with responses to information requests in the following areas: usefulness (93 percent), trustworthiness (92 percent), completeness (89 percent), clarity (88 percent), accessibility (86 percent), validity (90 percent), compliance with deadlines (87 percent), and avoidance of contradictions with other information (89 percent). In Paraguay, a sample of responses is followed by a satisfaction survey based on the response in question. The level of satisfaction, according to this exercise, is 72.2 percent.

1.2.3.-EXCEPCIONES AND REFUSALS

Given that not all information in possession of the State should be released to the public, ATI Laws establish a series of exceptions and motives for refusal in order to avoid releasing sensitive information. Generally these exceptions focus on sensitive personal data protection, information related to public and national security, as well as commercial secrets, while refusals are used in cases where the information requested does not exist or the State has no obligation to produce said information. These motives to avoid releasing information are legitimate, however, oftentimes government agencies illegitimately rely on these exceptions and motives for refusal as a strategy to avoid compliance with the ATI Law.

The perception among participating organizations is that nowadays this is still a widespread tactic by government agencies to avoid releasing information. Where there is no homogeneity is in the motives argued by these agencies. For example, in Colombia, where there is currently an important process regarding the implementation of the peace accords after years of armed conflict, the most used motive to not release information is national security. By contrast In Guatemala, governmental offices outside of Guatemala City argue that as the information is centralized, they do not hold the information. In Mexico, the government currently mentions the non-existence of information in order to avoid responding to requests. In Paraguay, officials argue personal data protection as the reason for noncompliance, while in Brazil the government uses both non-existence of information and personal data protection.

66 COLOMBIA: TENSIONS BETWEEN ATI AND SECURITY

Efforts to deepen ATI implementation and promotion have waned in the last few years. As Andrés Hernández from Transparencia por Colombia mentions, currently there are only limited efforts by the government to promote the use of the ATI Law, and more actions by the Public Prosecutor's Office (oversight body) and the Ministry of Transparency (one of the main implementation agencies) are required to maintain progress. Two issues are highlighted that have undermined RTI. The first one relates to the implementation of the peace accords, as the national government efforts to proactively release information on progress in meeting commitments, as well as challenges are not enough. The second is opacity in security and defense activities, stemming from the lack of clarity in the ATI Law regarding the definition of information related to national security and what kind of information should be classified. Due to this government entities in the defense sectors have more room to deny information requests.

Taking into account the salience of the armed conflict and the peace accords in Colombia, and the implications in terms of transfer of resources and public investment, the ATI agenda should have a more preponderant role. Furthermore, there should be more efforts to provide more and better information regarding budget transparency, investments related to the accords, social programs for vulnerable groups, and define what kind of information in possession of security agencies should be released to the citizenry and thus enhance social accountability.

The illegitimate recurrent use of exceptions and refusals to avoid disclosure of information originates in a lack of political will from political leadership to strengthen the ATI regime or in bureaucratic resistance from public officials due to lack of interest to comply or knowledge about their responsibilities that would take them away from a secrecy culture toward more open practices.

1.2.4.- SCOPE AND BODIES MANDATED BY THE ATI LAW

The scope of an ATI Law refers to governmental bodies mandated by the ATI Law to disclose information. Among the countries included in this report there are no major issues in their respective ATI Laws regarding which bodies should be included. In practice, however, there are significant discrepancies in the level of compliance with ATI Laws among these bodies. The different indices and compliance reports elaborated across the region, such as statistics generated by Brazil's e-SIC (electronic information system for the citizenry), El Salvador's 2019-2019 Transparency Performance Evaluation, or even CSO-led monitoring efforts such as Fundación Ciudadanía y Desarrollo Active Transparency Index in Ecuador indicate this high degree of variance in compliance with ATI Laws by different government bodies.

While there are no clear regional trends regarding which government bodies are more prone to non-compliance, there are a few issues to highlight. First, of the different government branches, the executive has greater compliance levels when compared to the other branches. Yet there are countries where other branches comply regularly with ATI Laws, for example the legislative branch in Paraguay, noted IDEA.

Within the executive branch, security forces, be it the military services, the police or others, have a strong tendency to avoid disclosing information as part of their obligations under the ATI Laws. A combination of factors could explain this. Security forces possess information that legitimately must not be disclosed to the public, as established in ATI Laws. This makes it more appealing for them to use these exceptions based on national security, even for information that should be disclosed. In addition, these institutions tend to be quite rigid and reluctant to the cultural changes entailed in an ATI Law.

Finally, there seems to be a significant level of non-compliance among non-traditional bodies mandated by the ATI Law, such as state-owned enterprises, unions or private organizations that receive public funding. Regardless of whether there is political will or not, lack of knowledge among this kind of non-traditional bodies about their obligations under the Law, lack of training or lack of tools, together with limited familiarity by citizens on their functioning contribute to this shortcoming.

1.2.5.- APPEALS

As mentioned, effectiveness of appeals mechanisms when information requests are denied, not responded, or the response is incomplete is closely linked to the institutional design in each country. Among participating countries in this report there are different kinds of institutional designs to resolve appeals. These include models where appeals are resolved by the same body mandated by the ATI Law to which the request was submitted; specialized agencies located within the same branch that they oversee but without the capacity to issue binding resolutions; pre-existing agencies with different functions to which ATI oversight responsibilities are added; independent specialized oversight bodies with the possibility to issue binding resolutions; and cases where appeals are resolved in the judiciary (keeping in mind that this channel is still available for the other institutional models). In this sense, an oversight body is a very relevant agency so that through resolving appeals, the RTI is guaranteed.

To have an independent and specialized oversight body in liking of INAI in Mexico, IAIP in Honduras and IAIP in El Salvador, is definitely an advantage that helps to improve effectiveness of appeals mechanisms. The benefits of this kind of institutions lie in the specialization they have on ATI to solve related appeals, the celerity in which these appeals are resolved, the limited formality required to activate the mechanism (as compared to a formal process through the judiciary), and independence from mid-rank political officials, and even top leadership in some cases allowed by the institutional design (mainly independence in budget and designation of the heads of these bodies). Both ACIJ in Argentina and CAinfo y Uruguay highlighted important deficits in their respective Laws regarding the institutional design of the oversight bodies. On the one hand they mentioned a lack of independence from the branch in which they operate. In Argentina, where each branch has an oversight body, these bodies face challenges to ensure compliance with their resolutions by government agencies.

The set up of a specialized and independent oversight body, with the capacity to issue binding resolutions is ideal. However, having this kind of bodies does not guarantee by itself an effective appeals system. For example, in Honduras, previous conformations of their oversight body, the IAIP, have been subject to the political power and have not been effective in fulfilling their responsibilities, mentioned C-Libre. In contrast, the absence of an oversight body with the aforementioned features does not necessarily entail lower levels of compliance with the ATI Law.

Beyond the institutional design, there seems to be an unequal performance among participating countries in terms of appeals and their resolutions both through administrative and judicial channels. This is contingent on the oversight body's or the judiciary's political clout, independence, interest and knowledge about ATI. IDEA mentioned that in Paraguay a new cohort of judges was appointed and some of these judges arrived with a pro-transparency perspective. This resulted in improvements regarding appeals resolutions. In Ecuador, in contrast, Fundación Ciudadanía y Desarrollo says: the judiciary is not independent, thus its room for maneuvering when resolving appeals is limited

The criteria used by authorities responsible for resolving appeals (be it administrative or judicial) is also a critical aspect where variance has been noted between the countries participating in this report. Sometimes pro-transparency criteria that favor RTI are used, as it is done at the CGU in Brazil, INAI in Mexico, AGESIC in Uruguay, the executive branch ATI Agency in Argentina or the judiciary in Colombia, Costa Rica and Paraguay. In other cases, decisions are made through political criteria and with heavy influence from political leadership as the cases of El Salvador, Honduras or the judiciary in Ecuador and Nicaragua highlight. The availability of solid pro-transparency jurisprudence, as it has been developed in Costa Rica, is an element that contributes significantly to guide decisions regarding ATI appeals, IPLEX mentioned. Notwithstanding this, most of the organizations interviewed stressed that even in countries where criteria lean toward openness, these criteria can be sidestepped when the information requested and not released by the State is highly sensitive in political terms.

“ ARGENTINA: OVERSIGHT BODIES WEAKNESSES

Out of the participating countries in this report, Argentina approved its ATI Law most recently. Before the ATI Law adoption there were various ATI related cases that reached the Supreme Court, which set the foundations for a solid jurisprudence. The 2016 ATI Law is on par with most international standards, and it is clearly a significant step in the right directions, however, Sebastián Pilo from ACIJ mentions a déficit regarding oversight bodies. “First the Law includes the creation of five different oversight bodies: executive branch, Legislature, the Supreme Court, the Judicial Council, and the Public Prosecutors’ Office. Yet not all of these bodies have been created. In addition, except for the executive branch case, the ATI Law is vague regarding how these bodies must be created. The designation of the head is not a process conducive to select the ideal candidates. Finally, the oversight body within the executive branch is not independent, and when it was created, administratively it was located under the office of the chief of cabinet, thus undermining its independence,”

1.2.6.- SANCTIONS

International standards such as the OAS ATI Model Law establish administrative sanctions for public officials that do not comply with their responsibilities regarding ATI. The objective of sanctions is to generate incentives for compliance. In the countries included in this report, according to the RTI-rating, sanctions in ATI Laws is the weakest aspect of the laws. And when looked at how they work in practice, this shortcoming is even more evident. Sanctions are not applied and do not work as an incentive to comply with ATI Laws. In this regard, Fundación Ciudadanía y Desarrollo in Ecuador mentioned that sanctions are useless. Only in rare instances are these used given that the responsibility of applying said sanctions as per the institutional design is within the same government body where the non-compliant official works, or because the oversight body is not responsible for applying sanctions or it does not have political clout to make them effective.

The only country where sanctions are in some way effective in their objective of promoting compliance is Guatemala. This is because in addition to administrative sanctions, in Guatemala there have been criminal penalties which has set an important precedent among public officials.

Beyond the fact that sanctions did not become the decisive incentive for compliance, the little or null application of these has not become a barrier for implementation. This situation merits a reflection on the best use and features of sanctions. For example, as mentioned by ACIJ, sanctions could be rearranged so that they do not focus on only one instance of non-compliance, but rather in cases when a public official systematically avoids complying with the ATI Law.

1.2.7.- PROMOTIONAL MEASURES

It was mentioned previously that the organizations interviewed noted a lack of awareness about RTI, its usefulness and the mechanisms to exercise this right as one of the main challenges to consolidate ATI regimes. ATI Laws, anticipating this challenge, include provisions related to the promotion of RTI both within the public administration and among society at large. In practice however, this is not a priority, resulting in said low levels of awareness and in the need for CSOs to pick up these awareness raising and training responsibilities.

In a scarce resources setting, where oftentimes ATI implementation is not a priority, only few, if any at all, resources are allocated for training both internal and external. This prompts CSOs to promote RTI with their own resources. An alternative to ameliorate this deficit has been financial support provided by the international cooperation or private foundations. However this comes with the disadvantage of foreign-funding dependency. In Colombia, the European Union implemented the project Anticorruption and Transparency from the EU for Colombia, aiming at promoting the transparency agenda, but since the project ended, there is a lack of funding for these activities, mentioned *Transparencia por Colombia*.

In practice, CSO-led training activities for citizens on ATI have a positive impact. After training takes place, the use of RTI increases, noted C-Libre. To a great extent, the fact that there are increases in the awareness about ATI and its use among citizens is due to CSOs' promotion and training efforts.

Just as awareness raising and training are important toward society, training within the public administration is key, given that through these efforts, officials become familiar with their responsibilities under the ATI Law, as well as with the mechanisms and processes they need to implement in order to comply with the Law. These training activities are generally led by oversight bodies or implementing agencies, yes as mentioned before, these efforts are limited by the availability of resources, both in terms of funding, time and political will. An initiative that has contributed to raise awareness about the transparency and open government agenda not only among CSOs but within public administration is the Open Government Partnership (OGP), of which all participating countries are members, with the exception of Nicaragua. As various of the organizations noted, OGP had a significant impact by promoting this agenda among a sizable number of public officials, “being members of OGP helped to increase the awareness and knowledge about transparency and open government in the bureaucracy” IPLEX mentioned.

1.2.8.- ACTIVE TRANSPARENCY

Information and communication technologies (ICTs) have had a great impact over public administration, particularly in the past 15 years. These tools enabled active transparency initiatives to foster a significant change in the relationship between State and Society. In terms of the regulatory framework, there has been progress, not only by expanding the catalogues of information subject to active transparency in ATI Laws, but also through the adoption of specific legal instruments (laws, decrees or secondary regulations) that focus on active transparency, as is the case in Paraguay, and open data in Brazil and Costa Rica. Even open data provisions have been included in more recent ATI Laws such as Mexico’s ATI reform in 2014.

In practice there is general progress. More and more governments are actively releasing information about its functioning. The development of active transparency indices and even awards as positive incentives have generated a healthy competition among the various bodies mandated by ATI Laws to comply with their responsibilities. “Government agencies update their websites right before the data collection for the transparency index begins in order to improve their position in the ranking” said C-Libre in Honduras.

These initiatives to measure implementation of active transparency measures have gained popularity in the region. There is a mix of indices led by the State, as is the case in Costa Rica, Guatemala, Honduras; indices or monitoring exercises developed by CSOs, for example in Colombia, Ecuador, Nicaragua, and Uruguay, and indices jointly developed by government and civil society, as in Argentina and México.

The fact that there is a positive trend overall regarding active transparency does not mean that this is sustainable and always moving forward or that there have not been setbacks. In countries like Brazil, Mexico and El Salvador, interviewed organizations mention that after the most recent change in government opacity has gained space. In Mexico there were two joint problems to take into account, first information had to be relocated to a new platform, which resulted in information loss, and second, the COVID crisis, said FUNDAR.

The situation in Nicaragua is more complicated, and it shows the extent to which an ATI regime can deteriorate. In 2005 even before the approval of the ATI Law the government implemented a series of voluntary ATI strategies, where public agencies released information proactively. Yet as highlighted in a report by Fundación Violeta B. De Chamorro from 2020, government websites do not contain performance information about government actions but rather propaganda.

With regards to the information published by governments in participating countries there seems not to be uniformity. In Colombia, while there is a transparency portal, there is still plenty room for improvement about budget transparency. In Brasil, although there are an ATI Law, an environmental information access law, and an open data law, information about the environment is deficient.

Something that interviewed organizations mentioned is the fact that active transparency does not substitute information requests. These are complementary. During the first stages of ATI implementation, proactive disclosure of information on salaries can somewhat reduce requests, but overtime this stabilizes. Furthermore, FUSADES mentioned that social accountability efforts are conducted by comparing information proactively disclosed with information obtained through requests. Similarly, FUNDAR noted that having more information disclosed proactively is conducive to more sophisticated information requests.

“ HONDURAS: INDICES AS INCENTIVES FOR COMPLIANCE

The regulatory framework in Honduras is complex given the recent approval of legislation that contradicts the ATI Law, particularly the law on public documents classification. This makes it easier for officials to deny information requests, which hinders RTI. Nonetheless, the Access to Public Information Institute (IAIP) is trying to distance itself from political leadership. One of its most relevant initiatives is the active transparency index. According to Amada Ponce from C-Libre, “compliance with active transparency requirements is not fully satisfactory, but IAIP’s index is an incentives for government agencies to comply.”

2. LESSONS LEARNED FROM REGIONAL EXPERIENCE

The Latin American experience regarding ATI implementation in the first two decades of the XXI century is significant, as the previous sections in this report attest. The regional diversity where this is taking place, and the time since these processes began offer a useful perspective to strengthen efforts to advance ATI. For example, it is clear that, as with other public policies, effective ATI implementation is not straightforward, and it has moments when progress takes place at a faster pace and moments when there are setbacks due to lack of political will, as illustrated by the case of Nicaragua, or due to a major crisis such as the COVID-19 pandemic.

“ BRAZIL: THE BUREAUCRACY RESISTING ATI SETBACKS

During the first years of this century, and up until the election of Jair Bolsonaro as president, Brazil signaled its move toward openness. The approval of the 2011 ATI Laws, as well as its participation as founding member of the Open Government Partnership evidence this trend. Once Bolsonaro was elected, there have been overt efforts to limit democratic institutions that act as checks and balances against abuse by the executive. Technical staff at the General Comptroller of the Union (CGU) have played a key role in resisting these attempts by political leadership to undermine the ATI regime. Moreover, as Denise Dora from Artigo 19 mentions, “Bolsonaro’s attempts to limit the ATI Law gave more visibility to RTI in the public agenda, resulting in more people knowing about it and its usefulness.” ”

From this regional experience it is possible to identify general trends regarding progress and challenges that in turn are helpful to distill lessons. These lessons are important for key stakeholders, such as CSOs promoting the ATI agenda, to strengthen their activities, either in countries that are in advanced stages of implementation or countries that are just beginning.

2.1 PROGRESS

While it is clear that currently the ATI agenda in participating countries has seen setbacks and faces significant challenges, it is undeniable that ATI is now better than it was before the approval of related legislation. Thus it is possible to suggest that there is a positive trend. Even in Costa Rica, where there is no ATI Law, IPLEX recognizes progress in relevant areas such as the development of a pro-transparency jurisprudence, and active transparency. Key factors in this progress, or in resisting setbacks have been advocacy efforts by CSO, their collaboration with champions within government, and specific institutional arrangements such as a strong and capable bureaucracy prepared to handle ATI related issues. The only case where a clear regression can be spotted is Nicaragua, where the ATI regime has been dismantled despite having a strong ATI Law.

2.1.1 STRONG REGULATORY FRAMEWORKS

The first issue to highlight regarding progress made among countries participating in this study is the quality of ATI Laws. As mentioned, this does not guarantee effective implementation. Nicaragua with an excellent Law has seen in recent years the collapse of its ATI regime, however, when a window of opportunity to push for greater ATI presents itself, having a strong Law eases progress, or conversely it makes more difficult efforts to hinder transparency. Strong linkages between regional stakeholders enabled experience exchanges that when drafting ATI bills enhanced the position of local actors to promote higher standards. In addition, advocacy aiming at multilateral organizations such as the OAS, contributed to set these regional standards that then served as a comparison point for country ATI bills. This has been critical to reach the current level of quality in ATI Law, although it is important to note that each ATI Law can have specific shortcomings that should be addressed eventually.

2.1.2 JURISPRUDENCE

A key element that contributes to strengthen the exercise of RTI, either in countries with ATI Laws or countries without, is the jurisprudence that the judiciary develops in this regard. A substantive pro-transparency jurisprudence sets the criteria that public bodies will rely on to argue their ATI-related decisions. Various of the interviewed organizations mentioned that in their respective countries, the judiciary has issued rulings in favor of ATI. In Costa Rica for example, IPLEX mentioned that since they do not have an ATI Law nor an administrative channel to resolve appeals, stakeholders have relied on the judicial system, resulting in several ATI cases that built a pro-transparency jurisprudence. In the case of El Salvador, jurisprudence produced before president Bukele took office contributed to build a barrier that to a certain extent hinders efforts that aim to limit ATI, mentioned FUSADES. In Argentina, the development of a solid jurisprudence prior to the adoption of the ATI Law was critical during the approval of said law, noted ACIJ. At the international level significant progress has also been achieved. Rulings by the Inter American Human Rights Court are cornerstone in the development of international standards and deeply informed the discussions and final contents of the OAS ATI Model Law in 2010, and its 2.0 version in 2020. Nonetheless, even when a strong jurisprudence has been developed in several countries, there are still others where this process has not taken place, such as Colombia and Uruguay.

2.1.3 ACTIVE TRANSPARENCY

Active transparency was also highlighted as an area with significant progress. The mainstreaming of ICTs, together with civil society advocacy and the development of monitoring tools either from within or outside the State have had a positive impact on governments' active transparency schemes. Fundación Ciudadanía y Desarrollo in Ecuador mentioned that active transparency there is improving and has generated inputs that are used in the fight against corruption.

2.1.4 TRAINING FOR PUBLIC OFFICIALS

It is worth noting progress made regarding awareness raising and capacity building for public officials on ATI issues in participating countries. While there are still shortcomings in this area, more and more officials are becoming familiar with their responsibilities under ATI Laws, and the tools at their disposal to comply. This issue is important given that oftentimes having a bureaucracy aware and trained can contribute to openness, even in cases where political leadership is pursuing opacity. IDEA in Paraguay commented that there are instances where middle management officials, given their better understanding of ATI, are well positioned to argue in favor of openness and convince their political leaders to disclose information. In Brasil, technical staff at the CGU, ATI oversight body, have been key stakeholders in avoiding major setbacks in the current political situation, said Artigo 19. The role that multi-stakeholder initiatives, such as the OGP, where CSOs and bureaucrats interact regularly, has played in promoting this agenda among a greater number of public officials is remarkable. Through these initiatives, together with CSO-led promotional and advocacy activities, more and more public officials are familiarizing themselves with these issues.

2.1.5 ATI AS A TOOL FOR JOURNALISM

The use of ATI is still concentrated in a few groups, but it is important to underscore that one among journalists ATI has grown significantly as an everyday tool. The exercise of RTI contributed to strengthen investigative journalism to the point where journalists see in ATI a powerful tool crucial for their work. This is even more remarkable when taking into account that in various countries there was initial reluctance by journalists and media practitioners to promote ATI Laws. In Paraguay, says IDEA, the idea of an ATI Law did not sit well with journalists as they had the perception that this piece of legislation would function more as an official secrets law than a transparency law. The deepening of active transparency schemes has also been key to enhance data journalism. Thus, the group that due to ATI has seen their modus operandi modified the most, and in a relatively short span, is that of journalism. To have a better understand of this dynamic between RTI and journalism, as well as promoting linkages between ATI initiatives and journalism schools, could lead to a virtuous cycle where both the ATI agenda, and journalism practices are strengthened, thus this should be to keep in mind for the future.

2.2 CHALLENGES

It is important to describe progress made to see what has been achieved. However it is as equally important to recognize current challenges that countries participating in this report are currently facing.

2.2.1 LOW AWARENESS AND USE OF ATI

It was already mentioned that organizations interviewed stressed as a challenge the low level of awareness and use of ATI, beyond the traditional users (CSOs, journalists, academia). This could be seen as the counterpart to the secrecy culture among public officials, a culture of silence engrained among the citizenry that is not used to ask the State for information. A powerful incentive to modify the secrecy culture is precisely the use of ATI, such that public officials by virtue of having to respond become more familiar with their responsibilities. However, if the culture of silence remains, and public officials perceive that only a few stakeholders exercise their right, the perception that this is an elitist tool for privileged groups can emerge. Due to this it is important to promote awareness about and use of ATI among the citizenry at large.

2.2.2 INDEPENDENCE OF OVERSIGHT BODIES

Another challenge is related to the independence of oversight bodies, regardless of whether the institutional design entails formal independence, as in El Salvador, Honduras and Mexico, or not, as in Argentina and Uruguay, or even in countries that do not have an oversight body such as Costa Rica or Nicaragua. In general at some point, sooner or later, ATI oversight bodies see their independence threatened from various fronts. In Argentina the oversight body for the executive branch was created under the office of the Chief of Cabinet, and does not have budget independence, while oversight bodies in other branches of government face significant challenges regarding the designation of their heads and there are no guarantees against arbitrary removal. In the case of Honduras, the process to designate IAIP's information commissioners suffers political influence, and while current commissioners are trying to distance themselves from political power, generally the IAIP followed political criteria. Even countries that have managed to built strong ATI institutions overtime are not exempt from attacks to the independence of ATI oversight bodies, as is the case of Mexico where the current government is attempting to curtail the independence of INAI.

It is clear that an effective oversight body, regardless of its institutional design, can generate discomfort for political leadership, hence the constant tensions and attempts to reduce their effectiveness. Some measures that can contribute to mitigate these risks are the emergence of a professional cadre of public officials in oversight bodies familiar with ATI and its importance, and the collaboration between them and civil society. As mentioned for Brazil, but also in other countries like Mexico, the development of a professional bureaucracy familiar with ATI creates barriers that reduce the likelihood of success of these efforts to move toward opacity. In addition, civil society can advocate and influence government actions in order to avoid backsliding.

66 MEXICO: ONCE AGAIN AIT UNDER SIEGE

Mexico was one of the first countries in Latin America to adopt an ATI Law, and it currently possess the strongest law in the region after a transparency reform in 2014. Significant progress in terms of training and capacity building for bureaucrats and the development of platforms, processes and tools that simplify the exercise of RTI. Also in this period, however, there have been regressions and attempts to limit ATI. Nowadays the ATI regime in Mexico is the target of attacks by the current government. The president, for example has mentioned several times about the need to disappear INAI, the strong oversight body there. Furthermore “regularly information requests are not being responded arguing the non-existence of information and there are concerns due to the militarization of infrastructure projects and the potential impact of the military in handling this kind of information” mentioned Haydeé Pérez Garrido from FUNDAR.

2.2.3 USE OF EXCEPTIONS

A recurring challenge highlighted by participating organizations was the illegitimate use of exceptions to avoid disclosing information. The most common exceptions are related to national security issues, protection of personal data and the non-existence or lack of obligation to produce information. It is important to note that the systematic use of these exceptions can take place due to political motives, with directions issued from top political leadership, but also could be attributed to low levels of knowledge by public officials about how to correctly apply exceptions. This distinction is important as the strategies to face each challenge will be different. In Colombia for example, Transparencia por Colombia commented that public officials are not familiar with the possibility of redacting documents to eliminate information from documents that legitimately should not be disclosed while keeping and disclosing information that can be public. Thus, capacity building efforts for public officials on the correct use of exceptions can contribute to limit its indiscriminate use. With regards to the non-existence and lack of obligation to produce information, ACIJ remarked that finding a solution to this issue will be difficult.

2.2.4 EL EJERCICIO DEL DAIP EN TIEMPOS DE CRISIS

The current situation, where the COVID-19 pandemic has had a negative impact on government performance overall, also present significant and distinctive challenges. On the one hand some governments took advantage of the situation to extend or remove deadlines to issue responses to information requests. On the other hand, active transparency measures to better inform citizens about the situation and government activities related to the pandemic have been deficient. A report by Alianza Regional from 2020 found that 60 percent of the member organizations perceive as incomplete information on investment to improve health services for COVID patients. The current crisis not only poses questions about access to information during the COVID-19 pandemic, but also how can governments better prepare for further crises and avoid a negative impact over the ATI regime.

2.2.5 RTI AT THE SUB-NATIONAL LEVEL

Finally, although this goes beyond the scope of this report (which focused on the national level), participating organizations mentioned the stark difference between implementation and use of ATI at the national and the sub-national levels. Given that it is at the sub-national level where issues more closely related to the everyday life of citizens, and thus the relationship between citizens and the State is more dynamic at this level, it is crucial that ATI regimes effectively reach these levels of government.

2.3 LESSONS AND RECOMMENDATIONS

As the previous sections showed, the collective experience generated among the countries that participated in this report is enriching. A thorough review of this experience, comparing progress made, regressions and challenges, as well as the evolution over time of ATI regimes enables the distilling of lessons useful to continue promoting this agenda. This report thus includes the main lessons learned and recommendations identified during its preparation. In addition, it is acknowledged that each country experience is a universe in itself with plenty of other lessons to grasp that can be subject to analysis in the future.

2.3.1 POLITICAL WILL IS IMPORTANT BUT IT IS NOT EVERYTHING

The first lesson to highlight is related to political will. This is understood as the willingness of top political leadership to move forward with high level reforms such as the adoption and implementation of ATI Legislation. A lack of political will is a sizable obstacle when promoting ATI, and various organizations mentioned this as a challenge. Fundación Ciudadanía y Desarrollo in Ecuador noted that current lack of political will generated stagnation and even regression in the ATI agenda, thus limiting the implementation of the current Law and the adoption of a new, updated one. IDEA and Artigo 19 made remarks in the same vein. That said, political will is not everything, and progress can be achieved even in its absence. The existence of professional, technically sound staff that are aware of the importance and supportive of ATI can put barriers to limit regressions, even in cases where political leadership is pushing against openness, as was the case in Brazil with the CGU previously mentioned. Similarly, there can be reformist champions within the public administration that distance themselves from the political direction in order to contribute to the consolidation of ATI, even when confronted by internal reluctance. This is what is currently taking place in Honduras, as mentioned in the previous section. Collaboration between civil society and bureaucracies or reformists that are more inclined toward openness can lead to progress in consolidating RTI or to mitigate the risk of backsliding, even in cases where political will is scarce.

66 PARAGUAY: MAKING PROGRESS IN ACTIVE TRANSPARENCY AND JURISPRUDENCE

In general terms, Paraguay's ATI Law is solid, yet it has some weak points such as a lack of an oversight body through which appeals can be submitted. However, as Federico Legal from IDEA notes "there are areas related to ATI implementation with positive results. One of these areas is active transparency". The role that the judiciary has played is also worth mentioning, as judges have generally adopted a pro-transparency stance, although in cases of politically sensitive information, these criteria can change.

2.3.2 TRAINING FOR PUBLIC OFFICIALS IS KEY, EVEN WHEN IT IS NOT A PRIORITY

It is also important to highlight the importance of training and capacity building for the overall public administration but particularly for officials in the frontlines of implementation. Constant capacity building results in better prepared bureaucrats, a key aspect in consolidating RTI. These officials are able to posit stronger arguments in favor of openness before their political leadership. Resistance from political leadership to openness can stem from the level of political sensibility of the information in question, or just a lack of knowledge about ATI Laws. It is precisely in the latter case when a well-prepared bureaucracy can push for ATI. The former case, however, is more difficult to address. Due to this, training and capacity building should be included in the text of ATI Laws as explicitly and as detailed as possible (agency or agencies responsible for the delivery, target audience, frequency, evaluation measures, and so on). Furthermore, implementation of training activities should also be ensured. Civil society and particularly ATI champions within government must be alert so that capacity building does not fall through the cracks in terms of government priorities.

2.3.3 THE STATE SHOULD NOT OVERLOOK RTI PROMOTION

Challenges related to low awareness and use of RTI also offer lessons. While all ATI Laws in participating countries include promotional measures, these are poorly implemented or not implemented at all. The benefits of greater RTI use are on the one hand that citizens incorporate it as a tool to address problems in their everyday life, while on the other, civil servants start shifting their paradigm toward a culture of openness, thus addressing both the cultures of secret and silence. In view of this, similarly to training for public officials, implementation efforts—especially during early stages—should not overlook the State's responsibility to promote RTI. As said by Transparencia por Colombia, CSOs can promote RTI but this should not be their job, this is a job for the government.

2.3.4 RETHINKIN SANCTIONS FOR MORE EFFECTIVENESS

An important lessons has to do with the extent to which sanctions are used. All participating organizations mentioned that sanctions do not work. Public officials do not perceive them as an incentive to comply with ATI Laws. Nonetheless, and with officials being aware of the inapplicability of sanctions, there is still a degree of compliance with ATI Laws. This means that as they are currently set up, sanctions do not fulfill their objective to encourage compliance. Because of this it is necessary to rethink sanctions. For example sanctions could be based on cases of systematic use of illegitimate exceptions and refusals. Another option could be sanctions in cases of non-compliance with additional aspects of ATI Laws such as training and capacity building. In order for sanctions to have a positive impact on ATI implementation, it will be key to think creatively, beyond traditional approaches.

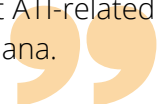
2.3.5 THE ISSUE OF OVERSIGHT BODIES

The effective exercise of RTI is enhanced when the institutional design includes some form of oversight body to guarantee this right. Ideally this body should be independent, specialized on ATI and with the mandate to issue binding resolutions. However, reaching this kind of body is contingent on different factors, including the political negotiations when drafting the ATI bill, as well as institutional arrangements once this is approved. Not being able to get to this point does not imply a major failure, and there are other arrangements that can be satisfactory to a certain degree. For example, the responsibilities of this kind of body could be assigned to a previously existing office with political clout, as seen in Guatemala with the Human Rights Office, or in Colombia with the Public Prosecutor's Office. There are also options when it is not possible to assign ATI responsibilities to an independent body (either new or pre-existing) such as focusing on the designation process of the head of said body to ensure the head's suitability and independence from political power. And when this is also not a viable alternative, or when in practice the oversight body ends up not being independent, the development of pro-transparency jurisprudence can mitigate the negative effects as it will set general criteria for the release of information. In any case, when drafting ATI bills it is critical to analyze the institutional environment to have a sense of how and where an ATI oversight body can be created.



GUATEMALA: AN ALREADY EXISTING OVERSIGHT BODY

The case of Guatemala's oversight body is interesting as it is not a specialized body on ATI, rather, it is the Human Rights Office. The decision to allocate ATI responsibilities to this Office stemmed from the fact that it already possessed political clout among Guatemala's democratic institutions, and this would constrain potential executive attempts to limit its independence. "In the past years, efforts toward effective ATI implementation have lost momentum, and after the dismantling of the International Commission against Impunity (CICIG), the executive cut ATI-related funding" said Manfredo Marroquín from Acción Ciudadana.



2.3.6 ATI MONITORING AND EVALUATION

As any other public policy, ATI implementation requires constant monitoring to pinpoint failures, areas for improvement and launch corrective measures. Additionally, the publication of performance indicators and awards encourages, as seen in Honduras, healthy competition among bodies mandated by the ATI Law. In this sense, it is key that these monitoring and evaluation mechanisms are included in the text of ATI legislation. In practice there have been government-led and civil society-led monitoring efforts. Civil society participation in this exercises is important and sometimes CSOs are the only ones conducting monitoring and evaluation, however, this should be complementary. The State must develop its own mechanisms to follow up on performance regarding ATI implementation and generate strategies for improvement.

2.3.7 ENRICHING EFFORTS WITH INTERNATIONAL EXPERIENCE AND STANDARDS

Finally, an issue that was mentioned several times by participating organizations is the need to enrich dialogue around a new ATI bill by bringing international experience. Lessons from other countries, particularly from the region contributes to: clarify doubts, concerns or myths that public officials may have regarding ATI prior to the approval of the Law; and strengthen with evidence arguments to promote higher international standards, among others. Similarly, the availability of international instruments that set up standards, such as the OAS ATI Model Law and its 2.0 version—which in turn benefited from previous country experiences—aids in elevating the normative floor during negotiations of ATI bills. Although not all standards included in the Model Law are necessarily met when negotiating ATI bills, this instrument helps as it prompts political calculations regarding the cost and reputation as risk of not meeting said standards among legislators and the executive branch; civil society in turn can leverage this to increase the quality of the Law. Efforts to elaborate a bill and adopt an ATI Law should take this into account and rely on both experience available in other countries and international standards.

“ EL SALVADOR: GOOD START THAT LOST MOMENTUM

The ATI Law implementation process in El Salvador is characterized by progress and setbacks. The drafting of the ATI bill approved in 2011 benefited from international experiences, as well as from conversations around the first OAS ATI Model Law. Civil society played a key role through the Grupo Promotor (a CSO coalition that promoted ATI), and support from the two major parties—ARENA and FMLN—was achieved. However, after winning the presidential election, the FMLN sought to undermine the ATI Law's implementation, by enacting weak secondary regulation that went against the spirit of the Law. Grupo Promotor went to court claiming that the regulation was not constitutional, and obtained a favorable ruling. After that, the executive tried to capture, unsuccessfully, the oversight body (Instituto de Acceso a la Información Pública), mentioned Javier Castro De León from FUSADES. Currently ATI in El Salvador faces new attacks as president Nayib Bukele, through attempts to capture the designation process of the IAIP's commissioners, is trying to undermine this right. This has resulted in a weaker and less independent IAIP, another aspect of the president's actions to dismantle democratic checks and balances.

CONCLUSION

This report showed that during the first two decades of the XXI century, the overall balance on how participating countries fared regarding ATI has been positive. ATI Laws approved in these years are mostly adequate and in some cases quite strong, active transparency has found its footing in the region, pro-transparency jurisprudence keeps growing and in some countries the bureaucracy has moved away from a secrecy culture.


However, this does not mean that participating countries have not seen setbacks or that challenges are a thing of the past. Nicaragua's ATI regime collapsed despite having one of the strongest laws in the region. There are concerted efforts to curtail RTI in Brazil, El Salvador and Mexico, consequence of the leadership style of new political leadership. Countries such as Argentina, Colombia, Ecuador, Guatemala, Honduras, Paraguay and Uruguay are currently significant yet varied challenges, while Costa Rica is still in the process of adopting an ATI Law although it has in place a regulatory framework that enables the exercise of RTI.

Civil society was and continues to be a powerful force driving progress or contributing to stop backsliding regarding ATI. CSOs have even stepped up to conduct activities that are the responsibility of the State, for example RTI promotion and monitoring of its implementation. A key element to strengthen CSO-led initiatives has been the regular experience exchanges taking place at the regional level. These exchanges contribute to reducing learning curves and to the cross-fertilization of ideas.

In these two decades, journalists emerged as a group that uses ATI Laws heavily. For them, using ATI-related tools became part of their everyday job. The effects of these changes are widely felt on the quality of investigative and data journalism across the region.

The cumulative experience in participating countries also yielded valuable lessons to consider when promoting the ATI agenda, both in countries that have not started this process and countries that already have. In this regard, capacity building for public officials on their responsibilities under ATI laws emerged as an understated issue but that if properly implemented it can generate benefits in the medium and long terms. This particular aspect of ATI Laws is oftentimes relegated in terms of policy priorities due to the lack of resources or time, but as seen in the case of Brazil, a well trained cadre of officials can become a line of defense against attacks to undermine RTI.

With regards to sanctions, the report highlights the need to rethink their current set up and effectiveness. Presumably a clear and robust sanctions regime would be an incentive to foster compliance with ATI Laws. However practice has shown that sanctions are not applied and thus are irrelevant. Due to this, in the future different ways to set up sanctions should be explored, aiming at turning them more effective.



Oversight bodies' design and responsibilities were recurring themes. The creation of this kind of bodies, which mainly focuses on guaranteeing the exercise of RTI, is key. However, when the political environment does not allow for the creation of an independent and specialized oversight body, it is possible to put focus on other institutional features to strengthen their role to the extent possible. These features include for example the suitability of the head of the office as a key criteria in the selection process, or enabling the office to issue binding resolutions.

Looking forward, it is clear that new challenges are on the horizon, for example the impact of greater connectivity by citizens through the use of ICTs, and the mentions to these issues in the OAS ATI Model Law version 2.0; or the role that ATI should play in a context with pervasive fake news. To tackle current challenges while adapting to new ones, at the same time that lessons from previous experiences are leveraged, will be critical for practitioners from civil society or government aiming at advancing access to information in the coming years.