

# **ADB Must Clinch the Opportunity for Bolder PCP Reforms**

## **Comments by the NGO Forum on ADB on the Second Consultation Draft of the Public Communications Policy (PCP) of the Asian Development Bank**

**January 14, 2011**

Last 26 November 2010, the ADB released its Second Consultation Draft of the Public Communications Policy (PCP). To us this already represents the more definitive response of the ADB to the various comments raised by various stakeholders in the first commenting period, as well as in the country consultations. The NGO Forum on the ADB (Forum), for its part, has submitted a comprehensive assessment of the 2005 PCP last April 15, in addition to a joint submission with the Global Transparency Initiative (GTI) on the same date. We have also sent two sets of detailed follow-up comments responding to the release of the first consultation draft, as well as the posting of summaries from the country consultations.

At the outset, we state our recognition of the favorable response in the Second Consultation Draft to some of Forum's calls. First, we welcome the unequivocal recognition by the ADB of the right of the people to seek, receive, and impart information and ideas about ADB-assisted activities. We also welcome the commitment to introduce an Independent Appeals Panel for second-stage review of decisions by the Public Disclosure Advisory Committee (PDAC).

Even as we recognize these advances in asserting our right to information, on Forum's most important concern, the access by affected people, we sense that the ADB has been holding back in the second draft, confirming our observation in the past that the ADB has been reluctant to make an institutional commitment to the needs of affected communities for information beyond what it makes available in its website. Furthermore, we are deeply troubled to learn that the ADB has failed to make any major improvements on exceptions, and is also preventing public access to some of the most basic information about private sector activities compared to those in the public sector. We find it very troubling that the ADB has introduced major limitations on the scope of the subject of review by the Independent Appeals Panel. We choose to confine our comments to these three issues, in the hope that the ADB will take the last clear opportunity in the review process to introduce bolder, more decisive reforms on the PCP.

### **On Access by Affected People**

From the beginning of the review process, Forum has already emphasized that its greatest concern about the 2005 PCP has been its failure to secure for affected communities effective access to timely and adequate information. Our first comprehensive comment submitted last 15 April 2010 culled from extensive consultations with affected communities, and the ADB's own country consultations, provide clear evidence to this experience and observation.

**Joint development of a communication plan or strategy must be mandatory.** We see the improvements that the ADB tried to introduce in paragraph (graph 82 and 83) of the second

consultation draft, but we sense a holding back on the part of the ADB to fully commit to an obligation to adequately inform affected communities in practice despite rhetoric to the contrary. The first sentence of paragraph 159 states clearly that “for ADB projects, much of the responsibility for disclosing information will rest with the borrower/client”. It has also dropped the language of “joint development” of communication plans in paragraph 83 to one of “assisting” DMC governments and private sector clients to develop a project or program communications strategy.

We reiterate our original position that the joint development of a communications plan or strategy must be mandatory for all projects and programs. The ADB must also own up to the responsibility of informing affected people commensurate with its extensive role in project or program technical analysis, preparation, and implementation. To this end, it must further refine paragraph 83 and delete the first sentence of paragraph 159.

**The terms “stakeholder” and “affected people” must be clearly defined.** We see different uses of the terminologies “stakeholder” and “affected people” in the second draft. In some places ‘*stakeholder*’ is a standalone word; in other places the wordings are ‘...*stakeholder, including affected people...*’. Furthermore, the second draft in paragraph 30 removed the phrase ‘*women, poor and marginalized groups*’ from information about stakeholders that was introduced in the 1st draft (paragraph 31).

PCP should have a consistent use of clearly defined terminologies. Affected people in the ‘Definition’ part at the beginning of this 2nd draft should include women as follows: “*affected people*” means men and women who may be beneficially or adversely affected by a project or program assisted by the Asian Development Bank (ADB)”.

We also call for the reinstatement of the phrase ‘*affected people, poor and marginalized groups*’ in paragraph 30.

**The means of communication should include lower technology modes.** As affected people is considered among the key target audiences for the PCP (paragraph 48-50), the means of communication enumerated in paragraph 51 should be expanded to lower technology communication methods and tools to ensure that the poor and marginalized can access meaningful information about ADB and its projects.

### **Translation**

Paragraph 64, p.11 states that translation is provided according to operation needs. Translation of ADB documents especially those relating to ADB projects should be made in light of the needs of affected people. Therefore, translation of documents related to projects should be also done upon request by affected people and supporting civil society groups. Furthermore, key project document including EIA for Category ‘A’ projects should be available in the local language in the same time as the English version. So, affected people can enjoy the provision of 120 days public commenting period before Board approval as required by the Safeguard Policy Statement (SPS)

### **On the Exceptions**

We observe the ADB’s reluctance to bring its relations with the private sector fully into line with the regime of transparency and right to information. Paragraph 135 point 5, p. 24 makes a blanket exclusion of “any confidential business information (information covered by a confidentiality agreement or nondisclosure agreement that ADB has entered into with clients or other related parties)”. This is reiterated in paragraph 138, p. 26, which provides that ADB will not disclose any information if it “has given an express legal commitment to any party to keep such information in question confidential”, unless that party consents to the disclosure, as well as in

footnote 19 which excludes from public availability the private sector legal agreements entered into by ADB.

This is far from best international practice. For example, the bilateral U.S. Overseas Private Investment Corporation operates with a presumption of disclosure subject to a narrowly defined business confidentiality exception. Allowing private sector companies and the ADB to define on an ad hoc basis through non-public contract documents the allowable universe of disclosable documents is likely to prevent meaningful transparency and oversight of publicly funded private sector activities by affected communities and governments alike. Clearly, this broad range of exceptions to disclosure is unacceptable.

A similar observation holds true for paragraph 105, p. 18 where a bilateral or multilateral co-financier is given the right to object to the disclosure of legal or financial agreements in official co-financing transactions.

The 1<sup>st</sup> draft PCP (paragraph 39, p.7) stated that full disclosure is not always possible for legal and practical reasons; however, the 2<sup>nd</sup> draft PCP doesn't even substantiate the reasons (paragraph 40, p.7) by removing the language 'for legal and practical reasons'. The loophole allowing private sector actors to decide which documents are to be made public for disclosure, should be eliminated. Instead a clearly defined narrow definition of business confidentiality should be made – reference OPIC standards. The new PCP should provide substantiated reasons for non-disclosure to avoid a broad interpretation in the implementation. Furthermore, any non-disclosure of documents or parts of documents should be carried out via "black-out" redaction to allow the public to see how much of the total project information is being hidden from public view. In addition, there should be principles defined for deliberation procedures whether particular information will be disclosed or not as well as an appeals process where the public can appeal, based on the redacted documents for more information to be made public.

Another worrisome expansion of discretionary exception is introduced in paragraph 139, p.26, which gives the ADB through its Board (with respect to the Board records) and President the right not to disclose information not covered by the exceptions, when it determines that such disclosure would or would be likely to cause harm that outweighs the benefit of disclosure, with respect to the Board record. The exercise of this prerogative is not subject to appeal by either the PDAC or the Independent Appeals Panel.

These provisions allow the private sector the simple expedient of contractually identifying information that it wants to withhold, bilateral or multilateral co-financiers the right of veto, and the Board and the President to expand exceptions, which trump any of the draft policy's commitment to the right to information. These provisions should be either deleted, or substantively revised, to bring them into line with a rights-based approach to disclosure and confidentiality.

## **On Pro-active Disclosure**

We noted that there are new provisions to increase the proactive transparency of ADB activities, including through Board documents. However, we also noted that there are different standards applied for public and private sector projects. There is also inadequate coverage of Financial Intermediaries and high-risk projects such as Multitranchise Financing Facility (MFF).

**Simultaneous Disclosure of Board document.** There is a new provision in paragraph 39, p.7 that states: "...*In certain cases, Board documents will be disclosed to the public before approval or endorsement by the Board...*". The wording 'certain cases' should be defined, and examples should be listed.

Documents that will be disclosed simultaneously with the circulation to the Board should also be listed. This would include documents as required for disclosure under the Safeguard Policy on (1) environment such as draft full environmental impact assessment (EIA) (including the draft EMP), draft environmental assessment and review framework (EARF), final EIA or initial environmental examination (IEE), new or updated EIA or IEE, corrective action plan prepared during project implementation, and environmental monitoring reports; on (2) involuntary resettlement such as new or updated resettlement plan, and corrective action plan prepared during project implementation, if any, resettlement monitoring reports; and on (3) Indigenous Peoples such as draft indigenous peoples plan (IPP) and/or indigenous peoples planning framework, including the social impact assessment, final IPP upon completion, new or updated IPP and corrective action plan prepared during implementation, and indigenous peoples monitoring reports.

Paragraph 96, p.17 states that ADB shall post the Report and Recommendation of the President (RRPs) for sovereign projects on its website at the same time they are circulated to the Board, if the member country consents. If the country does not consent to such early disclosure, ADB shall post the RRP on its website upon approval by the Board.

We believe that all RPPs for projects should be posted at the time of circulation. After all, what rational criteria exist for not posting such documents regarding publicly funded projects?

Similar criteria should be on the provision of paragraph 97, p.17 on the Project Administration Manual. The decision and rational for no-consent for simultaneous disclosure should be included in the Project Brief of respective project.

**Operation Manual.** As Operation Manuals are important documents on procedure for the implementation of policies, they should also be subject to public consultation at its drafting process. This provision should be included in paragraph 73 (b), p.12 on “Policies, Strategies, and Operational Procedures”.

**No Provision Regarding Financial Intermediaries.** Given the fact that the ADB has a robust portfolio of Financial Intermediaries and is likely to broaden this sector of investment, it is a shocking oversight and a slap in the face to public process that, despite significant civil society input, there is still no provision for disclosure regarding financial intermediaries in the 2<sup>nd</sup> draft PCP. This shows an inconsistency with the new Safeguard Policy Statement that regulates the financial intermediaries as in paragraph 65 to 67, p.23-24 in new SPS.

The new PCP must have provisions on disclosure of information of Financial Intermediaries projects. Our recommendations for the top four minimum disclosure requirements for Financial Intermediaries can be found in Appendix A.

**Multitranche Financing Facility/MFF.** There are provisions excepting disclosure of MFF projects. Project Briefs (replacing Project Information Document/PID) of a project or program are posted 30 days after its concept paper is approved, but the project briefs for each tranche of MFF projects will be posted upon submission of the project financing agreement (paragraph 78, p. 13). Furthermore, legal agreements of MFF tranches are not included for disclosure on the ADB website under paragraph 109, p.19.

Tranches of a MFF project should not be treated differently than other projects in terms of information disclosure. Therefore, each tranche of MFF project should be posted as early as possible after its project framework is already approved. Moreover, legal agreements of MFF tranches should be released and covered according to provision of paragraph 109, p.19 for other projects' legal agreements.

**Full Disclosure of Information on Private Sector Projects.** Substantially less transparency is provided to the public regarding the ADB's private sector projects in this 2<sup>nd</sup> draft PCP document:

- Project Briefs (PB) of sovereign (public sector) project are to be disclosed not later than 30 days after the approval of the project concept paper (paragraph 87, p.13); however, disclosure of PB of a non-sovereign (private sector) project is no later than 30 days before Board consideration (paragraph 8, p.14). The period from concept paper approval to Board consideration could reach more than 1 year.
- Information about fund source and amount, financing plan, and loan and/or technical assistance utilization (point viii), and status of loan covenants (point xviii) are for disclosure in the Project Brief on paragraph graph 76, p. 13. However, this is only for sovereign project, but not for non-sovereign projects.
- The RRP of a sovereign project is for full disclosure (paragraph 96, p.17), but the RRP of a non-sovereign project is only its abbreviated version. The same distinction holds true for paragraph graphs 99, p.17 and 101, p.18; meanwhile for paragraph 103, p. 18 the non-sovereign project only discloses a redacted version of its evaluation. It is not clear that the redacted version will be presented in "black out" version to demonstrate publicly the extent of data removal in private sector documents.
- The RRP of a sovereign project is posted at the same time it is circulated to the Board (if member country consents), but the posting of RRP of a non-sovereign project is after Board approval (paragraph 96)

Sovereign and non-sovereign projects should not be treated differently. The disclosure standards for sovereign projects should also apply to non-sovereign projects.

### **The new PCP must fully complied to the Safeguard Policy Statement**

On paragraph 42, p. 7 states that disclosure provisions of the PCP should prevails in the event of conflict with any other Board-approved policy. The new PCP should comply with other ADB policies, particularly he Safeguard Policy Statement because non compliances will cause safeguard problems in project implementation. Furthermore, if the reason of non-agreement is accepted with the reason "upon submission to ADB by the borrower/client", it gives advantage for prolongation of document preparations unreasonably, which may lead to endless bureaucratic processes.

**Mandatory Information on Accountability Mechanism/AM.** There is a tremendous lack of information on the AM as well as about project components, including their respective impacts to project-affected people in ADB-funded projects and programs in developing member countries (DMCs). Project-affected people don't know if they can file their grievances to ADB accountability mechanism. As the current AM is a separate mechanism from the project, this leads to lack of knowledge in addressing their grievances against the impact of a project. Most borrowers, including implementing agencies, either are not informed or are not informing project-affected people about this mechanism at the earliest stage of the project cycle. The AM must be included as a mandatory component of each ADB-funded or co-financed projects and special provision should be written in new Public Communication Policy, so AM information will be reaching affected people. Same concern relates to local grievance redress mechanism.

**Providing information during implementation of loan project:** Detailed information on agreements between ADB and borrower is contained in a document called "Memorandum of aid" that is available only in rare cases (mostly, after much pressure from NGOs). NGOs and people are falling under the influence of the loans should be informed about all aspects, including the



negative impacts. During the implementation of the loan agreement, ADB also prepares monitoring reports - Reports to the central office. Therefore, documents of (a) "Memorandum of aid" and "Reports to the central office" were available throughout the project cycle, and (b) a list of documents prepared by ADB for the project (no matter whether they are available or not) must be available for people on the web page of the project or program

**Historical information:** 2<sup>nd</sup> draft of PCP requires disclosure of "historical information beyond the period of limitation for 20 years. The historical information needs to be available as soon as the program or project is closed.

**Audit report.** The audit reports should be also publicly available. It is valuable for the public in ADB member countries to have access to audit reports of ADB's projects and programs in order to strengthen public support for development cooperation.

## **On the Independent Appeals Panel**

We welcome the second draft's commitment to set up an Independent Appeals Panel (IAP). We however note a troubling aspect of the IAP which may substantially limit its usefulness. The ADB has significantly limited the scope of the independent panel's review, to exclude the exercise by the Board or President to restrict access, as well as applications of public interest override. Bringing these matters to the scope of the IAP's authority would demonstrate ADB's full commitment to a truly independent and authoritative review body.

On paragraph 167, p. 30 requires the requester to establish a "prima facie" case that the ADB has violated the policy. This is similar to the process of filing case to the Office of the Special Project Facilitator (OSPF), whereas affected people are requested to be in "good faith" to solve the problem. The definition of "good faith" is one-sided decided by OSPF team's on own perception. The new PCP should use clear defined terminologies because a policy should be understood by general public particularly affected people. In this case "prima facie", which is usually used in court, about the ability to determine improper or unreasonable action to argue about violations, should be replaced with other clear defined terminology.

The authority of the independent appeals mechanism is restricted as states on paragraph 169, p. 30. For instance, the independent mechanism does not have authority to assess cases regarding "public interest override". Assessment of "public interest" is very difficult and one case will be different from other, it depends on particular circumstances of each case. The IAP should have the authority to ask questions or challenge the decisions of the ADB regarding override Policy's exceptions.

## **On Other Issues**

### **Views and interests of the Developing Member Countries (DMCs) should be substantiated:**

On paragraph 34, p.6 on Country Ownership, ADB also recognizes the great importance of country ownership of the activities it supports in DMCs. The views and interests of these DMCs shall, therefore, be respected when the Policy is implemented. 'Views and interest' are vague terms and provide broad interpretation. Country ownership should be based on existing national legislations on rights to information. If there is no such national legislation in a DMC, ADB's provisions based on the principles of the rights to information should be prevailed.

## **Conclusion**

The review process has taken a lot of the resources and efforts not only of ADB, but also of the participating stakeholders. We engaged the process constructively, endeavoring to substantiate our positions with analysis based on broadly accepted norms as well as concrete experience on the ground. We note that the next review will come another five years yet after the new policy takes effect. We therefore challenge the ADB to take the last clear opportunity in the review process to introduce bolder, more decisive reforms in the PCP before it is presented to the Board for consideration.

## Appendix A

### Top Four Minimum Disclosure Requirements for FI Projects and their Associated Subprojects

Given the ADB's significant portfolio of FI projects and associated subprojects, in order to provide the most basic transparency for this almost completely opaque use of public funds, the ADB must, at a minimum, require that the following information be made public for each FI and non-microfinance subproject:

1. Basic information about the identity, funding sources, environmental, and gender segregated social risks including and financial performance of subprojects;
  2. Basic information about binding language pertaining to environmental and social safeguards and disclosure requirements for each FI and subproject;
  3. For existing FIs, basic information about implementation track record of ADB Safeguards, UNDRIP, Core Labor Standards;
  4. Development rationale.
1. **Basic information about the identity, funding sources, environmental, gender segregated social risks and financial performance of subprojects, including:**
    - a. **Names of subprojects**
    - b. **Location/domicile:** Domicile of FI and subproject, physical location of subproject managers, physical location of operations of projects and subprojects.
    - c. **Funding/funders:** amount and origin of funds, including from ADB, other MDBs, other sources
    - d. **Financial performance:** record of financial performance of subproject, and for subprojects, aggregated, within an FI
    - e. **Risk categorization:** Identified (A,B,C) for each non-microfinance subproject, description of environmental and gender segregated social risks, involvement of politically exposed persons.
  2. **Basic information about binding language pertaining to Safeguards and Disclosure requirements for each subproject:**
    - a. **By-laws.** A copy of the **by-laws of FI project and subproject companies** including, specifically, any language pertaining to disclosure, consultation, environmental and social safeguards.
    - b. **Contract and partnership agreement language on environmental and social standards.** A copy of portions of all contracts and partnership agreements, including those between ADB and FI, with other subsequent/existing partners/investors, and those held by or with project and subproject companies, contractors and subcontractors pertaining to social and environmental standards requirements, including disclosure and consultation requirements. Given that the ADB's Safeguards and Disclosure requirements are public information, these portions of the contracts and partnership agreements should not trigger confidentiality or privacy requirements. ADB must ascertain that Safeguard and disclosure language has been inserted into all contracts and partnership agreements.
  3. **Contract and partnership agreement compliance language.** A copy of portions of all contracts and partnership agreements specifying the manner by which the ADB may exercise veto power over investments or partners and may divest from an investment, without prejudice or fee, in the case of client (project or subproject) violation of ADB policy or performance standards requirements or violations of local, national, or international law or treaty, or in the case of concerns about violations of anti-money laundering statutes by FI or co-investors, including subsequent investors.
  4. **Basic information about implementation of ADB Safeguards, UNDRIP, Core Labor Standards, CEDAW:**
    - a. **Consultation, supervision, BCS determination.** Detailed descriptions of gender sensitive and meaningful consultation processes with affected communities under the principle of free, prior and informed consent, ADB supervision processes, site visits, ADB determination of Broad Community Support for projects and subprojects;



- b. **ADB due diligence/oversight of subprojects.** Detailed descriptions of the **manner by which the ADB exercises control** at each FI over choice of and implementation of subprojects including whether ADB serves on Investment Committees, boards of FIs, has contractually mandated “veto rights” over investments and co-investors, contractually mandated exit/divestment protocols and has the right to examine any and all company by-laws, documents, books, registers and accounting records held by FIs and subprojects;
  - c. **UNDRIP/Core Labor Standards.** A description of the manner in which the **UN Declaration on Indigenous Peoples, core labor standards** and **CEDAW (UN Convention on Elimination of All forms of Violence Against Women)** have been implemented at the FI project and subproject level;
5. **Development rationale.** Detailed descriptions of the development rationale of sub-projects and an account of the value-added of ADB support.