Securing the People's Right to Information

Will the ADB Rise to the Challenge?

Comments by the Global Transparency Initiative on the Public Communications Policy of the Asian Development Bank

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I. Introduction

The Asian Development Bank's (ADB) review of its *Public Communications Policy: Disclosure and Exchange of Information* (PCP) began in mid-February 2010. Part of the review is a number of public consultation mechanisms, commencing with an eight-week period for public comments on the current PCP.

The Global Transparency Initiative (GTI) welcomes the undertaking by the ADB to review the PCP. The PCP, approved by the ADB Board of Directors on 22 April 2005, included a commitment to undertake a "comprehensive review after a period of time, not to exceed 5 years from the effective date of the Policy" (par. 166), which was on 1 September 2005. This review is therefore very timely. The review is also timely because, although the PCP was considered to be relatively progressive when it was adopted, a number of other IFIs have now put in place more open disclosure policies in various respects. Equally important, during the nearly five years of implementation of the PCP, an appreciable level of experience in its use has been generated. This provides an important source of material and lessons that can help inform the PCP reform process to ensure that it becomes more effective.

The right to access information held by public bodies, including inter-governmental organisations like the ADB, is a fundamental human right. At its heart is a presumption that all information held by public bodies should be accessible, subject only to a narrowly-drawn regime of exceptions. Access should be ensured through both the proactive disclosure of information and the putting in place of procedures to make requests for information. Any refusal to provide information should be subject to appeal before an independent oversight body. These are the key features of a right to information system found in the GTI's *Transparency Charter for International Financial Institutions: Claiming our Right to Know* (the Charter).

Assessed against the Charter, the PCP has a number of positive features. It establishes a clear presumption in favour of a right of access to information, in the absence of a "compelling reason for confidentiality" (par. 28). It commits to the proactive disclosure of far more information than had hitherto been the case (pars. 59-122), although these commitments need to be reviewed in light of moves towards greater openness by other IFIs. It also puts in place a clear framework for making requests for information, including timelines for processing such requests and notice requirements (pars. 153-160). The regime of exceptions it establishes is, for the most part, harm-based and mostly protects legitimate interests (paragraphs 123-130). And it also puts in place an internal appeals mechanism (pars. 151-152 and 158-159).

At the same time, there are important shortcomings in the PCP, as discussed in this paper. Our analysis is guided by the following:

- The principles of the GTI Transparency Charter for International Financial Institutions.

- The GTI policy document, the *Model World Bank Policy on Disclosure of Information* (the Model Policy).
- The new Disclosure Policy adopted by the World Bank on 10 December 2009;
- Relevant best practices in national freedom of information legislation.
- Consultations with various non-government organisations working on the ADB as well as communities affected by ADB funded projects and their support groups, including:
    - An international workshop on the PCP jointly organised by the GTI, the NGO Forum on the ADB, and the Freedom from Debt Coalition in Manila on 11-12 February 2009; and
    - Consultation meetings organised by the NGO Forum on the ADB, with participation from the GTI, with select affected communities and their support groups from Indonesia (held in Yogyakarta, Indonesia on 22-23 January 2010), the Mekong region (held in Siem Reap, Cambodia on 19-21 February 2010) and South Asia (held in Dhulikhel, Nepal on 26-28 February 2010), along with comments solicited from groups from Central Asia.

These Comments focus on three key issues in the current PCP, namely: (1) the regime of exceptions; (2) the oversight or appeals systems; and (3) access by affected people to project information. These are the issues identified as most problematic in the consultations that the GTI has participated in so far. We also comment on some other provisions than could be improved further.

II. The PCP Regime of Exceptions

The right to information creates a presumption that all information held by public bodies is subject to disclosure. At the same time, it is recognised that in certain circumstances disclosure may threaten harm to overriding public or private interests. It is thus appropriate for a disclosure policy to include a reasonable regime of exceptions, which provides for an appropriate balance between openness and competing interests.

International law establishes clear guidelines for any system of exceptions to the right of access, which require disclosure of information unless three cumulative conditions are met:

- disclosure would cause harm;
- the harm is to a legitimate private or public interest listed in the law or policy; and
- the harm outweighs the benefits that would result from disclosure of the information.

This harm-based approach is followed in most exceptions in national laws and is also reflected in Principle 5 of the Charter, as follows:

> *Principle 5: Limited Exceptions*
>
> The regime of exceptions should be based on the principle that access to information may be refused only where the international financial institution can demonstrate (i) that disclosure would cause serious harm to one of a set of clearly and narrowly defined, and broadly accepted, interests, which are specifically listed; and (ii) that the harm to this interest outweighs the public interest in disclosure.

As noted above, the PCP states that the presumption in favour of disclosure shall apply "in the absence of a compelling reason for confidentiality" (par. 28). The main exceptions are set out in paragraphs 126, 127 and 130 of the Policy. Paragraph 126 is the main provision, while paragraph 127 provides for a more limited set of exceptions that continue to apply after twenty years (under the heading Historical Disclosure). Some of the proactive disclosure commitments, found at paragraphs 60-122 of the PCP, also include exception provisions, for example stating that information will not be released without the consent of a certain party, or that it will simply not be released.

For the most part, these exceptions protect legitimate interests, although in some cases the interests are cast too broadly. Most of the exceptions also incorporate a harm test, but a significant number exempt whole categories of documents or information, such as audit reports (par. 126(16)) or proceedings of the Board of Directors (par. 126(7)). This is problematic as a category-based approach is prone to be over inclusive, leading to documents being withheld even where there is no genuine risk of harm.

There are a few categories of documents which are reasonably defined by reference to an implicit harm. This is the case, for example, for trade secrets and information subject to

attorney-client privilege. However, even in these cases, the justification for withholding the documents is precisely the anticipated harm, not the fact that they belong to a particular category.

Deliberative Process Exception

The exceptions in paragraphs 126(1) and (2) seek to protect the integrity of the deliberative and decision-making process. In both cases, the harm to be avoided is identified as "inhibiting the candid exchange of ideas and communications". The first exception applies to deliberative and decision-making processes internal to ADB, and the second to deliberations involving ADB members and external entities. Neither paragraph 126(1) nor 126(2) are subject to historical protection (i.e. these interests are only protected in relation to documents that are less than twenty years old).

Safeguarding deliberative space for those charged with developing public policy is widely recognised as a legitimate interest and an exception along these lines is found in almost all right to information laws. At the same time, this exception must be clearly circumscribed, and should not operate as an undue limitation on access to information, which would have the result of excluding the public from participation in decision-making.

Paragraphs 126(1) and (2) represent better practice than the analogous provisions in the new World Bank Disclosure Policy inasmuch as the PCP provisions explicitly incorporate a harm test. In contrast, the World Bank policy elevates the deliberative process to the status of a principle and does not include a harm test.[1]

At the same time, there are two concerns with these provisions. First, they do not appear to protect a sufficiently broad set of legitimate internal policy processes, such as the effectiveness of a policy or investigations (although the PCP does protect the administration of justice, which might extend to this). Based on country experiences, the key problem with having an internal exception which is formally too limited is that in practice the institutional response is to interpret it unduly broadly. Bureaucracies are normally very adept at protecting information they believe should be confidential. Trying to impose unduly limited exceptions is likely to backfire as the agency attempts to undermine it through unduly expansive interpretation. As a result, it is better to protect all legitimate interests.

Paragraph 42 of the Model Policy provides a list of appropriate internal interests which should be protected:

> *Policy formulation and investigations*
>
> 42. The Bank may refuse to disclose information where to do so would, or would be likely to:
>
> a. Seriously frustrate the success of a policy, by premature disclosure of that policy.

[1] See paragraphs 7 and 17(i) of the World Bank Policy.

b. Significantly undermine the deliberative process within the Bank by inhibiting the free and frank provision of advice or exchange of views.
c. Significantly undermine the effectiveness of a testing or auditing procedure used by the Bank.
d. Cause serious prejudice to an ongoing investigation by the Bank.

Second, paragraph 126(1) explicitly lists "internal documents, memoranda, and other similar communications" as examples of the types of information that fall within its scope. This is most unfortunate as many Bank staff are likely to interpret this as meaning that all of these types of documents should be kept confidential. Evidence (sample denials based on this exception) shows that this is in fact the case, leading to the tragic consequence that most ADB documents not identified for voluntary disclosure are unduly withheld as falling under this exception.

To participate in decision-making, the public may not need to know about the thought processes and debates within the body which is making a proposal; but it will often need to have access to the facts which form the basis for the proposal, such as studies, statistics and factual findings. Paragraphs 126(1) and (2) could be improved by explicitly excluding background studies, factual findings and statistical information from the scope of the exception.

Third-party Information

In an age when access to information has received recognition as a human right, any government, organisation or business which supplies information to an international financial institution should reasonably expect that this information may be made public, absent a risk of harm to any protected interest. A positive feature of the PCP is that it seems on its face to reject the "originator veto", which is still found in some other IFI disclosure policies. For example, information obtained from governments or international organisations is subject to disclosure even if provided in confidence; withholding it requires a showing that disclosure would "materially prejudice ADB's relations with that party" (par. 126(3)) or "materially prejudice the commercial interests, financial interests, and/or competitive position of such party" (par. 126(8)). These provisions reflect a reasonable harm-based approach.

The first of these provisions, aimed at protecting good relations, is repeated under the section on historical disclosure, albeit narrowed to protect only information provided with the express understanding that it remain confidential (par. 127(2)). The second, aimed at protecting competitive position, does not extend beyond twenty years.

It is, however, a matter of significant concern that other provisions in the Policy undermine these forward-looking provisions. Paragraph 126(9) exempts all "confidential business information", defined as "information covered by a confidentiality agreement or a non-disclosure agreement that ADB enters into with clients, advisors, consultants and other related parties" (see Definitions section). This is a category, rather than a harm-based exception, with the effect that certain third parties may veto disclosure in advance through the contracting process.

Provisions allowing third party veto are also found elsewhere. Under paragraph 99, 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.

Paragraph 130 is even more far-reaching than paragraph 126(9), providing that no (non-historical) information will be released if the ADB has given an express legal commitment to any party to keep the information in question confidential, unless that party consents to the disclosure. Furthermore, in contrast to paragraph 126(9), this provision is not subject to any public interest override.

Worst still is paragraph 104, which forecloses the public availability of private sector legal agreements entered into by ADB outright. In contrast, under paragraph 103 public sector loan agreements are publicly available after excising confidential information (which should be taken to mean information falling under the exceptions). The same blanket exception is accorded to commercial co-financing agreements under paragraph 99.

Together, these provisions create a broad third-party veto, which applies not only to information provided to the ADB by the third party but to any information whose confidentiality the ADB is prepared to warrant. These provisions evidently seriously undermine the presumption of disclosure. They either vest substantial discretionary power in the ADB to set the Policy aside in respect of particular documents or pieces of information, or exclude outright classes of documents, namely legal and co-financing agreements with a private sector contracting party, from the coverage of the right to information.

Paragraph 126(10), which exempts any "information related to procurement processes", is also overbroad. This provision insulates procurement processes from public scrutiny, despite their well-known proneness to fraud and other forms of corruption. The legitimate commercial, financial and competitive interests of (prospective) bidders are already protected by paragraph 126(8) which, in contrast to paragraph 126(10), is subject to a harm test.

The PCP includes a limited third party notice provision, in paragraph 155, which applies where a request relates to an ADB assisted activity in a developing country, and which calls for consultation with "the government, project sponsor, or co-financier, as appropriate". This is both rather limited and vests undue discretion in ADB staff to decide whether or not consultation is 'appropriate'. Instead, the ADB should be required to consult whenever there is a well-founded reason to assume that an exception applies to information obtained from a third party which is the subject of an access request. In such cases, the third party should be given an opportunity to make representations as to why it believes the information should be withheld. The third party's objection should not be treated as a veto, but as a factor to be taken into account when assessing whether or not an exception actually applies.

The Model Policy provides the following third party notice clause:

> *Third party notice*
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> 45. Where a request for information relates to information provided to the Bank in confidence by a third party, the Bank will give written notice to that third party of the request and will give the third party eight days within which to object to disclosure of the information and to provide reasons as to why the information should not be disclosed. Where a third party objects to the disclosure of the information, the Bank will take this into account, among other things, when deciding whether or not to disclose the information.

Privacy

Paragraph 126(4) exempts a range of employment-related files on ADB management, staff and consultants from disclosure, such as terms of employment, performance evaluations and medical information. This is repeated verbatim for historical information in paragraph 127(7). This is a typical example of a provision which should be replaced with an identification of the interest to be protected, in this case the legitimate privacy interests of ADB management, staff and consultants. This would ensure that the sensitivity of a file is assessed based on its substance rather than its title. The Model Policy, for example, refers to the "unreasonable disclosure of personal information about a natural person" (paragraph 36).

Financial Information

Paragraph 126(5) lists a range of ADB economic data which are to be withheld, such as estimates of future borrowings, financial forecasts and credit assessments. Although this is probably appropriate, it would be preferable to list the interests sought to be protected here, and to add a harm test to this provision. The interests might, for example, be the protection of ADB's management of its resources or to avoid undue benefit to other persons. Similarly, paragraph 126(16) provides blanket protection to audit reports. While audit processes may legitimately be kept confidential, it is normal practice for public bodies to disclose annual audit reports. In any case, the legitimate aim, presumably the protection of ADB's ability to manage its resources, should be substituted for the category exception, and a harm test should be added.

Paragraph 126(18) provides an exception in respect of financial information, the disclosure of which "would or would be likely to materially prejudice the ability of a member country government to manage its economy". Provisions along these lines are a fixture of national laws and this provision represents good practice, with a clear identification of the protected legitimate interest and a sufficiently stringent harm test. In this regard, Paragraph 126(6), which exempts analyses of country creditworthiness and credit ratings from disclosure, appears to contribute to the same objective as paragraph 126(18), and may therefore be superfluous. In any case, it lacks a legitimate interest and harm test.

Board of Directors

Pursuant to paragraph 126(7), the "proceedings of the Board of Directors" are confidential, although the schedule and minutes of Board meetings are disclosed (par. 113), along with chair's summaries of Board discussions on country strategies and programmes (par. 65), and on operational policies and strategies (par. 67). This information shall, however, be available as historical information after twenty years.

The GTI submits that Board meetings should be open and that members of the public should be allowed to observe. To facilitate this, notice of meetings, indicating the time, place and the topics to be discussed, should be provided in advance. Meetings may be closed to protect legitimate interests but any decision to close a meeting should itself be taken in public and reasons for closure should be provided. Summaries, minutes and transcripts of Board meetings should also be made available as soon as possible after the meeting, although legitimately confidential information may be redacted.

To the extent that openness, either of the meeting itself or in relation to transcripts, would inhibit the free and frank discussion of a particularly sensitive matter at a Board meeting, closure could be asserted under the exceptions in paragraphs 126(1) and (2), discussed above. There is no need for further protection for Board confidentiality.

Exceptions Relating to Investigations and Legal Matters

A peculiar provision is paragraph 126(15), which protects the names of those declared ineligible (blacklisted), or who are under investigation, under the anticorruption policy. While the presumption of innocence may justify withholding the names of those under investigation – which could also be done pursuant to the general provision on privacy – no legitimate interest is served by withholding the names of those already subject to sanction after having been found responsible for corruption. The World Bank has for some time disclosed the names of those prohibited from doing work on Bank-financed development projects, and early in 2009 this was extended to cover all of those prohibited from providing goods and services directly to the Bank.[2]

Paragraph 126(14), conversely, applies to protect the identity of the source of a corruption allegation. Without a doubt, withholding the identity of whistleblowers will often be a justified measure, to protect them against retribution and to encourage others with knowledge of wrongdoing to come forward. At the same time, this is another example of an issue which could be dealt with under a more general, harm-based exception, for example one permitting information to be withheld where disclosure would harm the prevention or detection of corruption or an investigation. These are already protected by paragraphs 126(12) and (13) which, on a harm-based approach, protect the administration of justice, attorney-client privilege and investigations.

[2] See http://freedominfo.org/ifti/20090127.htm.

Notice for Denial of Access

Paragraph 155 requires the ADB to provide reasons when information in a document is removed for being confidential in accordance with the Policy's exceptions. Pursuant to paragraph 157, when a request for information is denied, the ADB shall provide the reasons why the request has been denied, indicating the particular provision in the Policy upon which it has relied to justify the refusal.

In practice, we have observed cases where a denial of access to information by the ADB is accompanied by just a simple reference to the claimed exception under the PCP. This does not satisfy the requirement to provide reasons for the application of an exception. There is a presumption in favour of disclosure and exceptions represent a derogation from a substantive right. As a result, the ADB, when denying a request for information, has the burden of showing that the information requested falls within the scope of one or more exceptions. This burden is not discharged by a bare reference to an exception. At a minimum, the denial should state clearly the legitimate aim or interest sought to be protected, and the facts and circumstances that demonstrate the substantial harm to, or the frustration of, the legitimate aim or interest that will result from the disclosure of the information.

Public Interest Override

As discussed at the beginning of this section, international law requires requests for information to be granted if the public interest in disclosure, on balance, outweighs the harm that would be caused to the protected private or public interest. This flows directly from the concept of proportionality, which applies to any restrictions on rights (i.e. restrictions need to be proportionate and where the harm to the right exceeds the benefit to other interests, this standard is not met). This implies that any regime of exceptions to a disclosure policy should be subject to a 'public interest override'.

The PCP only provides for a limited public interest override. Paragraph 129 does set out a public interest override which applies to all of the exceptions. However, application of the override is discretionary rather than obligatory, as it provides that the "ADB *may* disclose" information pursuant to it [emphasis added]. This suggests, peculiarly, that the ADB reserves the right to act against the overriding public interest. Moreover, for most exceptions, the ADB may only disclose the requested information if the public interest in access to the information "significantly" outweighs the harm that would be caused by disclosing it. Thus, if disclosure is preponderantly in the public interest, but not by a significant margin, the ADB is actually required to act against the overriding public interest. For the internal deliberations exceptions listed in paragraphs 126(1) and (2), and for the historical exceptions listed in paragraph 127, the ADB is allowed to release information where the public interest in access simply outweighs the harm from disclosure.

The public interest override should be mandatory and should apply whenever there is an overriding public interest in disclosure. The Model Policy includes the following public interest override:

> *Public interest override*
>
> 46. Notwithstanding any provision in this Section of the Policy, the Bank does not refuse to disclose information unless the harm to the interest protected by that provision outweighs the overall public interest in disclosure.

Historical Information

We welcome the fact that the PCP establishes a presumption that historical information will be released 20 years after its issuance. Paragraph 127 sets out a series of ten exceptions to this presumption; essentially a shortened version of the list of 19 exceptions which apply to contemporary information. Although these exceptions are in some cases formulated more restrictively, for the most part the concerns noted above also apply where the exception is repeated in paragraph 127.

Furthermore, it is not clear why at least some of the interests listed in paragraph 126 would need to be protected for 20 years. This applies, for example, to the deliberative process exceptions and to the proceedings of the Board of Directors. These documents would lose their sensitivity within five or at most ten years, making a shorter declassification window more appropriate. The new World Bank Disclosure Policy, for example, provides for the release of most Board information after either five or ten years, including verbatim transcripts of Board and Board Committee Meetings.

Severability

Paragraph 124 stipulates that where part of the content of a document is subject to one of the exceptions, the remainder will nevertheless be disclosed, insofar as it can be reasonably severed from the document. Where information is withheld in this manner, paragraph 123 provides that the fact that it has been removed should be indicated, unless doing so would itself violate an exception. These are positive provisions which accord with international better practice.

Recommendations:

- The list of interests protected under the deliberative process exceptions found in paragraphs 126(1) and (2) should be expanded so as to protect not only the free and frank provision of advice but also the success of policies, testing and audit procedures, as well as ongoing investigations.

- The reference to "internal documents, memoranda, and other similar communications" should be removed from paragraph 126(1).

- The deliberative process exceptions under paragraphs 126(1) and 126(2) should expressly exclude background information such as facts, analysis of facts and technical data.

- The ADB should not be allowed to extend the harm-based exceptions in favour of good relations with third parties and protection of competitive position by entering into confidentiality agreements. Paragraph 126(9), protecting "confidential business information", should be replaced by protection for trade secrets, and the definition of "confidential business information" should be deleted.

- Paragraph 130, protecting legal agreements on confidentiality, should be removed.

- The provisions in paragraph 99 giving a bilateral or multilateral co-financier the right to object to the disclosure of legal or financial agreements in official co-financing transactions, as well as the provisions giving blanket exception to commercial co-financing agreements, should both be removed.

- The provision in paragraph 104 exempting private sector legal agreements from public availability should be removed, and the section revised to align with paragraph 103 where public sector loan agreements are made publicly available after excising exempt information.

- Protection of information related to procurement processes, as provided for in paragraph 126(10), should be removed.

- The policy should require the ADB to consult with third parties who are affected by an access request relating to information they provided to the ADB whenever there is a well-founded reason to assume that an exception applies.

- The exception in favour of privacy, in paragraph 126(4), should incorporate a harm test (such as unreasonable disclosure of private information).

- The exception in paragraph 126(5), protecting various types of ADB economic data, should refer to a legitimate interest and incorporate a harm test.

- The exceptions at paragraph 126(16), in favour of audit reports, and at paragraph 126(6), in favour of country credit ratings, should either be removed or conditioned by reference to the idea of harm to a legitimate interest.

- The Board of Directors should not receive special protection over and above that accorded generally to other ADB-held information. The protection to Board of Directors proceedings under paragraph 126(7) should be removed. Instead, Board meetings should be open to the public and transcripts of these meetings should be

made available on a proactive basis.

- The names of those declared 'ineligible' under the anticorruption policy should be published on the ADB website, instead of being rendered confidential pursuant to paragraph 126(15).

- Protection of whistleblowers ("source of a corruption allegation" under paragraph 126(14)) should be made subject to a harm test such as serious prejudice to the prevention or detection of corruption.

- The provision for public interest override under paragraph 129 should be revised to make it mandatory and so that it applies whenever disclosure is in the overall public interest.

- The historical protection for certain types of information under paragraph 127 – such as Board information and internal information – should be shortened to five or at most ten years.

- The requirement under paragraph 155 for ADB to provide reasons when information in a document is removed for being confidential, and in paragraph 157 for ADB to provide the reasons why a request has been denied, should be made more definite by requiring a clear statement of the legitimate aim or interest sought to be protected, and the facts and circumstances that demonstrate the substantial harm to, or the frustration of, the legitimate aim or interest that will result from the disclosure of the information.

III. The PCP's System of Oversight

The key oversight function in the PCP is the establishment of the Public Disclosure Advisory Committee (PDAC), with a mandate to "interpret, monitor, and review" the Policy. The Committee is comprised of the Managing Director General (the chair), the Principal Director of the Office of External Relations (OER, the secretary) and the General Counsel, and reports directly to the President (paragraph 151).

Any requester who believes that his or her request for information has unreasonably been denied, or that the PCP has not been applied properly, may submit a complaint to the PDAC. The PDAC will acknowledge receipt of such a complaint within five days and come to a decision as soon as possible and in any event within 30 calendar days. In coming to a decision, the PDAC shall take into account both the exceptions and the public interest in disclosure, and it shall provide reasons for its decision (pars. 158-159).

Pursuant to paragraph 177, the disclosure requirements of the PCP are also subject to review in line with the policy on accountability, namely the *Review of the Inspection Function: Establishment of a New ADB Accountability Mechanism*, adopted 8 May 2003. This means that anyone who has been harmed by the non-application of the PCP may petition the Compliance Review Panel for redress.

The disclosure policies of a number of IFIs are subject to accountability mechanisms, as is the case with the ADB, but these systems have two key drawbacks from the perspective of oversight of access to information. First, they are limited in scope to those who have suffered harm from the non-application of a policy. This is a significant limitation since, although information disclosure failures often contribute to the creation of harm, it is rare that they are the sole or even main cause of the harm. Second, the procedure for accountability reviews is normally very cumbersome and time-consuming, unnecessarily so in the context of pure information appeals.

At the time it was established, the PDAC was an important innovation. It represents a formal level of appeal from refusals to disclose information which should help ensure consistency in the application of the policy, as well as an opportunity for redress. Few other IFIs had gone so far as to establish a formal level of appeal at the time, although the European Investment Bank, as a European Union institution, is subject to the jurisdiction of the European Ombudsman.

However, the PDAC remains an internal level of appeal, consisting of members of senior management reporting to the President. It thus fails to conform to the standards of the GTI Charter, Principle 6 of which provides:

> *Principle 6: Appeals*
>
> Anyone who believes that an international financial institution has failed to respect its access to information policy, including through a refusal to provide information in response to a request, has the right to have the matter reviewed by an independent and authoritative body.

The new World Bank Disclosure Policy, adopted on 10 December 2009, comes much closer to implementing the standards of Principle 6 of the Charter than any other IFI has done. It provides for an internal appeal to the Disclosure Committee, chaired by the Vice-President for External Affairs (EXTVP) and comprising four other regular members representing Operations Policy and Country Services (OPCS), the Corporate Secretariat (SEC), the World Bank Group Archives Unit and the Legal Vice Presidency (see paragraphs 24 and 28(a) of that Policy).

Significantly, the World Bank has made a commitment to establish a "second, 'independent' stage of appeals", by constituting a three-person body whose members "would be appointed for their recognized reputation in this area" and who "could respectively be: (i) a lawyer experienced in matters of compliance with laws related to access to information; (ii) a representative of client countries, perhaps a senior official from such an information office in a client country; and (iii) an expert in freedom of information issues, independent of government." (see paragraph 28(b) and footnote 40) The body, which has yet to be constituted, would report to the Board, and the Policy states that its decisions would be final.

***Recommendation*:**

- The ADB should maintain the PDAC as level of internal appeal but it should also put in place an independent body, perhaps along the lines of the proposed World Bank oversight body, to consider appeals from decisions of the PDAC.

IV. Access by Affected People

The PCP defines "affected people" as those who may be beneficially or adversely affected by a project or programme assisted by the Asian Development Bank.

On top of the right to information available to all, the PCP recognises other important values associated with providing access to information by affected people. These values include participatory development, accountability in ADB operations, and development effectiveness (see pars. 11, 12 and 27).

For these reasons, the PCP appropriately gives emphasis to the need to provide affected people with adequate and timely information on ADB assisted projects and programmes. In the PCP Executive Summary, the ADB declares that it "must expand opportunities for people affected by ADB-assisted operations to be informed about, and influence, the decisions that affect their lives", and that through the policy, "it seeks to provide information in a timely, clear, and relevant manner and to share information with project-affected people early enough to allow them to provide meaningful inputs into project design."

Unfortunately, based on consultations with affected communities and their support groups, a picture of consistent failure to respect these PCP commitments in practice emerges. We heard and verified numerous accounts of the following access to information problems relating to ADB assisted projects:

- Ineffective public/community notice of projects under preparation.
- Limited, incomplete information, if at all available at the local level.
- Lack of timeliness of information.
- Lack of comprehensibility of available information.
- Unresponsiveness of concerned people at the local project level, whether from ADB or from the government or private sponsor.
- The primary means of public access to information, which is the ADB website, is not available to most members of the community.

This is tragic considering that the community members we have consulted have clear ideas of their community interests. There is high level of awareness of their right to information, strong aspiration for meaningful consultation, legitimate and reasonable concern over adverse impacts (relating, for example, to the environment and ecology, livelihood and employment, physical dislocation, and so on), and concrete ideas on how their concerns could be addressed.

One underlying reason for this situation is that the PCP provisions on access by affected people passes much of the responsibility for disclosing information to the borrowing government or private sector sponsors. It is the borrower or private sector sponsors that are responsible for making relevant environmental, involuntary resettlement, and indigenous people's planning documents available to affected people (see paragraphs 78,

80 and 83 of PCP). This allocation of responsibility has not been changed in the new Safeguard Policy Statement.

Where the ADB does take responsibility for making project documents publicly available, the general rule is that public availability means availability on its website, which facility is unfortunately inaccessible to poor communities. The result is a level of ADB responsibility for access to information by affected people that is completely inconsistent with its significant level of involvement in project conceptualisation, approval and implementation.

Paragraphs 74 and 75 of the PCP provide an opening to address the situation. Paragraph 74 reads:

> To facilitate dialogue with affected people and other individuals and organizations, information about a public or private sector project or program under preparation (including social and environmental issues) shall be made available to affected people. ADB shall work closely with the borrower or project sponsor to ensure information is provided and feedback on the proposed project design is sought, and that a focal point is designated for regular contact with affected people. This should start early in project preparation, so that the views of affected people can be adequately considered in project design, and continue at each stage of project or program preparation, processing, and implementation. ADB shall ensure that the project's or program's design allows for stakeholder feedback during implementation. ADB shall ensure that relevant information about any major change to project scope is also shared with affected people.

Paragraph 75 reads:

> To support the requirements in paragraph 74, developing member country governments and ADB may jointly develop communications plans for certain projects and programs, particularly those likely to generate a high level of public interest. Such plans could, for example, recommend how to engage in dialogue with affected people, broaden public access to information on economic and legal reforms, help governments and project sponsors involve affected people in the design and implementation of ADB-assisted activities, and increase involvement of grassroots and civil society organizations in the development process.

In turn, footnote 16 of the PCP expounds on what a communication plan would contain:

> Communication plans would indicate objectives, form (including languages), method, and timing for sharing information; the stakeholders; and the focal issues. They would also include a process for incorporating responses and inputs, and for reporting on the use of those inputs. Some communication plans could call for the development of project information centers. If relevant, project proposals would include a description and financing plan for such centers.

The ADB, however, has failed to use these provisions proactively to make good its policy pronouncements regarding access to information by affected people. In the ADB's "Assessment of the Implementation of the Public Communications Policy in 2008", it admits that the joint development of communication plans on projects (and programmes) by borrowing governments and the ADB was "not emphasized in 2008 because of capacity issues."

Substantively, the PCP review can help address the serious gap by revising paragraph 74 to make clear a direct obligation on the part of the ADB to provide information to communities affected by projects to which it provides assistance.

Paragraph 75 should also be revised to make the joint development of communication plans for ADB assisted projects and programmes mandatory, and not merely discretionary as presently provided. The requirement should apply not just to borrower governments, but to private project sponsors as well. The communication plan should form an integral part of publicly available preparatory project documents.

The PCP should set out the minimum content of the communication plan, to include the following:

1. Communication strategy appropriate for the project or programme

   The communication strategy would differ based on a number of factors, including the nature and scope of the programme or project and its location, the profile of the affected people, and the expected level of public interest in the project. The strategy should include a multi-stakeholder mechanism for information management and flow at the local level.

2. Mechanisms for effective public notice

   The plan should indicate how and when the ADB and the borrower/project sponsor will notify a community that a project or programme expected to affect them is under preparation. The notice may be disseminated in different ways, such as on board notices in conspicuous areas, via notice letters through local government administrative units or announcements through the mass media, and through other appropriate means. The notice should identify where and how more detailed information about the project or programme may be accessed.

   In addition to the initial public notice, there should also be notices of major project or programme developments, such as a change in scope.

3. Designation of information centres

   The information centre for the project or programme should be identified. For projects affecting communities, the information centre should be located within the community, such as at a public school or local government office.

4. Complete and timely information to be made available

   Information centres should have copies of all publicly available information, on the project or programme (such as the PID, safeguard documents as amended by the new Safeguard Policy Statement), with a documents index for

easy reference, updated on a rolling basis, including as new project/programme documents are produced.

Key information should be produced in an accessible language and form.

5. Reporting and monitoring of implementation of the communication plan

   The communication plan should indicate the responsibility and mechanisms for monitoring of and reporting on its implementation.

Recommendations

- Paragraph 74 should be revised to make it clear that ADB is under a direct obligation to provide information to communities affected by ADB assisted projects.

- Paragraph 75 should be revised to make the joint development of communication plans for ADB assisted projects and programmes mandatory, and to apply to both borrower governments and private project sponsors. The communication plan should form part of the publicly available preparatory project documents.

- A new paragraph should be added setting out the minimum content of the communication plan, to include the following:
  - Communication strategy appropriate for the project or programme
  - Mechanisms for effective public notice
  - Designation of information centres
  - Complete and timely information to be made available
  - Reporting and monitoring of implementation of the communication plan

V. Other Comments

The right to access information held by public bodies, including inter-governmental organisations like the ADB, is a fundamental human right. However, the PCP still falls short of expressly recognising this right, and suggests that a commitment to disclose information is merely policy on the part of ADB. Specifically, paragraph 31 of the PCP states: "ADB **supports** the right of people to seek, receive, and impart information and ideas about ADB-assisted activities". [emphasis added]

We welcome the statement made in the executive summary of the ADB's 2008 assessment of PCP implementation that "the PCP recognizes that access to information is a right rather than a discretionary privilege." More recently, in a response to a joint letter from the NGO Forum and the GTI to the ADB, dated 18 November 2009, on the subject of the PCP review, the Bank's public information and disclosure specialist and head of the Info Unit, Delphine Roche, stated: "ADB recognizes that people have a right to information held by ADB and this is the underlying principle that governs the PCP."

We look forward to the ADB making express in the PCP such recognition of the people's right to information.

Pursuant to paragraph 55 of the PCP (see also paragraph 35), the scope of the policy is limited to documents the ADB "produces or requires to be produced". This is a very significant limitation and potentially rules out a wide range of information which the ADB holds, but which it has not itself produced or required to be produced. Better practice is to cover all information held by or accessible to the institution. The GTI Model Policy goes even further:

> *Information held by third parties*
>
> 3. To give full effect to the presumption of disclosure, the Bank includes, from the date of adoption of this Policy, clauses in the contracts it concludes to ensure that, subject only to reasonable operational constraints, it can access the information created or obtained pursuant to those contracts, by the parties to those contracts. This includes access to key documents held by borrowing governments or direct service providers created or obtained pursuant to a contract with the Bank.

The current PCP commits to its review within five years and that has, in part, triggered the current review. This is welcome but, at the same time, five years is a very long time in a field where developments are taking place all the time, including in the form of reviews by other IFIs, as well as in terms of changing attitudes and values about information. We recommend that the new policy commit to a full review within a shorter period of time, for example within three years.

Recommendations

- In paragraph 31, the word "supports" should be replaced with the word "recognizes".

- Paragraphs 55 and 35 should be revised to expand the coverage of information to include not just documents the ADB produces or requires to be produced, but all documents held by it.

- Consideration should be given to including a new provision so that the ADB commits to ensuring that it has access to information held by bodies which operate under a contract with the ADB.

- The new policy should commit to a full review within three years instead of five years.

Conclusion

The ADB is a very powerful institution. All of its operations, from policy reform to development finance, are public sector in nature. These operations, directly or indirectly, for better or worse, affect the lives of millions of men and women not only in Asia but throughout the world.

Because of this, the ADB itself, in its PCP, acknowledges the moral argument for transparency and public accountability. Paragraph 14 of the PCP states in part that "[A]s a public institution, ADB should be publicly accountable. Accountability cannot be achieved without availability of information." In the absence of any international body with compulsory jurisdiction over the ADB, and in the face of broad ADB immunities at the country level, internal policies such as the PCP constitute the main mechanisms to secure transparency and accountability. This is why this review of the PCP, as well as its outcome, is so very important.

We note the positive approach taken by the Office of External Relations/Info Unit in inviting submissions on the current policy before releasing its own discussion note or other document, which might have pre-empted the outcome of review. We take this as an indication that the ADB will carefully consider the public comments it receives as it moves forward to amend its disclosure policy. Indeed, it is in this spirit that we are submitting these comments.

The true test of the ADB's commitment to high norms of transparency and accountability will be evidenced by the substance of the draft revised policy it prepares. We hope that the ADB is ready to rise to the challenge of taking bold measures to improve the PCP in both substance and practice, thereby sending a strong signal to all that it takes its declarations on transparency and accountability in earnest.