



**Joint Submission of NGO Forum on ADB and Both ENDS Comments on the  
2<sup>nd</sup> draft of the Public Communications Policy  
(to be renamed as Access to Information Policy “AIP”)  
6 April 2018**

Currently the review process for Asian Development Bank’s (ADB) Public Communications Policy (PCP) is on its 2<sup>nd</sup> year. The 2<sup>nd</sup> draft Consultation Paper is a result of extensive consultation process across different stakeholders including CSOs through 17 face – to – face consultations. The NGO Forum on ADB (the “Forum”) and its members including Both ENDS actively participated in 5<sup>1</sup> of these consultations as well as submission of written comments. The summary of key points raised from the December 2016 written submission to the latest letter to ADB’s Board of Directors dated 12 January 2018 are as follows:

1. Implementation Arrangements (previously called Staff Instructions) should be compliant under ADB’s Accountability Mechanism;
2. Retain the commitment of the current 2011 PCP that “ADB will undertake translations in accordance with its translation framework adopted in 2007 (para. 112)”;
3. Directly demanding the appointment of the focal point to support a two – way communication with affected people whose needs for information require responses that are reliable, project – specific, policy – informed and above all, time – bound;
4. ADB should narrow down its list of exemptions, remove questionable overrides and unnecessary vetoes and refrain from introducing additional barriers to right to information;
5. Strongly subscribe for prescriptive information disclosure policy;
6. To have an independent and uncompromised appeals panel;
7. Mandatory requirement that any change both in the new Access to Information Policy and Implementation Arrangements should be subject to public consultation; and
8. ADB should have stringent information disclosure requirements to disclose information on financial intermediaries including third parties and when using country safeguards system (CSS).

This submission of comments on the 2<sup>nd</sup> draft will focus on the above - mentioned key points.

**Implementation Arrangements (previously called Staff Instructions) should be compliant under ADB’s Accountability Mechanism.**

1. The Implementation Arrangements, which were previously called as Staff Instructions, will now be under ADB’s Operations Manual (OM). The current OM Section L3/BP on the PCP is also clear that it is subject to compliance review. This same section should also be included in the Implementation Arrangements. At the same time, the Forum recognizes that the 2<sup>nd</sup> draft explicitly indicate that, “**This policy is subject to AIP’s appeals mechanism, as described in paras. 19 – 26 and compliance review under the ADB Accountability Mechanism (para. 28) [emphasis supplied].**”

---

<sup>1</sup> NGO Forum on ADB participated on consultations held in the Nepal, Bangladesh, Philippines, Thailand and Europe (from Germany).

2. As previously articulated by the Forum, the proposed Policy and its corresponding Implementation Arrangements should be clear on this. Its scope should not be subject to any interpretation on whether or not breach of the Policy and the Implementation Arrangements can be legitimate grounds when filing a complaint under the Accountability Mechanism. According to ADB's Office of the Compliance Review Panel (OCRP), the subject of complaints on information; consultation and participation represent 14% and 13.5% respectively ranking as third and fourth main issues.<sup>2</sup> Any violation on the Policy and the Implementation Arrangements should not prevent complainants (and project – affected persons) from having a recourse and remedy to address their concerns and to facilitate their meaningful engagement and/or dissent in all phases of ADB's project cycle.

**Retain the commitment of the current 2011 PCP that “ADB will undertake translations in accordance with its translation framework adopted in 2007 (para. 112)”.**

3. The Forum acknowledges that the 2<sup>nd</sup> draft has been translated into 10 languages already. The Forum equally recognizes that there is a devoted section on Translation under the Implementation Arrangements (para. 9) and cites the Translation Framework for further guidance. Furthermore, the Forum is also pleased that the earlier comment on reintegrating para. 112, 2011 PCP now appears in the same section on the Implementation Arrangements (ibid).<sup>3</sup> The 2<sup>nd</sup> draft under the Policy Principles also emphasizes that providing information will be done “within a timeframe, using relevant languages and in a way that allows project – affected people and other stakeholders to provide meaningful inputs into project design and implementation (para. 8 [vi]).” This is also consistent with the section on providing information to project – affected people (para. 5) under the Implementation Arrangements. In addition, the timely disclosure of documents with respect to the requirements under the Safeguard Policy Statement and Accountability Mechanism remains to be the same and was referenced in the Implementation Arrangements as well.
4. Conversely, in the same submission of the Forum, we also recommended to assign a prescriptive number of days for the release of translated versions particularly for safeguards documents.<sup>4</sup> In addition, this should be extended for the other documents or information that are mandated to be translated i.e. Country Partnership Strategies (CPS) and Interim CPSs and Project Data Sheets (PDS). In practice ADB is also translating its policies, strategies and information needed for stakeholder consultations. However to further strengthen the commitment of ADB on transparency and increased shared information, these should also be classified as mandatory documents to be translated.
5. As translation of safeguards documents is mandated by ADB, the Bank should also ensure that no construction, displacement, rehabilitation, etc. should move forward not unless these translated documents were also shared with the project – affected persons. This is also consistent with both the provisions of the 2<sup>nd</sup> draft and safeguards of providing information in a manner understandable to the project – affected persons to facilitate their meaningful participation (or dissent) into the project.

---

<sup>2</sup> Data as of 31 December 2017 which was presented during the Validation Workshop on the Development of Guidebooks on ADB Accountability Mechanism' Compliance Review Process (7 February 2018) held in Bangkok, Thailand.

<sup>3</sup> NGO Forum on ADB Submission on the Draft Communications Policy of the Asian Development Bank, para. 43. December 2016.

<sup>4</sup> Ibid,

6. Furthermore, taking into account the benchmarking exercises undertaken by ADB on the comparative data on translation in multilateral development banks (MDBs) and international organizations<sup>5</sup>, ADB should consider having in – house translators. As the findings have shown, ADB is the only international organization that does not have full – time staff.<sup>6</sup> Considering the demand side, resource implications and efficiency, the ADB should at least have x number of full – time staff for quality control on the volume of documents being translated and disseminated particularly for the project – affected people. The Translation Framework also provides that it will be reviewed every 5 years concurrent with the review of the PCP. The ADB should also initiate this process of review to assess the relevance and effectiveness of the framework as a means to provide information specifically for the project affected people in a language understandable to them.

**Directly demanding the appointment of the focal point to support a two – way communication with affected people whose needs for information require responses that are reliable, project – specific, policy – informed and above all, time – bound.**

7. The Forum recognizes that this input of reinstating the paras. 47 and 48 of the current 2011 PCP on providing information to affected people and other stakeholders including having project focal point are also integrated into the Implementation Arrangements. This is also encapsulated in the 2<sup>nd</sup> draft’s Policy Principles on providing information to project – affected people and other stakeholders (para. 8[vi]). The Implementation Arrangements is similarly clear that the project focal point for ADB is the project officer. The Forum recommends that ADB should systematically disseminate the information that, “the borrower or client needs to appoint its own information focal point/s according to the needs of the project (para. 8)”. An assessment on the implementation of the communications strategy should also be undertaken to gauge borrowers and clients compliance to it and its effectiveness as a tool for the project – affected people.
8. Furthermore, ensuring that gender differentiated response from the project – affected people and other stakeholders should be considered to further strengthen the role of the project focal point in all phases of the project cycle. This can advance measures to ensure that the access to information policy is also committed in making it gender sensitive and responsive.
9. In the Implementation Arrangements, it is written that only Category A non – sovereign projects requires a 120 - day consultation to be included in the MoU. However in the safeguards policy all Category A projects require 120 - day disclosure, consequently this could potentially be a dilution of the safeguards policy.<sup>7</sup>

**Strongly subscribe for prescriptive information disclosure policy.**

10. The Forum recognizes that the shift to a principles – based policy with a presumption in favor of (proactive) disclosure not unless it falls under the list of exceptions is an ongoing

---

<sup>5</sup> Comparative data across ADB, EBRD, IDB, IMF and World Bank.

<sup>6</sup> 2012 ADB Translation Framework para. 4.

<sup>7</sup> The ADB Safeguard Policy Statement has very particular language about prior disclosure for "a draft full EIA (including the draft EMP) at least 120 days prior to ADB Board consideration, and/or environmental assessment and review frameworks before project appraisal, where applicable" and "for environment category A projects, draft environmental impact assessment reports at least 120 days before Board consideration", and 120 day prior disclosure for different finance modalities (requirement 4 for financial intermediaries).

trend across MDBs. As this is the new proposed policy structure for ADB, the Forum recommends that a prescriptive implementation and review period should be established instead i.e. a review of the proposed AIP will be undertaken after 5 years of its effectivity. This will better gauge the effectiveness of the Policy and its commitment to transparency. Furthermore, the proposed AIP must not adversely affect the information disclosure requirements provided under the Safeguard Policy Statement, which provides the minimum set of safeguard documents to be disclosed with the timing and modality of dissemination for each document. .

**ADB should narrow down its list of exemptions, remove questionable overrides and unnecessary vetoes and refrain from introducing additional barriers to right to information.**

11. The class of documents identified in the 2<sup>nd</sup> draft under the exceptions to disclosure (paras. 9 - 10) is mostly similar from the current 2011 PCP on exceptions to presumed disclosure (para. 94 - 97). The review of the PCP should be an opportunity not to dilute the good features of the policy and strengthen the other aspects that are considered to be weak, irrelevant or ambiguous. It is in this context that instead of retaining this list of exceptions, ADB should veer away from it and must rather formulate with sufficient precision the “harm” it seeks to avoid by stating the commercial interests, financial interests, competitive position and/or confidential business information of such party that is put at risk if a specific document is disclosed rather than identifying a set of exceptions.
12. Essentially, the burden of proof in justifying the “harm” it seeks to avoid in instances of refusing access to information should fall on the ADB. Otherwise the principle on presumption in favor of disclosure should be applied.
13. The 2<sup>nd</sup> draft further provides that, “ADB does not disclose proceedings of the Board of Directors, except for verbatim transcripts, minutes of Board meetings and **chair’s summaries of certain Board meetings**, as disclosure of such documents would inhibit the frank exchange of ideas, views and approaches among Board members (para. 10[iii]) [emphasis supplied].” The Forum recommends that ADB should reconsider non - disclosure of Board meetings particularly the minutes of the Development Effectiveness Committee (DEC) and the Board Compliance Review Committee (BCRC). BCRC plays an integral role under the Accountability Mechanism and its decisions in reviewing CRP’s draft compliance review report and draft reports on monitoring implementation of remedial actions among others.
14. The Forum reiterates that having claimed the privilege of immunity, disclosure on decisions is one way of demonstrating that the said privilege is not abused in favor of political or business motivations. Disclosure of the minutes of the BCRC also adds additional safety net to ensure the independence of the committee and avoid suspicion on any potential conflict of interest that may arise. Risks of potential conflict of interest arise when a BCRC member is also representing the constituency of where the project is located e.g. complaints in the past e.g. Samoa: Promoting Economic Use of Customary Land and Samoa Agribusiness Support Project (2016); Mundra Ultra Mega Power Project (2013) and the Integrated Citarum Water Resources Management Investment Program (2012).
15. In the past, the Forum have argued that while in principle BCRC is sitting in the capacity responsible under the Accountability Mechanism and the focus of CRP’s investigation is on the alleged non - compliance by ADB (and not the borrower), its structure poses undue

influence that may affect the outcome of the investigation and monitoring of the CRP. Disclosing the minutes of the BCRC remains consistent with the intent of the Access to Information Policy and the Accountability Mechanism with respect to providing right to information that would have an impact on the remedy to project – affected persons.

16. The ADB should also disclose routinely the votes of the Board of Directors when approving projects.

**To have an independent and uncompromised appeals panel.**

17. In the last 5 years (2013 – 2017), ADB registered an average of 6 denied requests for information in a year. While this number may be seemingly low as compared to the breadth of ADB – funded projects among other possible scope of inquiry, ADB should still ensure to disseminate information that there is a process for an appeals mechanism. The lack of non – utilization of the appeals mechanism currently set up in the 2011 PCP can possibly be attributed as well to the low awareness of project – affected persons and other interested stakeholders on it. The Forum recommends that the clause on appeals mechanism should also be inserted in contract clauses and ADB should exercise more proactive dissemination of information on this.
18. The Independent Appeals Panel (IAP) however may not be as “independent” as what the Policy would want to achieve i.e. “the IAP has **no authority** to consider appeals against decisions taken by the Board or the President if the appeal is based on the public interest override, or appeals against decisions taken by the Board using their prerogative to deny access to information normally disclosed (para. 23) [emphasis supplied].” This structure poses limitation and restraint on what the IAP as a second stage of appeals can actually provide. Furthermore there should be a mechanism by which public interest override is anchored on the intent and provisions of the safeguards and/or anti – corruption policies.
19. Hypothetically if a request pertained to information that would have an impact on a complaint filed under the Accountability Mechanism (e.g. BCRC minutes), and this would be elevated to the Access to Information Committee and later on the IAP. Due to the current structure of IAP, it might render to be a futile exercise due to its lack of authority over possible scenarios.

**Mandatory requirement that any change both in the new Access to Information Policy and Staff Instructions should be subject to public consultation.**

20. On Policy Monitoring and Amendments the 2<sup>nd</sup> draft provides that “amendments to the Policy, may be made from time to time (para.29).” Whereas as the Implementation Arrangements stipulates that, “changes to the AIP’s implementation arrangements will be posted on the ADB website. **Major changes that substantially alter the disclosure requirements, information request process or appeals processes will undergo appropriate consultation** (para. 20) [emphasis supplied].”
21. While the list is not exhaustive and serves to illustrate only on what are the instances that comprise as a “major change”, it is considered to be reasonable and acceptable. However, this should be further strengthened by integrating the section on providing information to project – affected persons i.e. any change from its current language should also be under

the scrutiny of public consultation to avoid any future arbitrary amendments by the Management.

**ADB should have stringent information disclosure requirements to disclose information on financial intermediaries including third parties and when using country safeguard system.**

23. According to ADB's Independent Evaluation Department (IED) review, it found out that not all public sector financial intermediary (FI) safeguard monitoring reports were uploaded to the website. In addition, none of the private sector FI reports had been uploaded to the website not even its redacted form. IED further recognizes that "while confidentiality may be a concern, the Bank needs to clarify how the absence of any public reporting is consistent with both the Safeguards Policy Statement and Public Communications Policy".<sup>8</sup>
24. The 2<sup>nd</sup> draft lacks a commitment by the ADB to make an effort to ensure that it disclose information relevant to its operations and activities, even if the said information is normally created or held by another party such as a contractor. This could further be addresses by imposing transparency and/or access to information clauses in contracts to require third parties to provide key information to ADB. In turn the Bank should also exercise its own due diligence in assessing the veracity of these information, which includes safeguards monitoring reports among others, and disclose it in the public domain.
25. The ADB has the responsibility in enhancing the level of transparency in the selection of FIs and with respect to the final beneficiaries. The Bank should ensure that all beneficiaries that are incorporated in different jurisdictions must be obliged to disclose country level information about their profits and tax payments in each country in which they operate in their audited annual reports.
26. The Forum would also reiterate that the review of the PCP offers an opportunity to improve disclosure requirements particularly when ADB intends to use CSS. Specifically, the methodology used for equivalency and acceptability assessments must be disclosed to see how CSS are evaluated with the safeguards. This would ensure that the Bank and the borrower are using appropriate and adequate parameters for avoiding harm in the implementation of a project. Similarly, project monitoring reports must also include information on the progress of the CSS gap - filling measures when CSS have been applied in a particular sector or agency.

**Other Issues:**

27. The "**draft Country Partnership Strategies (CPS) may be posted** on ADB.org if this is the best mechanism to disseminate to - country stakeholders, **if ADB and the government agree** (Appendix 2, p.6, Implementation Arrangements) [emphasis supplied]." As the CPS is ADB's primary platform for designing operations to deliver development results at the country level, the draft CPS **and** schedule of consultations should be disclosed to allow for meaningful engagement on the consultation process.

---

<sup>8</sup> ADB Independent Evaluation Department. *Safeguards Operational Review ADB Processes, Portfolio, Country Systems and Financial Intermediaries*. October 2014.

## Conclusion

28. Having participated thoroughly in this review process, we hope that the ADB will consider and adopt the recommendations provided to further improve peoples' right to information to meaningfully engage and make informed decision in ADB - funded development projects.

Signatories and Contributors:

Both ENDS  
CEE Bankwatch  
NGO Forum on ADB