

***Holding ADB Accountable:
A look at the Present Accountability Mechanism***
NGO Forum on ADB¹

The Asian Development Bank (ADB) announced a review of its Accountability Mechanism (AM) during the Annual General Meeting (AGM) in Tashkent in May 2010. A joint Board-Management Working Group² was established to conduct the review, and two external experts³ were appointed to assist the Working Group for reviewing the existing policy.

The existing policy was approved by ADB board members in 2003. In December 1995, ADB approved its Inspection Function that was designed to improve the quality and transparency of ADB's operations, as well as its accountability. The old Inspection Policy was changed after two claims were brought to the Bank. However, from 2003 to 2010, the OSPF (Office of the Special Project Facilitator) received 27 complaints, mostly in 2009, and only nine out of that were declared as eligible. Ironically, 10 complainants were declared ineligible merely due to failure to address to Operations Department in first step by the complainants. Meanwhile, in the same period the OCRP (Office of the Compliance Review Panel) received only three complaints, and the third one is the only one deemed eligible in the last five years. One of the major reasons of the rejection the complaints, was because the problems were not addressed before to ADB Operation Department.

There are various discussions, analyses and first hand experiences which question the effectiveness and constraints of the current AM. This background paper attempts to present such gaps and limitations in light of the present AM review.

ADB Accountability Mechanism at a glance

The current ADB Accountability Mechanism (AM) was approved by the ADB Board of Director (BoD) in May 29, 2003, built up from a review its Inspection Function that was established in 1995 and underwent reviews in 1998 and 2001-2003. Those reviews⁴ assessed the operations of the Board Inspection Committee (BIC) and related inspection procedures, and review the Inspection Function's application to ADB's private sector operations. The findings of the reviews stated among others: the inspection process and procedures were lengthy, confusing, and complex for most stakeholders inside and outside ADB. The first full inspection also raised concerns about independence, credibility, transparency and information dissemination, and effectiveness of the Inspection Function. After external and internal consultations BoD of ADB approved the existing AM policy.

The AM consists of two separate but complementary functions according to ADB. The two functions⁵ are:

¹ This background paper is prepared by Tea Soentoro, Policy Coordinator, NGO Forum on ADB to extend support for a comprehensive discussion among Forum members towards the preparation for the ADB Accountability Mechanism Review.

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⁴ ADB, Review of the Inspection Function: Establishment of a new ADB Accountability Mechanism, p. iii-iv, at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies

⁵ *ibid* at iv

- (i) *a consultation phase* consisting of a special project facilitator (SPF), who will respond to specific problems of locally affected people in ADB- assisted projects through a range of informal and flexible methods; and
- (ii) *a compliance review phase* consisting of a panel (the compliance review panel [CRP]) to investigate alleged violations of ADB's operational policies and procedures that have resulted, or are likely to result, in direct, adverse, and material harm to project-affected people, and to make recommendations to ensure project compliance, including recommendations, if appropriate, for any remedial changes in the scope or implementation of the project.

With regard to the degree of independence, the SPF reports to the ADB President while the CRP reports to ADB BoD.

The Office of Special Project Facilitator (OSPF):

Mandate of the SPF is to promote “... *consensus-based problem solving, seeking agreement among all parties in identifying the matters in dispute, ways to resolve the problems, and the time frame required*”.

“People who believe they have been adversely affected by an ADB-assisted project can use the consultation process regardless of whether ADB operational policies and procedures have been violated”.

However, complainants first must attempt to resolve their problems in good faith with the assistance of the concerned ADB operations department. The Consultation Phase does not supplant the operations department’s project administration and problem-solving functions. Furthermore, the SPF’s role is limited to ADB-related issues concerning ADB-assisted projects. The SPF does not interfere in the internal matters of any developing member country...⁶”

From May 2003 to August 2010, the OSPF received 27 complaints⁷. Only *nine* out of 27 complaints were declared as eligible, 17 as not eligible, and one is not decided yet as it is a new complaint in August 2010.

Problems raised in those complaints are as follows:

- lack of access to information and consultation process mentioned in 11 complaints;
- resettlement was mentioned in seven complaints;
- land acquisition in four complaints;
- lack of community participation in three complaints;
- Environmental Impacts Assessment (EIA) was mentioned in three complaints;
- Project component in two complaints;
- indigenous peoples, social uplift program, social impact assessment, business income, village infrastructure, distributaries link, procurement, livelihood, environment, loan suspension, bus stop and school reconstruction, were mentioned in one complaint each.

⁶ ADB. Office of the Special Project Facilitator, Consultation Phase at the ADB Accountability Mechanism, p.1 at Annual Report 2009, <http://www.adb.org/Documents/Reports/Consultation-Accountability-Mechanism/OSPF-annual-report-2009.pdf>

⁷ OSPF Complaint registry as per August 12, 2010 at <http://www.adb.org/SPF/registry.asp>

Table-1: Complaints received by OSPF 2003-2010

Year	Number of complaints	Eligible	Not decided yet	Not eligible
2004	3	1		2
2005	1	1		-
2006	6	1		5
2007	2	1		1
2008	-	-		-
2009	13	4		9
2010	2	1	1	-
Total	27	9	1	17

(Source: OSPF Complaint registry as per August 12, 2010, <http://www.adb.org/SPF/registry.asp>)

Reasons for the non-eligibility of those complaints were mostly because the complainants never addressed their problem to Operations Department (10 complaints)⁸.

Others were declared as not-eligible because:

- issues initially raised with SPF have been addressed by the government;
- Project Completion Report (PCR) has been approved;
- complaint deemed premature as the identification of the complainant (and any representatives) and contact information was not available;
- procurement related matters which is not considered under AM;
- Operations Department's efforts to address concerns are underway,
- complainants are not materially and adversely and directly affected by the said projects;

This indicated that most of the complainants were not familiar with AM procedures including lack of information and understanding on ADB and its Accountability Mechanism, Not to mention about its provisions and procedures.

The Office of Compliance Review Panel

According to ADB AM, the purpose of CRP is “... to investigate alleged violations by ADB of its operational policies and procedures in any ADB-assisted project that directly, materially, and adversely affects local people in the course of the formulation, processing, or implementation of the ADB-assisted project...”⁹

The compliance review determines “... whether ADB has or has not complied with its operational policies and procedures in connection with the particular project under compliance review, and not to investigate the borrowing country, Executing Agency, the borrower, or the PPS...”¹⁰

From May 2003 to August 2010, only three cases were handled by the OCRP¹¹. They were:

⁸ ibid

⁹ ADB, Review of the Inspection Function: Establishment of a new ADB Accountability Mechanism, para 99, p. 23, at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies

¹⁰ ibid

¹¹ <http://compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XGAWN?OpenDocument>

1. Southern Transport Development Project in Sri Lanka, received in 2004
2. Melamchi Water Supply Project in Nepal, received in December 2004
3. Fuzhou Environmental Improvement Project in China, received in June 2009

A serious problem was encountered by the OCRP in handling the complaint of two affected people by Fuzhou Environmental Improvement Project. In its report of 2009, the OCRP reported “... On 17 November 2009, the CRP expressed its serious concerns over the refusal of permission for the site visit...”¹² Refusal from the Chinese government according to CRP “... will prevent it from conducting a comprehensive and balanced review...”¹³

Accountability as power relation

“Accountability is one of those terms about which there a wide spread sense on what it means, but difficulty in coming to any agreement on its definition...”¹⁴ This statement reflects that accountability could be defined on interest base, though there are some indicators trying to form what is accountability: a process of holding actors responsible for their actions¹⁵; a means to exercise the rights to development founded on the principles of due diligence, non-discrimination, participation, transparency, accountability and redress.¹⁶ Other attempt is to develop a condition of accountability: it is composed of two aspects, which are answerability and enforceability. The answerability is about an obligation to justify decision and actions; and enforceability is about the ability to ensure that an agreed action is taken and effective mechanisms for redress if the action does not comply with. Enforceability requires that others are able to apply sanctions—political, legal, or financial sanctions—for poor performance and failure to meet agreed commitments¹⁷.

Looking at those descriptions, accountability in the context of people in the developing countries where ADB operates is therefore also about power relation: power to hold the ADB responsible, power to exercise human and women’s human rights, and power to push for sanction for failures of ADB funded projects. This is clearly a huge challenge for mostly oppressed people in the developing Asia.

However, this AM review could be a starter for people affected by ADB funded project and the support groups to define accountability and its mechanism that defend people’s rights to life and livelihood.

Gaps and Barriers in Filing Claims or Complaints on Accountability Issues

Gaps and limitations of ADB AM were discussed during a briefing session on ADB Accountability Mechanism for civil society groups organized by ADB OSPF and OCRP in November 2009 in Manila. The constraints discussed during the briefing session were as

¹² ADB. 2009, Annual Report of the Compliance Review Panel, page 8 at [http://compliance.adb.org/dir0035p.nsf/attachments/CRP_AnnualReport2009.pdf/\\$FILE/CRP_AnnualReport2009.pdf](http://compliance.adb.org/dir0035p.nsf/attachments/CRP_AnnualReport2009.pdf/$FILE/CRP_AnnualReport2009.pdf)

¹³ ibid

¹⁴ Raynard, 2000 as quoted in Hetty Kovach, Caroline Neligan and Simon Bural in Power Without Accountability?, the Global Accountability Report 2003, One World Trust, Chapter 2, p. 3

¹⁵ Dana Clark, Jonathan Fox, Kay Treakle, Demanding Accountability, Civil Society Claims and the World Bank Inspection Panel, 2003, p. xii

¹⁶ Feeney (1998) at 147, as quoted by Tom Griffiths in A Failure of Accountability Indigenous Peoples, Human Rights and Development Agency Standards: a reference tool and comparative review, A Forest Peoples Programme Briefing Paper, April 2003, p. 16

¹⁷ Third International Roundtable, Managing for Development Results, Mutual Accountability: The Key Driver for Better Results, Hanoi, Vietnam – February 5 - 8, 2007, p. 3

follows¹⁸:

- The narrow scope of its terms of reference because the mechanism only deals with material harms and directs impacts. It is a matter of fact that changing of environment, shelter and livelihoods will not only cause material harm, but also non-material harm such as loss of cultural lives, increasing oppression and gender injustices, human and women's rights violation among others.
- There are many projects with long-term impacts beyond the project completion report. However, the eligibility of the accountability's period is until the Project Completion Report is issued.
- Lack of information provided to affected people about the Accountability Mechanism. They are not aware that they can file their grievances; most borrowers are not informed about the AM; even ADB's consultants and staffs are not aware of this AM.
- Affected people also fear their respective oppressive governments; that is the reason why they don't show their disagreement with a project.
- Lack of confidence among the affected people that the accountability mechanism can solve the problem favorably.
- Mere site specific corrective measures without touching the project as a whole.
- Incapability to restore lives of uprooted affected people.
- No sanction for non-compliance of a project to ADB policies.

Several experts on accountability of MDBs laid out various major barriers while addressing the responsibility and accountability. Here, specific seven barriers in filing claims or complaints on accountability issues are mentioned as follows: ¹⁹

1. Information: misinformation or lack of information on the project affecting people, and information on the resources available to file their grievances against the Bank;
2. Restriction in procedural matters in the presentation of claims including who can file a claim, the language of the claim, the modes of communication, the information that needs to be provided, the time bars in filing claims, and the costs involved in the gathering information and presenting the claim;
3. Fears of reprisal or intimidation by authorities;
4. Limited inclusion space being left out in the long tunnel during the investigation process until the outcome is reached;
5. The undermining of the credibility and independence of the accountability and independence of the AM and the panel members;
6. The absence of monitoring the outcomes resulting from the investigation of their claims;
7. Obtaining legal redress. No accountability mechanism of MDBs is empowered under its mandate to give legal redress such as injunction to suspend the project or damages.

The Constraints of the AM Policy

Holding ADB accountable is being derived from the AM among others. In the context of securing power by people to hold ADB accountable, some provisions in the AM Policy

¹⁸ Tea Soentoro (2009), "ADB Accountability Mechanism: Handling the Symptoms but not the Disease", NGO Forum on ADB, at <http://www.forum-adb.org/inner.php?sec=4&id=134&b=1>

¹⁹ Suresh Nanwani, "Holding Multilateral Development Banks to Account: Gateways and Barriers", *International Community Law Review* 10 (2008) 100-226, p. 210-221. Suresh Nanwani, former Associate Secretary of the ADB Compliance Review Panel. The seven barriers mentioned here are being extracted from his article.

needed to be critically looked at particularly in its effectiveness to provide affected people whose rights are violated by the projects in a timely manner.

1. Directly affected, direct and material harm

Provisions in the AM²⁰ only deal with directly affected claimants, and encounter direct and material harms.

*“... designed to deal with complaints from any complainant who (i) is, or is likely to be, **directly affected materially and adversely** by an ADB-assisted project, irrespective of any allegation of noncompliance by ADB of its operational policies and procedures; and (ii) claims that **the direct and material harm** is, or will be, the result of an act or omission of ADB in the course of the formulation, processing, or implementation of the ADB-assisted project.... ”* (Section D, para 60, p. 14-15 for the Consultation Phase, and para 61, p. 15 for the Compliance Review Phase)

*“...The purpose of CRP is to investigate alleged violations by ADB of its operational policies and procedures in any ADB-assisted project that **directly, materially, and adversely** affects local people in the course of the formulation, processing, or implementation of the ADB-assisted project. The purpose of the compliance review is to focus on ADB's accountability in determining whether ADB has or has not complied with its operational policies and procedures in connection with the particular project under compliance review, and not to investigate the borrowing country, EA, the borrower, or the PPS...”* (Para 99, page 23):

Regarding complaints filed to SFP, it must have the content of (para 70, points (i) to (iii) p.17):

- (i) that the complainant is, or is likely to be, **directly affected materially and adversely** by an ADB-assisted project, irrespective of any allegation of noncompliance by ADB of its operational policies and procedures;*
- (ii) that the complainant claims that the **direct and material harm** is, or will be, the result of an act or omission of ADB in the course of the formulation, processing, or implementation of the ADB-assisted project;*
- (iii) a description of the **direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely** by the ADB-assisted project;...”*

The request for compliance review must specify (para 107, page 25-26):

- (i) that the requester is, or is likely to be, **directly affected materially and adversely** by the ADB-assisted project;*
- (ii) that the requester claims that the **direct and material harm** is, or will be, the result of an act or omission of ADB's alleged failure to follow its operational policies and procedures in the course of the formulation, processing, or implementation of the ADB-assisted project;”*
- (iii) a description of the **direct and material harm, i.e., the rights and interests that have been, or are likely to be, directly affected materially and adversely** by the ADB-assisted project;*

2. Exclusions

In line with those above provisions, SPF and CRP defined the exclusions that can make complaints as not-eligible. They are as follows:

²⁰ ADB, Review of the Inspection Function: Establishment of a new ADB Accountability Mechanism at http://www.adb.org/Documents/Policies/ADB_Accountability_Mechanism/default.asp?p=policies

The SPF cannot accept complaint if it is ²¹:

1. not related to ADB's actions or omissions in the course of the formulation, processing, or implementation of ADB-assisted projects;
2. about decisions made by the ADB, the borrowing country, the executing agency, or the **private project sponsor on procurement of goods and services**, including consulting services;
3. about allegations of fraud or **corruption** in ADB-assisted projects and by ADB staff;
4. about an ADB-assisted project for **which a project completion report has been issued**;
5. relating to matters already considered by the panel under the former Inspection Function or by CRP, unless there is new evidence presented that was not known at the time of the original complaint;
6. about the adequacy or suitability of ADB's existing policies and procedures;
7. that are frivolous, malicious, trivial, or generated to gain competitive advantage;
8. within the jurisdiction of ADB's Appeals Committee or ADB's Administrative Tribunal or relate to ADB personnel matters; and
9. about ADB's non-operational housekeeping matters, such as finance and administration.

The CRP cannot accept complaint if it is:²²

1. that are not related to ADB's actions or omissions in the course of the formulation, processing, or implementation of any ADB-assisted project;
2. about decisions made by ADB, the borrower, the executing agency, or the private project sponsor, relating to procurement of goods and services, including consulting services;
3. about allegations of fraud or corruption in ADB-assisted projects and by ADB staff;
4. about an ADB-assisted project for which a project completion report has been issued;
5. relating to matters already considered under the previous inspection function or by CRP unless there is significant new evidence presented that was not known at the time of the original complaint or unless the subsequent complaint can be readily consolidated with the earlier complaint;
6. about the adequacy or suitability of ADB's existing policies and procedures;
7. that are frivolous, malicious, trivial, or generated to gain competitive advantage;
8. within the jurisdiction of ADB's Appeals Committee or ADB's Administrative Tribunal or relating to ADB personnel matters;
9. relating to actions that are the responsibility of other parties, such as a borrower, executing agency, or potential borrower, unless the conduct of these other parties is directly relevant to an assessment of ADB's compliance with its operational policies and procedures;
10. matters that otherwise do not involve an action or omission by ADB's failure to follow its operational policies and procedures;
11. relating to the laws, policies, and regulations of the executing agency or DMC government concerned unless they directly relate to ADB's compliance with its operational policies and procedures;
12. relating to a private sector project that received concept clearance before 29 May

²¹ Office of the Special Project Facilitator, Exclusions, at <http://www.adb.org/SPF/What/exclusions.asp>

²² Office of the Compliance Review Panel, Exclusions at, <http://compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XH4ME?OpenDocument>

2003 ; and/or

13. complaints that **have not first been filed with the Special Project Facilitator**

3. Limitation on Period and Procedures:

The exclusion lists also determine the period of eligibility of a complaint to the OSPF, which is not before a **Project Completion Report** is issued (point 4 on the SPF exclusion list). Furthermore, a complaint should have been **filed to the SPF before going to the OCRP** (point 13 on CRP exclusion list). Most complaints filed under OSPF were declared as non eligible because they were not addressed previously to the **Operation Department (OD)** as required by the AM(para 70, page 17, point viii).

4. Private Sector Operations

In line with the Public Communication Policy (PCP), the AM policy also protects the **confidentiality** of the **private sectors projects**.

Protection of Business Confidentiality. ADB's policy on confidentiality and disclosure of information explicitly recognizes that the public disclosure of information relating to ADB's private sector projects will be more limited than the disclosure of information relating to ADB's public sector projects, because of the distinctive nature of private sector projects and the competitive commercial environment in which they operate (Appendix 6, para 2, p 53)

Any accountability mechanism that is applied to ADB's private sector operations will take into account ADB's disclosure policy and the need to protect business information. The type of information that must be protected (i.e., information relating to the business, competitive and financial interests of the project sponsor) is typically not the kind of information central to understanding or responding to project-affected people's concerns over environmental and social impacts (which will presumably be the subject of most claims). Where such information is necessary for processing the claim, the same confidentiality rules that apply to ADB staff will also apply to the Special Project Facilitator (SPF), the Compliance Review Panel (CRP), and the secretariat staff (Appendix 6, para 3, p 53)

The issue of business confidentiality is critically looked at the on-going review of the ADB PCP. One of the major recommendations from the joint Forum-GTI Submission states “ ... protecting “confidential business information”, should be replaced by protection of trade secrets, and the definition of “confidential business information” should be deleted...”²³

5. Financial Intermediaries and Co-financing

The AM doesn't include its application on the **financial intermediaries** or **co-financiers** while it includes Bank's private sector operations. In line with the new Safeguard Policy Statement and recommendation by Forum-GTI submission, the AM policy should include the financial intermediaries.

The new ADB accountability mechanism will apply to private sector operations (loan, guarantee, equity investment to the extent that ADB's operational policies and operational procedures are covered by it, or TA grant). (Section D, para 59, p. 14)

²³ NGO Forum on the ADB and Global Transparency Initiative, Bold Measures Towards a Responsive PCP Joint Recommendations on the ADB Public Communications Policy, Recommendation on Exception, point 3 page 3, 15 April 2010 at http://www.forum-adb.org/docs/Forum-GTI-joint_submission-pcp.pdf

Addressing challenges in demanding for accountability

The OCRP of ADB noted several concerns raised in a meeting on November 19, 2009 with CSOs in Manila:²⁴

1. technical hurdles encountered in filing a complaint or request for compliance review;
2. concerns over harm that may be caused by ADB-assisted project when, strictly speaking, ADB has complied with all operational policies and procedures (the "Compliance/Harm" quadrant);
3. implications where a borrowing country refuses permission for the CRP to conduct a site visit;
4. increasing findings by NGOs on the lack or inadequacy of ADB's consultations during project processing, or even instance of exclusion from such consultations;
5. the need to strengthen the government's awareness about the AM and, perhaps, even addressing AM rights in loan agreement at the time of negotiations;
6. a governance issue relating to the AM, in view of the fact that ADB's President is also the Chairman of the Board of Directors and, as such, faces a possible conflict of interest when it comes to AM matters; and
7. the problems of having the CRP attempting to deal with both non-material adverse harm and damage or harm that may continue long after the issuance of a project completion report.

Issues for the Present AM Review discussion

The SPF and the CRP received a small number of complaints since the approval of the AM in 2003 until early August 2010. For sure this was not because ADB is doing well with their projects, but on the contrary, it indicates that this policy is not effective enough to help affected people. Therefore, the main issue need to be identified and resolved during the AM review is the effectiveness of the AM for affected people so that their problems are resolved and their rights are fulfilled. Those problems arisen not only because of the poor performance of the Operation Departments in its project implementation, but also in the provisions on the AM.

It is important that the scope of the AM should be broadened by covering the continuing damage of a project and the scope of damage itself. The AM review must address those problems by identifying gaps, barriers and limitations, and comes up with a real transparent and accountable, both internal and external, of ADB operations.

Few preliminary observations are mentioned here from the experiences of several cases which will accommodate the needs of affected people, among others are:

- Any individual can file a complaint to both OSPF and CRP;
- definition of harm must be expanded to 'non material and indirect harm';
- inclusion of indirect and long-term impacts (beyond the Project Completion Report);

²⁴ Dewi Utami, Associate Secretary, Compliance Review Panel, A Report on Outreach Program on ADB Accountability Mechanism For Non-Government Organizations (NGOs) and Private Sector Manila, Philippines, 19 November 2009, at <http://compliance.adb.org/dir0035p.nsf/alldocs/RDIA-7YVAQB?OpenDocument>

- the AM policy should be included as a mandatory project component in any project funded or co-financed with the governments and inform the affected people during the earliest stage of the project cycle;
- Remove or give clear definition regarding business confidentiality;
- inclusion of financial intermediaries and co-financing into the AM purview.

The AM review has to emphasize attempts to fill principle gaps and to make the new accountability mechanism more accountable and responsible to project-affected people by restoring their--material and non-material, direct and indirect, short and longer terms--loss of livelihood and also open for a possibility to review the whole project once it is proved to be harming people. Otherwise, the accountability mechanism will continue to serve its existing purpose, which is an image polishing that the ADB is accountable to people, but actually it misses the point of being accountable and responsible.

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