

Gearing Up for the Review of the ADB Public Communications Policy

Nepomuceno A. Malaluan¹

The Public Communications Policy (PCP) of the Asian Development Bank (ADB), the policy that guides the bank's external relations and public access to information, will move into its fifth year of implementation in September this year. Paragraph 166 of the PCP requires that a comprehensive review be conducted after a period of time not to exceed 5 years from the effective date. In its *Assessment of the Implementation of the Public Communications Policy* in 2008, the ADB states that it will conduct a comprehensive review of the policy by September 2010.

Public interest and people's organizations working with communities affected by ADB operations look forward to actively intervening in the review of the PCP. Already, various groups have initiated an independent process of looking at their experience with the PCP. In February 2009, the Global Transparency Initiative, the NGO Forum on the ADB, and the Freedom from Debt Coalition (Philippines) jointly organized a two-day international workshop on the PCP in Manila. The PCP was also taken up in one of the organizational workshops during the Annual Meeting of the NGO Forum on the ADB last 28-30 April 2009 in Bali, Indonesia. Also in Bali, the NGO Forum on the ADB organized a civil society panel discussion on the PCP on the occasion of the ADB's 42nd Annual Meeting. The groups involved commit to continue the process aimed at deepening familiarity with the PCP, comparing country experiences, identifying problem areas, drawing lessons, and developing concrete demands for reform.

A Right to Information

The groups proceed from a fundamental assertion that the public has a right to have access to information held by the ADB. This assertion is just and reasonable, considering that the ADB, by virtue of its membership, resources, influence, functions and operations, exercises tremendous powers that are governmental in nature. The exercise of these powers affects the lives of millions of men and women in Asia and the Pacific, and even the rest of the world.

The right of people to information held by ADB also finds support in law. The ADB, like similar international financial institutions, has international personality. As a subject of international law, it not only possesses rights; it is also bound by obligations incumbent upon them under general rules of international law. Among such obligations are human rights norms that can be considered as having attained the level of customary law or general principles of law. The Universal Declaration of Human Rights (UDHR)

¹ *Nepomuceno Malaluan, a lawyer with academic background in economics, is a trustee of Action for Economic Reforms. He is co-convenor of the Access to Information Network (ATIN-Philippines), which he represents in the Executive Committee of the Global Transparency Initiative. He may be reached at nepo@er.ph and at nepo_m@yahoo.com.*

adopted by the UN General Assembly in 1948 and the International Covenant on Civil and Political Rights (ICCPR) adopted by the UN General Assembly in 1966 are considered by many to be a codification or evidence of international custom or general principles of law binding even upon non-state parties such as the ADB.

Article 19 of the UDHR states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference **and to seek, receive and impart information** and ideas through any media and regardless of frontiers.” The same is also embodied in Article 19 (2) of the ICCPR.

In his fifth report as UN Commission on Human Rights Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain (India) stated that “the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but a freedom on its own.” While the report addresses mainly the right to information as it relates to nation states, this should apply with equal force to international organizations such as the ADB.

Rights-based standards and the PCP

What does having a right to information mean?

The Global Transparency Initiative, an international network of organizations working on the right to information in international financial institutions, has developed a Transparency Charter for International Financial Institutions. This charter enumerates standards drawn from best practices adopted by democratic states, to which the access to information policies of international financial institutions such as the ADB must conform. In addition to the recognition of access information as a fundamental human right, the charter lays down the following principles:

1. IFI’s should automatically disclose and broadly disseminate, for free, a wide range of information about itself and its work.
2. IFI’s should disseminate information that facilitates informed participation in decision-making; they should also establish a presumption of public access to key meetings.
3. Everyone has the right to request and to receive information, subject only to limited exceptions, and the procedures for access should be simple, quick and free or low-cost.
4. 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.

5. Anyone who believes that an international financial institution has failed to respect its access to information policy has the right to have the matter reviewed by an independent and authoritative body.
6. Whistleblowers – individuals who in good faith disclose information revealing a concern about wrongdoing, corruption or other malpractices – should expressly be protected from any sanction, reprisal, or professional or personal detriment.
7. International financial institutions should devote adequate resources for the effective implementation of their access to information policies, and for building a culture of openness.
8. Access to information policies should be subject to regular review.

While the PCP meets many of the principles laid down in the charter, a textual analysis of the PCP reveals numerous limitations. For one, the PCP falls short of expressly recognizing that public access to information is a right rather than mere policy. Paragraph 31 of the PCP states that the ADB **supports** the right of people to seek, receive, and impart information and ideas about ADB-assisted activities. It can do more than just support; it can expressly recognize the right. In this regard, we welcome the statement made in the executive summary of the ADB's Assessment of the Implementation of the Public Communications Policy in 2008, as follows: "Regarding information disclosure, the PCP recognizes that access to information is a right rather than a discretionary privilege." We look forward to see such statement expressly integrated in the PCP at its review.

For another, while many documents are identified to be publicly available, "publicly available" means available through the ADB website. In poor communities, access to internet facility remains a luxury, thereby limiting the extent of the information dissemination. Also, instead of a limited regime of exceptions, the PCP provides a long list of exceptions. Not all exceptions identify the serious harm to a clearly and narrowly defined, and broadly accepted, interest that is sought to be avoided by non-disclosure. In addition, there is no independent appeals mechanism. The Public Disclosure Advisory Committee (PDAC), the body authorized to review denials or interpretations of the PCP, is not an independent body as can be seen from its composition: the Managing Director General (serving as chair), the Principal Director of OER, the Secretary, and the General Counsel, reporting directly to the President. Finally, there is no provision for whistleblower protection in the PCP. In this connection, however, we note the draft whistleblower and witness protection policy that the ADB Office of the Auditor General has opened for public comments between 1 May to 29 July 2009.

Feedback from Affected Communities

Beyond its substantive content, an equally if not more important aspect of the PCP is its implementation. In the February and April 2009 workshops mentioned earlier, in addition to confirming the problem about the exceptions, the most critical concern raised in the country-sharing and in the discussion is **access to information by project-affected people**. We listened to accounts of inadequacy of information, both in quality and reach; lack of timeliness; lack of understandability of the information; and unresponsiveness of the concerned people at the local project level, whether from ADB or from the government or private sponsor.

One underlying reason we find 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, for instance, that are responsible for making relevant environmental, involuntary resettlement, and indigenous people's planning documents available to the affected people (see for instance paragraphs 78, 80 and 83 of PCP). For other project documents where ADB takes responsibility, the general rule is that public availability means availability on its website, a facility which is unfortunately inaccessible to poor project communities. The result is an ADB responsibility for access by affected people that is far incommensurate to its deep level of involvement in project conceptualization, approval and implementation.

The lack of attention to access by affected people in both policy and practice is confirmed by the findings of the ADB's *Assessment of the Implementation of the Public Communications Policy* in 2008 cited earlier. For all the glowing achievements on "proactive external relations," or put in other terms, the ADB's marketing strategy, there is a gaping hole with respect to access by affected people. In monitoring information requests, the Information (Info) Unit is able to monitor only the requests that it handled and is unable to include requests handled by project teams outside the Info Unit. Beyond the documents relating to affected people that find their way to its website as required by PCP, the information directly given by government and project sponsors at the local level is not monitored. Thus, there is no means for the Info Unit to assess their adequacy and timeliness. The assessment also admits that joint development of communication plans on projects (and programs) by borrowing government and the ADB (See pars 74 and 75 of PCP) was "not emphasized in 2008 because of capacity issues."

While the assessment commits to addressing these issues, it remains to be seen how much effort and resources will be devoted to addressing the imbalance. More importantly, it remains to be seen whether ADB will be open to addressing the serious problem in the provisions of the PCP itself on access to information by project-affected people.

One other issue raised by project-affected people is **the need to closely link access to information to policies and practices on consultation and participation**. We understand that consultation and participation policies are generally embedded in the different policy documents such as safeguards policies. We understand that there is likewise an ADB staff guide to consultation and participation. We will look at these

policies to see whether it will be a good idea to add to or strengthen the PCP provisions on consultation and participation to provide an over-arching framework.

Call for Transparent and Consultative Process

The same paragraph in the PCP that mandates a comprehensive review also states that the review “will actively engage interested individuals and organizations.” We call on the ADB to conduct a truly transparent and consultative review of the PCP. As a start, we hope that preparatory work on the review, such as the development of the review agenda as well as the determination of the review process, already consider the views of interested individuals and organizations, and that information and decisions generated along the way be publicly communicated in a timely and substantive manner.