

Executive Summary: Challenging the Culture of Secrecy



A Status Report on the Freedom of Speech
at the European Bank for
Reconstruction and Development

By the Government Accountability Project

The Need for this Report

The European Bank for Reconstruction and Development (EBRD) was established in 1991 to assist the countries of Central and Eastern Europe and the Commonwealth of Independent States with the transition to market-oriented economies and democracy. The Bank provides loans, equity investments and guarantees for private and public sector projects in the areas of finance, infrastructure, industry and energy. The Bank has invested more than 21.6 billion Euros in the region since its establishment.

The unfortunate reality is that the EBRD has not met its original goals. The Bank continues to make loans that fuel corruption and harm the environment. Corrupt government officials often benefit from projects financed by the EBRD. These officials try to silence opposition to the projects. For example, Ukrainian officials attempted to end debate about the construction of two nuclear reactors by using the Ukrainian Security Service (USS) to intimidate critics. The USS was accused of committing human rights violations against individuals who opposed Khmelnytsky 2 and Rivne 4.¹

These problem loans occur largely because the Bank has failed to address internal and external criticism. The Bank's reaction to outside critics was to move grudgingly toward more transparent operations. In 2000, the Bank's board of directors approved a Public Information Policy. The policy defines the information that the EBRD is willing to share with the public including sector policies, country strategy papers, project summaries and environmental impact assessments.²

The Bank finally adopted an Independent Recourse Mechanism (IRM) last year following formal prodding by the G-8 finance ministers and external critics. The creation of the IRM is a positive step, but this report notes the lack of whistleblower protection safeguards in the IRM.

Moving Toward Greater Transparency: Congressional Mandate

Last year GAP and its allies educated Congress about the need for policies at the MDBs that protect the free speech rights of employees and improve accountability. The resulting law, known as the Leahy-McConnell Amendment, incorporated themes from the Sarbanes-Oxley Act dedicated to combating corruption and improving transparency and from a series of audits undertaken by the investigative arm of Congress—the General Accounting Office (GAO).

The Leahy-McConnell Amendment requires the U.S. Secretary of the Treasury to report to Congress on progress at the MDBs toward achieving a set of specific transparency and accountability goals, including whistleblower protection, by June 2005. Meeting these goals will create powerful tools for advancing the rule of law and meaningful development around the world.

In recent years, the world has increasingly embraced whistleblower protection. In late 2003, the United Nations Convention Against Corruption was signed in

Mexico. It establishes a detailed list of measures that are expected to set the minimum anti-corruption global standard, including whistleblower protection. GAP also co-authored a model law for the Organization of American States (OAS) to implement whistleblower provisions in the Inter-American Convention Against Corruption.

The mandate in Leahy-McConnell is either an opportunity or a threat, depending on the policies adopted by the MDBs. While whistleblower protection laws are increasingly popular, early largely symbolic versions actually discouraged potential whistleblowers from stepping forward. Employees risked retaliation thinking they had genuine protection, when in fact their careers were over. These early “Trojan horse” whistleblower laws usually resulted in a legal forum endorsing the retaliation, leaving the careers of reprisal victims worse off than if there had been no whistleblower protection law.

Key Findings

Strengths:

- The EBRD has taken modest steps to reduce corruption and protect internal critics. First, the Bank hired a Chief Compliance Officer (CCO) in 2000 to promote good governance and standards of integrity for all Bank activities. The CCO is supposed to ensure that actions of EBRD staff, management and members of the board of directors are ethical and consistent with the Bank's Code of Conduct. The CCO is also supposed to provide oversight of Bank staff on proper management of actual and potential conflicts of interest with respect to the Bank's clients and other concerned parties.
- Second, the Bank provides a wide scope of protection from harassment or discrimination for whistleblowers. This includes explicit acts of retribution such as termination or more subtle acts such as refusing to promote. The EBRD's procedures also cover attempted or perceived retaliation.
- Finally, if a whistleblower prevails, the Bank provides relief of up to three times an employee's annual salary.³ This is not the main reason that employees choose to become whistleblowers. But, it is a tangible reward for the sacrifices that a whistleblower makes to reveal fraud or corruption. The EBRD also authorizes the awarding of attorney fees to a whistleblower who substantially wins.

Challenges:

- The EBRD doesn't have a comprehensive whistleblower protection program. The Bank has the makings of a whistleblower policy. The existing EBRD employee protection system is incomplete and many of its provisions lack sufficient legal protections.
- The most obvious omission is the lack of a provision for protected whistleblowing in the EBRD procedures, except in the context of employee appeals. Particularly troublesome is that testimony in IRM proceedings is not protected. The IRM was established specifically to resolve complaints by third parties against the EBRD. The IRM process won't work unless whistleblower testimony is protected.
- A second failure is the limited scope of protection for subject matter disclosures. Protected disclosures must include any illegality, gross waste, mismanagement, abuse of authority and substantial and specific danger to public health. The Bank's policy covers employee disclosures that protect the Bank but is silent about protecting the public's interest. This is unacceptable.
- A third failure in the EBRD's whistleblower policies is the limit the Bank places on the duty to disclose illegality. The employee is obligated to disclose illegal activity that undermines the Bank's interest but not the public interest. The result is a policy that protects the Bank and not the public from illegal acts.
- By September 2004, the U.S. Treasury is obligated under the Leahy-McConnell Amendment to report to Congress about the status of the EBRD's whistleblower policy. GAP's initial goal is to work successfully with the EBRD to establish a process to fix the problems identified in this report before U.S. Treasury issues its first report to Congress. The ultimate goal is to have a credible EBRD whistleblower program by the time the next U.S. Treasury report to Congress is issued in March 2005.

(Endnotes)

¹ See Central and Eastern European (CEE) Bankwatch issue paper "Public Participation on K2/R4". Available at <http://www.bankwatch.org/k2r4/ppp.html>.

² European Bank for Reconstruction and Development, "Public Information Policy".

³ EBRD, "Grievance and Appeals Procedure" § 9.04 – 9.05 (2002).

GAP's Twenty-Four-Point Checklist

Review of the track record for whistleblower protection laws over the last twenty-seven years has revealed patterns of flaws that repeatedly have rendered free speech rights ineffective. Those lessons are a baseline to measure MDB compliance with the Leahy-McConnell standards for a credible program to protect whistleblowers.

An institution that adopts whistleblower provisions has a choice: make the provisions binding and effective or weak and illusory. The checklist of twenty-four requirements below reflects the difference between the two. The checklist is used to assess the status of current MDB whistleblower systems, defining the improvements necessary to comply with the Leahy-McConnell standards. All twenty-four of these minimum standards already exist in various employee protection statutes except for the last one, which measures institutional leadership.

European Bank for Reconstruction and Development Report Card

#1 "No Loopholes" Context for Free Speech Rights	
#2 "No Loopholes" Subject Matter for Free Speech Rights	
#3 Duty to Disclose Illegality	
#4 Right to Refuse Violating the Law	
#5 Protection Against Spillover Retaliation	
#6 "No Loopholes" Protection for All Citizens With Disclosures Relevant to the Public Service Mission	
#7 Reliable Anonymity Protection	
#8 Protection Against Unconventional Harassment	
#9 Shielding Whistleblower Rights From Gag Orders	
#10 Providing Essential Support Services for Paper Rights	
#11 Right to a Genuine Day in Court	
#12 Option for Alternative Dispute Resolution With an Independent Party of Mutual Consent	
#13 Waiving Immunity From National Courts	
#14 Realistic Legal Standards to Prove Violation of Rights	
#15 Realistic Time Frame to Act on Rights	
#16 "No Loopholes" Compensation	
#17 Interim Relief	
#18 Coverage for Attorney Fees	
#19 Transfer Option	
#20 Personal Accountability for Reprisals	
#21 Credible Internal Corrective Action Process	
#22 Outside Oversight and Participation in Reform	
#23 Enfranchising Whistleblowers to Participate in Follow-Up	
#24 Committed Institutional Leadership	