

Executive Summary: Challenging the Culture of Secrecy



A Status Report on the Freedom of Speech at the Asian Development Bank

By the Government Accountability Project

The Need for this Report

The Asian Development Bank has remarkable influence over the development of the most populous region on the planet. The Bank has used that power to launch an agenda focused on the poor. Unfortunately, the ADB's effort to address poverty and to promote development has been marred by corruption.

A recent report issued by the Bank Information Center (BIC) analyzes how corruption is one of the most difficult issues the ADB faces in trying to improve the status of the poor.¹ The BIC report notes the ADB's rhetoric on corruption is stronger than the reality. Indeed, BIC found that the Bank did almost nothing to address corruption issues in its reports, assessments and evaluations.

The ADB admits that corruption adds between 20-100 percent to the costs of procurement of government goods and services in several countries in the region,² including Pakistan,³ the Philippines, Vietnam, China and India. The Bank concedes that corruption hinders investment and skews the allocation of public resources toward the upper strata of society. Corruption also diverts scarce resources from health care, housing and education, leaving the less fortunate to suffer.

The ADB's anti-corruption efforts are centered in the Anticorruption Unit of the Office of the Auditor General (OAGA). Potential whistleblowers are supposed to contact the OAGA with information regarding fraud or corruption. This report found that the OAGA operates under a framework that severely limits whistleblower protection. For example, potential whistleblowers are directed to appeal to management if they are dissatisfied with OAGA's response. But the OAGA procedures make no reference to this option.

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:

- Whistleblowing disclosures sustain the free flow of information that is a prerequisite for any legitimate institutional checks and balances to prevent, detect and stop misconduct that undermines the mission of MDBs. The ADB whistleblower program is a serious effort. It sets the standard among MDBs with a broad mandate to scout for evidence of corruption and to protect employees who find it. The program casts the broadest possible anti-corruption net. For example, the Bank specifically mandates that employees have a duty to disclose illegality. A violation of this duty can subject an employee to termination.
- Another strength is the institution's commitment to protect the confidentiality of whistleblowers. This is a key criterion to assess whether a whistleblower should attempt to work internally, and the Bank sets the standard here for all MDBs. The duty to protect anonymity extends during and after an investigation of the whistleblower's allegations.
- A third strength is the granting of a realistic time frame to act on rights. The ADB statute of limitations is 90 days to initiate claims and seek final review by the Administrative Tribunal.
- Finally, the Bank rules governing relief to whistleblowers who win have some good provisions. The Bank has two options: reinstate the employee or give them three-years basic salary. There is also a possibility of transfer within the Bank for a fresh start.
- There is an ambitious ombudsman or mediation system. The Bank has reduced the fear factor in proceeding with both no fault and adversarial options.

Challenges:

- GAP spent the last year gathering information on and evaluating the ADB's whistleblower policy. The overarching conclusion described in the report is that the Bank hasn't established a credible whistleblower program. For example, there is a blanket prohibition on communicating externally without prior permission from the Bank. A fundamental component of a credible whistleblower policy is that employees must be able to communicate freely with outside parties about the alleged wrongdoing.
- A second key finding is the program doesn't provide a right to credible due process. On the surface, the Bank endorses the principles of due process. However, the president reserves the right to terminate employees without recourse and controls the composition of the Appeals Panel.
- A third finding is the failure to include modern burdens of proof in the whistleblower process. In most instances, the Bank procedures apply either non-existent or ambiguous legal burdens of proof. Conversely, the boundaries are precise for determining which speech can result in the whistleblower being terminated.
- The fundamental finding is the absence of a credible outside review mechanism for allegations of wrongdoing. There are no anti-reprisal rights for witnesses or even parties in the Accountability Mechanism to redress outside community and citizen grievances from Bank-financed projects. In theory, the OAGA can refer corruption allegations for external investigation or audit to the Accountability Mechanism. But GAP didn't receive any records of actions taken by the Accountability Mechanism on referrals of whistleblower issues initially raised through the OAGA channel.

(Endnotes)

¹ "Herz, Steve. "Zero Tolerance?: Assessing the Asian Development Bank's Efforts to Limit Corruption in its Lending Operations" [hereinafter Zero Tolerance.] App. C 27. March 2004. Available at http://www.bicusa.org/bicusa/issues/Zero_Tolerance_Report.pdf.

² Asian Development Bank, "Anticorruption Policy: Frequently Asked Questions" [hereinafter Anticorruption Policy.] p. 1.














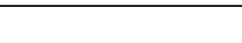
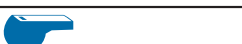



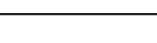

³ Anticorruption Policy, p. 16.

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.

Asian Development Bank 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	
#22 Outside Oversight and Participation in Reform	
#23 Enfranchising Whistleblowers to Participate in Follow-Up	
#24 Committed Institutional Leadership	