

Challenging the Culture of Secrecy: A Status Report on Freedom of Speech at the Multilateral Development Banks

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OVERVIEW OF FINDINGS, RECOMMENDATIONS AND NEXT STEPS

Introduction and Summary of Findings

The Government Accountability Project (GAP) is pleased to announce the release of four reports assessing the whistleblower protection policies at four multilateral development banks (MDBs): the World Bank, the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB) and the Inter-American Development Bank (IDB).¹ GAP's year-long assessment was based on its 27 years of experience with whistleblower protection issues.

GAP found substantial deficiencies in each of these banks' whistleblower protection policies, affording insufficient protection to those who seek to bring fraud, mismanagement or other wrongdoing to light to protect the institution's integrity. Notably, none of the banks recognizes the concepts of external transparency or external accountability, extending whistleblower protections only to internal disclosures. At present, GAP would not recommend that whistleblowers risk retaliation by utilizing the existing procedures. Instead, GAP hopes to work constructively with the banks in the coming months to address these deficiencies in order to improve transparency and accountability.

About GAP

GAP is a nonprofit, public interest law firm dedicated to whistleblower advocacy. The organization's mission is to advance governmental and corporate accountability by promoting whistleblower rights, investigating their claims, litigating their cases and developing legislative and regulatory reforms. On the international front, GAP's MDB whistleblower protection initiative is funded by a grant from the Ford Foundation. GAP is also engaged in working with governmental bodies such as the Organization of American States to develop model whistleblower protection legislation.

Whistleblowing: An Emerging Global Phenomenon

GAP has long defended U.S. whistleblowers who challenge abuses of power that betray the public trust. Now, whistleblower rights are an emerging global phenomenon.² Whistleblower protection provisions have become standard in anti-corruption conventions and treaties, such as those adopted by the United Nations, Organization of American States and the Council of Europe. As a leader in whistleblower advocacy, GAP has witnessed an upsurge in international interest in whistleblowing as an integral transparency measure in recent years. Governmental organizations across the globe increasingly demonstrate their desire to work with those who have witnessed abuses of power, and are eager to learn how best to protect them from reprisal.

Strong whistleblower protection policies give those who bring corruption to light a fighting chance to defend themselves, and serve the banks' institutional interest in preserving integrity. Weak policies, on the other hand, will cause many individuals to remain silent witnesses to corruption, and may actually harm some whistleblowers by creating a false impression of adequate protections. MDB whistleblower protection policies have particular significance because the MDBs often set the pace for anti-corruption

standards in loan recipient nations. Working with governments and national and international businesses to implement development projects, the banks' influences are far reaching. Unfortunately, the banks remain a focal point of corruption investigations. During a May 2004 congressional hearing, for example, U.S. Senate Foreign Relations Committee Chairman Richard Lugar estimated that the World Bank alone has lost \$100 billion to corruption since it was established. These problems significantly impede the MDBs' ability to advance their humanitarian mission of promoting community development and economic self-sufficiency in developing countries.

The Congressional Mandate for MDB Reform

The genesis for the GAP reports was a little-noticed provision in the U.S. Congress' 2004 omnibus spending bill, enacted in January 2004. The law requires the U.S. Treasury Department to use the U.S.' voice and vote at the MDBs to establish new anti-corruption, outside audit and transparency guidelines, including complaint systems that are consistent with U.S. and international law, by June 2005. On September 1, 2004 and March 1, 2005 the U.S. Treasury Department must issue reports on progress toward implementation of these transparency measures. The GAP reports provide a baseline that Treasury can use to measure the MDBs' progress toward the congressional mandate, and that other nations can use to assess MDB accountability and transparency improvements.

GAP's Methodology

GAP researched whistleblower protection policies and practices at each MDB and held at least one meeting with representatives from each Bank. GAP staff also studied academic research on the MDBs and interviewed whistleblowers, legislative staff, nongovernmental organization (NGO) leaders, critics and representatives from the four MDBs covered in these reports. The resulting record was compared to a 24-point-checklist developed by GAP to evaluate whistleblower policies at each MDB. The checklists were distributed to each MDB for comment several months prior to the drafting of the reports. After completing the draft reports, GAP submitted them to each bank for comment.

The 24-point-checklist evaluates whether the MDBs' policies (1) are comprehensive in scope; (2) offer the chance for a hearing in an impartial proceeding; (3) provide modern legal standards for adjudication of claims; (4) provide sufficient relief for those who win their cases; and (5) allow whistleblowers to make a difference against abuses of power if they risk retaliation to speak out. Each bank received a pass/fail rating for each criterion, along with a rating system based on a 0-4 scale.

GAP's Conclusions

All four of the banks surveyed received an overall failing grade when compared with the legal norms compiled in the 24-point-checklist. While the banks have recognized the value of whistleblowing, by limiting protections to internal disclosures the banks have effectively precluded external accountability and transparency.

The good news is that the MDBs' policies and culture are evolving. The banks are beginning to recognize the benefits of whistleblowing as an internal management tool, and have started the process of developing effective whistleblower protection policies. In preliminary discussions with MDB representatives, nearly all have expressed interest in upgrading their policies. It will take a sustained, broad-based effort, however, to establish fully effective whistleblower protection programs at these banks. This institutional effort must be led by the banks' presidents, whose leadership has been inconsistent to date.

Finally, while the banks' overall efforts to date are deficient in many ways, each bank has scored some passing grades on various specific issues identified in the 24-point-checklist. These best practices, coupled with strong executive leadership, can serve as a starting point for the MDBs to improve their policies.

MDB Strengths

Common strengths among the surveyed MDBs' policies are summarized below:

- Except for the EBRD, the banks GAP studied have embraced the notion of whistleblower protection. This is a significant prerequisite for developing a functioning whistleblower protection program.
- The MDBs have established a duty to disclose that helps prevent retaliation. There generally is less hostility against whistleblowers who act pursuant to a mandatory duty rather than on personal initiative.

- The MDBs have recently established anti-corruption units, a useful first step toward the development of full-scale whistleblower protection programs. These units are too new for GAP to recommend them to whistleblowers as a safe avenue for seeking relief from retaliation. (The only exception is the World Bank's Department of Institutional Integrity, on a case by case basis.)
- The banks provide a realistic limitations period within which whistleblowers must act on their rights. Employees have at least 90 days to file a grievance through administrative processes.

MDB Challenges

The surveyed MDBs' policies contain numerous deficiencies in whistleblower protection. These areas for improvement are summarized below:

- The banks' existing whistleblower policies only cover internal disclosures; external disclosures are not protected, including even those made by witnesses to third-party citizen complaint mechanisms. In fact, the banks prohibit external disclosures that could be detrimental to the banks, including disclosures to law enforcement agencies and legislatures of member nations.
- With the exception of the World Bank, the existence and quality of confidential hotlines are unpredictable and unreliable.
- None of the banks studied offer independent due process. All of them limit enforcement of employee rights to in-house grievance hearings, potentially tainted by conflict of interest because the defendant institution acts as judge and jury.
- The banks fail to support stated promises of protection with enforceable rights. While the World Bank adopts them on paper for informal investigations, its Administrative Tribunal consistently ignores such rights in formal hearings.
- Whistleblowers appear to lose even when they win, because none of the banks has a record of returning them to their jobs even when they prove that their removal was illegal. In practice, the banks limit relief to financial compensation, which is small comfort to an employee deported for losing MDB employment.
- With anecdotal exceptions, the MDBs have no record of protecting whistleblowers who rely on the MDBs' existing protections.
- MDB policies do not have credibility with would-be whistleblowers. As a result, many would-be whistleblowers remain silent about the fraud and mismanagement they have witnessed.
- The banks fail to protect parties and witnesses who participate in the newly-created citizen complaint mechanisms. The MDBs created these mechanisms to give individuals who are negatively impacted by a Bank loan decision the chance to challenge that decision.

Recommended Actions for the MDBs

GAP recommends that each of the four MDBs take the following actions to improve transparency and accountability:

- Protect direct disclosures to external authorities when necessary to avoid a significant threat to public health and safety, damage to the bank's mission or criminal violations of national or international law.
- Protect participation in the citizen complaint mechanisms for addressing harm caused by MDB-financed activities. Safeguards could be included to prevent public release of proprietary information.
- Provide a flow of information from secure hotlines to each bank's Boards of Directors.
- Offer alleged reprisal victims the opportunity to seek justice through third-party, independent, binding arbitration by a decision-maker selected through mutual consent.
- Institutionalize the legal burdens of proof from the U.S. Whistleblower Protection Act to judge whether a whistleblower's rights have been violated, as the World Bank does for reprisal investigations.
- Provide prevailing whistleblowers full make-whole relief from confirmed retaliation, including the right to reinstatement as necessary to maintain national residency rights.
- Establish performance standards for bank investigative agencies, to ensure that misconduct threatening the banks' public service missions is given a high priority.
- Enfranchise whistleblowers to file complaints under the citizen complaint mechanism regarding misconduct that threatens the banks' public service missions.
- Provide visible institutional leadership by the banks' presidents, through broadly communicated policy statements, active employee outreach, training for staff and management, and personal intervention against retaliation.

Next Steps for GAP's MDB Initiative

GAP intends to continue its efforts to achieve genuine whistleblower protections at the MDBs. Next steps include the following:

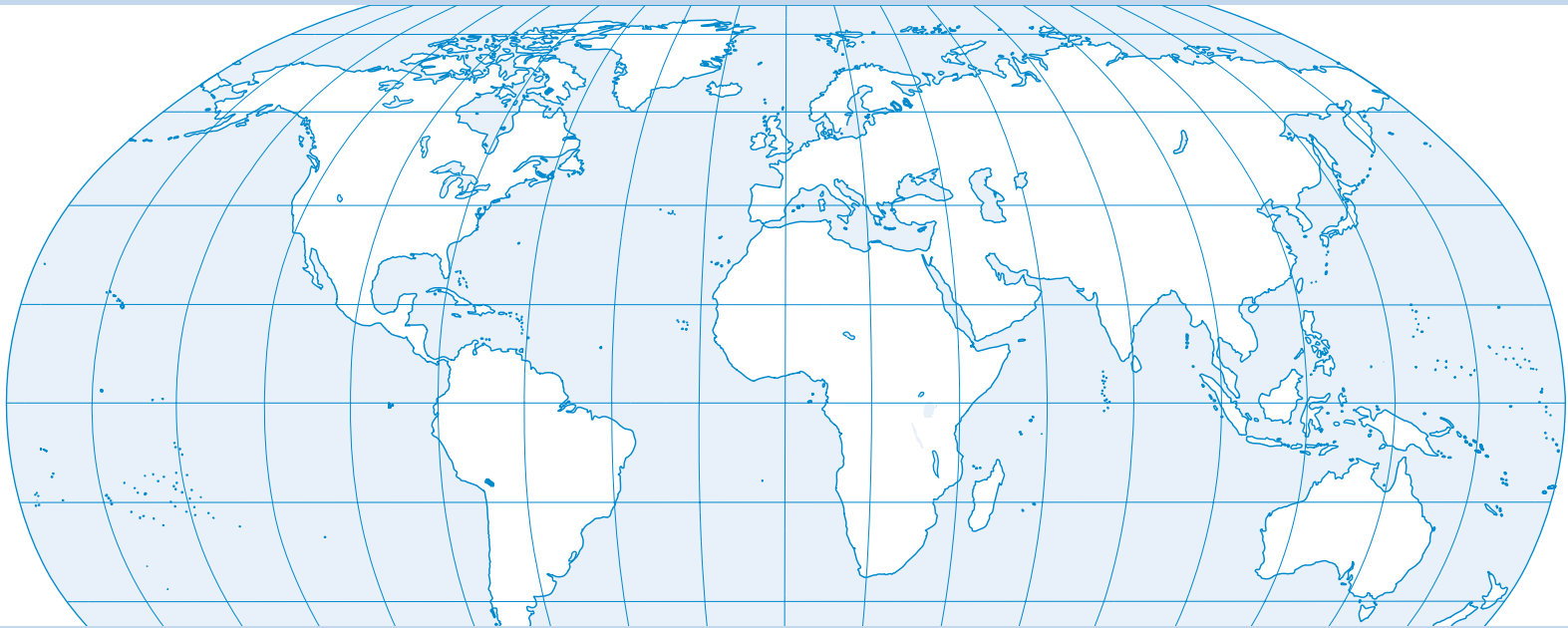
- Distribute GAP's MDB whistleblower protection assessment reports to members of Congress, senior U.S. and foreign government officials, the MDBs (including the U.S. Executive Directors), the media and interested nongovernmental organizations.
- Offer to work directly with the banks to help upgrade existing policies, and to apply lessons learned for constructive solutions to legitimate confidentiality concerns.
- Keep the U.S. Treasury Department and congressional oversight agencies informed of progress, as well as equivalent ministries or legislative bodies from any other member nation that requests such updates.
- Analyze the U.S. Treasury's September 2004 and March 2005 reports to Congress on these issues, and provide feedback to the Treasury and to Congress.
- Monitor individual whistleblower cases, with consideration for "friend of the court" briefs or representation to test how the MDBs' policies are applied in practice.
- Maintain and update the assessments presented in this study, including the ultimate recommendation of whether or not to recommend that whistleblowers work within a particular bank system.

*The Governmental Accountability Project may be contacted
at (202) 408-0034, or www.whistleblower.org.*

¹ The African Development Bank was studied but ultimately excluded because it is still in the process of developing whistleblower policies.

² As human rights activist Helena Kennedy explained in her foreword to the 2004 book Whistleblowing Around the World: Law, Culture and Practice, "[B]oth culturally and legally, things are changing. Whistleblowing is coming of age. There is a growing recognition around the world that people who encounter corruption and wrongdoing must be given as safe an environment as possible, to be able to tell someone in authority what they know."

Executive Summary: Challenging the Culture of Secrecy



A Status Report on 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.














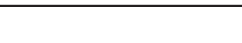
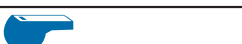



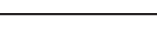


³ Anticorruption Policy, p. 16.

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

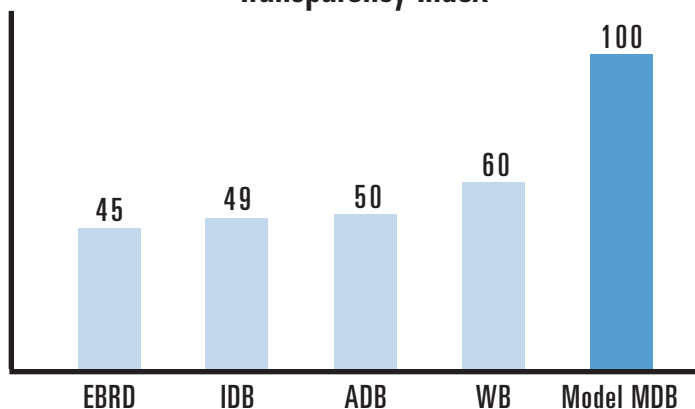
#1 "No Loopholes" Context for Free Speech Rights	
#2 "No Loopholes" Subject Matter for Free Speech Rights	
#3 Duty to Disclose Illegality	
#4 Right to Refuse Violating the Law	
#5 Protection Against Spillover Retaliation	
#6 "No Loopholes" Protection for All Citizens With Disclosures Relevant to the 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	



Challenging the Culture of Secrecy: The Transparency Score Card

*The Government Accountability Project has completed an assessment of the whistleblower protection policies at four multilateral development banks in a comprehensive report entitled **Challenging the Culture of Secrecy**. This Score Card summarizes the findings of the report.*

Transparency Index



World Bank: 60 points

Strengths:

The World Bank has the most sophisticated whistleblower policy of the multilateral development banks (MDB) surveyed, governed by modern legal standards and the broadest anti-harassment net.

Challenges:

The policy is not enforceable through independent hearings. Internal disclosure rights are limited to institutional threats; external communications that may be “detrimental” to the Bank are banned. The Inspection Panel for citizen complaints includes no protection against retaliation.

Asian Development Bank: 50 points

Strengths:

The ADB’s program is a serious effort generating numerous investigations, providing broad free speech rights and protecting whistleblower identities.

Challenges:

The ADB’s program lacks institutional leadership, independent hearings and adequate legal standards for reprisal cases. There is no external whistleblowing without advance permission and no protection against retaliation in the accountability mechanism for citizen complaints.

Inter-American Development Bank: 49 points

Strengths:

The IDB has the strongest statement of leadership commitment to whistleblowing of the MDBs studied. Its program covers the full scope of harassment and misconduct in Bank-funded projects.

Challenges:

There is no right to an independent hearing, or modern legal standards for in-house grievances. External communications that might harm the Bank are banned, and there is no protection against retaliation in the Independent Investigation Mechanism for citizen complaints.

European Bank for Reconstruction and Development: 45 points

Strengths:

The EBRD has begun to establish accountability mechanisms that provide protection from retaliation.

Challenges:

There is no right to communicate externally without advance permission and no protection against retaliation in the Independent Recourse Mechanism for citizen complaints.

Scoring Analysis

Scope of Coverage

Optimal Score: 40 points

The Banks' whistleblower protection policies should extend protection to any relevant witness, audience or misconduct to protect against harassment or retaliation. In this category, each Bank received the following number of points:

WB: 27

ADB: 23

IDB: 26

EBRD: 16

Forum

Optimal Score: 12 points

Whistleblowers' rights must be adjudicated in a setting free from institutionalized conflict of interest, operating under due process rules that ensure a fair day in court. In this category, each Bank received the following number of points:

WB: 4

ADB: 3

IDB: 2

EBRD: 1

Rules to Prevail

Optimal Score: 8 points

Whistleblower protection procedures should establish fair legal standards for what a whistleblower must prove to establish that his or her rights were violated. In this category, each Bank received the following number of points:

WB: 6

ADB: 4

IDB: 3

EBRD: 5

Relief for Whistleblowers Who Win

Optimal Score: 20 points

The Banks' programs should serve an important remedial purpose by ensuring that whistleblowers who establish retaliation claims are properly compensated for any harm suffered. In this category, each Bank received the following number of points:

WB: 11

ADB: 8

IDB: 8

EBRD: 13

Making a Difference

Optimal Score: 16 points

This category measures whether institutional channels for whistleblowers are effective at fighting corruption or other abuses of power. It is the bottom line for the public and for would-be whistleblowers. In this category, each Bank received the following number of points:

WB: 8

ADB: 8

IDB: 6

EBRD: 6

Methodology

Based on 27 years of experience in whistleblower law and policy, GAP developed a "24-Point Checklist for Effective Whistleblower Protection." A model MDB, with the most effective whistleblower protection system, could receive up to four points for each checklist element (with four bonus points awarded, bringing the maximum possible score to 100). The 24 Checklist elements are grouped into five categories: Scope of Coverage, Forum, Rules to Prevail, Relief for Whistleblowers Who Win and Making a Difference. An optimal score has also been assigned to each category, reflecting the number of corresponding checkpoint elements. For instance, the Scope of Coverage category has ten Checklist elements for an optimal score of 40 points.

The Transparency Score Card is based on policies and associated records obtained by GAP as of June, 2004, and meetings with each of the MDBs. Each MDB was given an opportunity to provide feedback on its respective assessment report.

Note: The African Development Bank was not included in GAP's assessments because it is still in the process of developing whistleblower protection policies.