

Evaluation of the Asian Development Bank's New Whistleblower and Witness Protection Policy (Administrative Order No. 2.10)

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In 2004, the Government Accountability Project (GAP)¹, a U.S. nonprofit public interest group that promotes accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists, evaluated the whistleblower protections at the Asian Development Bank (ADB). Our resulting report “Challenging the Culture of Secrecy”² found these rights to be deficient in many areas.³ In the intervening years, three Bank whistleblowers have sought GAP’s assistance to navigate the whistleblowing process, fearing that without external help, they would be subjected to retaliation and their disclosures would be ignored. These experiences confirmed that the Bank needed to do more to protect employees of conscience.

The cases in question showed a lack of independence between ADB operations and its investigative body that tainted the investigation of both the disclosures in question and the consequent retaliation. In pursuing these cases GAP also detected that the primary objective of the ADB was to avoid reputational damage rather than to address the issues disclosed. In addition, the Bank was reluctant to investigate a case in which the alleged retaliator had left the ADB, thus demonstrating a willingness to leave in place the operational and professional consequences of both the corruption exposed and the retaliation experienced.

It should be noted that the ADB is not unique in this regard. When challenged, the reflexive reaction of those responsible for the reputation and operations of an organization is often to protect those assets first. A staff member with potentially embarrassing information about the institution or its management is typically considered

¹ GAP has led the public campaigns for passage of nearly all United States national whistleblower laws and has played partnership roles in drafting and obtaining approval for the Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption and the United Nations Secretariat and African Development Bank whistleblower protection policies, among other initiatives.

² This report is available at <http://www.whistleblower.org/doc/A/Asian%20Development%20Bank%20Report.pdf>.

³ In summary GAP found that the ADB’s program at that time lacked “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.”

only later, if at all. As we outline the shortcomings that remain in the whistleblower protection policy of the ADB, the recommendations we propose are designed to correct, to the extent possible, this structural conflict of interest. The challenge facing any effort to protect whistleblowers administratively at intergovernmental organization is the lack of access to an independent judicial process. In short, those officials who preside over the adjudication process a whistleblower faces in contesting retaliation may also be involved, directly or indirectly, in the misconduct the whistleblower has exposed.

In the summer of 2009, the ADB sought feedback on changes to its whistleblower and witness protection provisions. At that time, GAP submitted detailed comments and suggestions for improving the policy.⁴ On December 11, 2009, the Bank released its new Administrative Order No. 2.10 [“Whistleblower and Witness Protection.”](#) This order addresses some of the concerns that GAP raised during the revision process and is in many ways an improvement over the ADB’s previous protections. However, the policy still fails to comply with three of the four mandatory criteria in U.S. law that are prerequisites for U.S. support: 1) access to independent adjudicative bodies, including external arbitration; 2) relief that eliminates the effects of retaliation so that whistleblowers who win their cases are made whole; and 3) best practices for legal burdens of proof. As a result, the U.S. Executive Director does not have the discretion to lawfully support this proposal under U.S. Public Law 109-102.⁵ This is not a mere technicality. Paper rights that cannot be enforced through a fair trial in a credible forum and victories that leave the winner a victim produce cynicism. These flaws deeply damage the policy’s legitimacy as a credible reform.

The following evaluation of the ADB’s whistleblower and witness protections outlined in Administrative Order No. 2.10 is based on GAP’s “Best Practices for Whistleblower Protections at Intergovernmental Organizations.”⁶ These best practices are drawn from model international laws and GAP’s 32 years of experience in drafting and implementing whistleblower protections in the U.S. and at Intergovernmental Organizations (IGOs). All the concepts below exist in other venues with current employee protection statutes.

⁴ Where our recommendations were adopted in the ADB’s final policy, we simply refer to them in this discussion. Where they were not, we have included them in the present document, together with the justification and arguments that support them.

⁵ See Sec. 1505 (a)(11) of the 2006 Foreign Operations, Export Financing and Related Programs Appropriations Act, which became Public Law 109-102 on November 14, 2005. This Act states that it is the policy of the United States that each multilateral development bank “implement best practices in domestic laws and international conventions against corruption for whistleblower and witness disclosures and protections against retaliation for internal and lawful public disclosures by the bank’s employees and others affected by such bank’s operations who challenge illegality or other misconduct that could threaten the bank’s mission, including: (1) best practices for legal burdens of proof; (2) access to independent adjudicative bodies, including external arbitration based on consensus selection and shared costs; and (3) results that eliminate the effects of proven retaliation.”

⁶ See <http://www.whistleblower.org/doc/IGO%20Best%20Practices%20checklist1.doc>. The Best Practices document cites the precedents for each best practice contained in this evaluation.

1. Context for Free Expression Rights with “No Loopholes”

Best practice: Protected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices. It is necessary to specify that disclosures in the course of job duties are protected, because most retaliation is in response to “duty speech” by those whose institutional role is “blowing the whistle” as part of organizational checks and balances.

ADB policy: The ADB policy defines a whistleblower as “any person who, in good faith and voluntarily, reports, or is believed to be about to report, or is believed to have reported a suspected integrity violation or misconduct.” (paragraph 2.14) This definition is not consistent with best practices. By stipulating that protected disclosures must be voluntary, the ADB has effectively disqualified staff members who disclose misconduct and fraud as part of their job duties. Employees such as internal auditors and investigators in the Office of Anticorruption and Integrity (OAI) are now unprotected by the policy. To GAP’s knowledge, no other policy in the growing body of Intergovernmental Organization law disqualifies people from protection from retaliation merely because they were compelled to disclose information.

The policy even exempts witnesses who are compelled to provide testimony by OAI, BPHR or any other authority, which may be the highest stakes possible contexts for integrity. Under section 2.15, a protected “witness” is one who participates “at the request of OAI or BHPR.” (emphasis added) There is no protection even for voluntary participation in any other investigation as a witness.

The policy states that “a staff member has a duty to report any suspected integrity violation to OAI. A staff member is encouraged to report any suspected misconduct to BPHR but is not required to do so.” (paragraph 4.1) This complies with best practices. However, the Bank must not disqualify job duties or assignments as protected activity.

The policy does protect external disclosures made by “staff members” in specific circumstances, but it has an undefined exception for “any confidentiality obligations to concerned third parties.” (paragraph 9.1). In many circumstances it will not be possible for the would-be whistleblower to know what those are in advance, and the chilling effect will prevent disclosures that may need to be made and meet the Bank’s criteria. Further, these external reporting rights do not apply to individuals in the ADB’s outside labor force, a deficiency that should be corrected.

Recommendations for improving the Bank’s policy: Delete the word “voluntarily” from paragraph 2.14. In paragraph 2.11 after “cooperation with an ADB investigation by the whistleblower or witness,” add “-- whether at the employee’s initiative or in the ordinary

course of the employee’s duties (or any person acting pursuant to a request of the employee).” With respect to third party confidentiality limitations, adopt a system parallel to that in 5 USC 2302(b)(8), the U.S. Whistleblower Protection Act, for analogous contexts. Define the exception in paragraph 9.1 as follows: “except for releases specifically prohibited by Bank responsibilities to concerned third parties whose violation would result in liability for the Bank.” This should be reinforced by disclosing and training employees in what those restrictions are, so they will know when there is an independent ban on public disclosure due to liability.

2. Subject Matter for Free Speech Rights with “No Loopholes”

Best practice: Whistleblower systems should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety, and any activity which undermines the organization’s mission to its stakeholders, as well as any other information that assists in honoring those duties.

ADB policy: The policy defines a whistleblower as “any person who, in good faith and voluntarily, reports, or is believed to be about to report, or is believed to have reported a suspected integrity violation or misconduct.” (paragraph 2.14)

Misconduct is defined as including, but not limited to, “the failure to observe the Staff Regulations, AOs, Administrative Circulars and all other duties of employment. For purposes of this AO, it also includes, but is not limited to, the acts or omissions specified in paragraph 2.1 of AO 2.04 (Disciplinary Measures and Procedures) except those related to an integrity violation.” (paragraph 2.10) AO 2.04 contains numerous additional definitions of misconduct, including “any conduct that may be detrimental to ADB or to its reputation” (para. 2.1 (c)) and “acts that violate applicable criminal law...” (para. 2.1 (f))

An “integrity violation” is defined as “any act which violates ADB’s Anticorruption policy and includes abuse, coercion, collusion, conflict of interest, corruption, and fraud, as defined herein.” (para. 2.9)

Reports regarding a significant threat to public health and safety, substantive damage to ADB’s operations or violations of national or international law are protected if they are made externally. (para. 9.1)

Recommendations for improving the Bank’s policy: Strengthen the definition of covered disclosures including reports made in the course of performing normal job duties. In addition, the policy should expressly include any disclosure of suspected gross waste, mismanagement, or substantial and specific danger to the environment. The cornerstone is protection for disclosing any activity that undermines the Bank’s mission, duties to its stakeholders, or governance. See, for example, the Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption (OAS Model Law), Article 2(c) and Section 4.1 of the African Development Bank’s (AfDB) “Whistleblowing and Complaints Handling Policy.” “Abuse” should be specifically

defined as well for consistency with international standards for “abuse of authority: arbitrary activity that results in favoritism or discrimination to third parties”.

3. Right to Refuse Violating the Law

Best Practice: This provision is fundamental to stop *faits accomplis* and in some cases prevents the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus, a fair and expeditious means of reaching such a determination is needed, while protecting the individual, who reasonably believes that she or he is being asked to violate the law, from having to proceed with the action or from suffering retaliation while a determination is sought.

ADB policy: According to the policy, staff members are allowed to make an external disclosure if such reporting is necessary to avoid “violations of national or international law.” (para. 9.1) Therefore, Bank staff members have the right to raise violations of the law.

The policy also states that “staff have the right and obligation to refuse to participate in misconduct.” (para. 3.5) Because AO 2.04’s definition of misconduct includes “acts that violate applicable criminal law (e.g., theft, felonious acts, use or possession of illegal drugs) (para. 2.1 (f)), ADB employees have the right to refuse to violate the law.

Recommendation to improve the Bank’s policy: The policy must clarify that the same procedural due process rights, burdens of proof and relief available to enforce whistleblower and witness protections are also available to protect those who refuse to violate the law. Otherwise, the breakthrough in principle could become a dangerous magnet for cynicism by those who take it seriously.

4. Protection Against Spillover Retaliation

Best Practice: The law should cover all common scenarios that could have a restraining effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as “assisting or associated with whistleblowers,” (to guard against guilt by association), and individuals who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a “reasonable belief” and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the potential to discourage disclosures; they lock in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

ADB policy: The ADB policy defines a whistleblower as “any person who, in good faith and voluntarily reports, or is believed to be about to report, or is believed to have reported

a suspected integrity violation or misconduct.” (paragraph 2.14) The policy defines retaliation as “any detrimental act, direct or indirect, recommended, threatened or taken against a whistleblower or witness or person associated with a whistleblower or witness in a manner material to the complaint because of the report or cooperation with an ADB investigation by the whistleblower or witness.”(para. 2.11)⁷ The policy therefore protects people who are associated with whistleblowers.

The draft version of the policy extended protection to “any person because such person was believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.” This language was removed from the final version. The policy would have been stronger if the deleted language had been included, as that language specified that perceived whistleblowers would be protected from retaliation even if they did not actually make a disclosure.

Recommendations for improving the Bank’s policy: Add a provision that protects from retaliation “any person because such person was believed to be about to report misconduct or believed to have reported misconduct, even if such belief is mistaken.”

5. “No Loopholes” Protection for All Citizens with Disclosures Relevant to the Public Service Mission

Best Practice: Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, an IGO’s whistleblower system should protect all who are applicants for funding or are paid with IGO resources to carry out activities relevant to its mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors or employees seconded from another organization. If harassment could discourage legitimate disclosures of conduct that undermines an organization’s mission as defined by the Charter and implementing rules, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization’s activities. Some multilateral development banks have inspection panels organized entirely to provide redress for citizen victims of organizational activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.

ADB policy: The policy protects “staff”, which it defines as “all former and current ADB staff, and Vice Presidents.” (para. 2.12) While this is a good starting point, it is unclear whether part-time, temporary employees, or employees seconded from another organization are included in this definition. The policy also protects “external

⁷ The ADB also protects from retaliation staff members who avail themselves of the administrative review and appeal mechanisms (Administrative Order No. 2.06, para. 10.1)

whistleblowers and witnesses, including contractors, consultants, local counterparts, and project beneficiaries engaged in dealings with ADB.” (para. 8.1) This definition of external whistleblowers could be improved by including those affected by the organization’s activities or those who apply for jobs, contracts or other funding.

Overall, the protections that the ADB policy provides for external whistleblowers and witnesses are exemplary. The ADB’s policy states that, “External whistleblowers and witnesses, including contractors, consultants, local counterparts, and project beneficiaries engaged in dealings with ADB, are entitled to the protection provided in Sections 5 and 8 of this AO” (para. 8.1) and that “ADB will endeavor to ensure that external whistleblowers and witnesses are protected from retaliation by staff. Staff who are found to retaliate against them will be subject to disciplinary action under AO 2.04.” (para. 8.2)

Unlike most policies at Intergovernmental Organizations, the ADB policy attempts to outline how the Bank will implement these commitments. The policy states that “where an external whistleblower or witness may suffer or has suffered retaliation from [*sic*] other than staff because of a report to ADB or cooperation with an ADB investigation, ADB may use its good offices with the member country government to endeavor to secure transfer or adequate security protection or employ other reasonable measures to reduce the risks of retaliation.” (para. 8.4) Unfortunately, a typographical error in this provision leaves it somewhat ambiguous (the missing word is presumably “someone.”)

While the intent to use the leverage of the ADB to assist external whistleblowers is clear, the fact that “ADB *may* use its good offices” to protect a whistleblower outside the organization means that ADB may decide not to take such action. This provision should be strengthened.

Also, “External parties who make false or malicious allegations or who retaliate against whistleblowers and witnesses may have their contract(s) terminated or be declared ineligible to participate in ADB-financed or ADB-supported activities, or may be subject to sanction or other remedial action, following the procedures under the *Integrity Principles and Guidelines*.” (para. 8.5) In addition, the policy specifies procedures through which the Bank can provide remedial action to external whistleblowers. The Bank’s commitment to both protect external whistleblowers and discipline external parties who retaliate against them is laudable.

Recommendations for improving the Bank’s policy: The typographical error in the first sentence of paragraph 8.4 should be corrected in order to clarify that provision. The definition of “staff member” should be expanded to explicitly include interns, volunteers or any other person who is paid with Bank resources to carry out activities relevant to the Bank’s mission regardless of whether or not they are full time, part time, temporary, permanent, or employees seconded from another organization. See, for example, paragraph 5 of the World Food Programme’s “Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits, inspections, investigations and evaluations” policy (WFP’s Policy).

The definition of “external whistleblowers and witnesses” should be expanded and clarified so that the policy will clearly protect all relevant applicants who challenge betrayals of the organizational mission or public trust, including those affected by the organization’s activities (including those who approach the ADB’s Accountability Mechanism) or those who apply for jobs, contracts or other funding.

The rights provided in paragraph 9.1 should also be extended to any whistleblower who makes an external report, rather than just “staff members.”

Paragraph 8.4 should be amended to read “ADB *must* use its good offices...”

6. Reliable Anonymity Protection

Best Practice: To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe restraining effect. There should also be ways to protect the identity of the whistleblower once he or she comes forward. The whistleblower's identity should not be disclosed without his or her express written permission, unless there is an imminent threat to public health or safety from corruption, in which case there should be reasonable prior written notice to the person.

ADB policy: The policy allows anonymous reporting (para. 3.2) and specifies what is needed for an anonymous allegation to be investigated (para. 3.3) However, it does not provide information on how such disclosures can be made (i.e. through a hotline or via email).

The policy states that “Staff involved in an investigation in any capacity are required to preserve and protect the confidentiality of information related to investigations, including the identity of the subjects of investigation, witnesses, or other parties concerned.” (para. 5.4) Further, according to paragraph 5.1, “OAI and BPHR will protect the identities of whistleblowers and witnesses from unauthorized disclosure during and after an investigation in accordance with the provisions of AO 2.04.” According to Appendix 2 of Administrative Order No. 2.04, “ADB shall not identify by name, any person who has reported suspected misconduct unless: (a) the person consents to disclosure; or (b) the Investigator had obtained sufficient evidence that the person has knowingly and willfully reporting [*sic*] false information regarding the misconduct of another staff member.” (para. 4.2).⁸ Together, these provisions provide reliable confidentiality protection as far

⁸ As GAP stated in our 2004 review of the ADB’s whistleblower protections, the Anticorruption Operational Procedures (AOP) also state that “The source of any corruption allegation(s) or evidence will always be treated with the utmost confidentiality” and the Audit Manual states that reliable confidentiality protection is necessary “for earning the trust of ADB staff, management and witnesses.” The Audit Manual also said that it is “essential” that the whistleblower’s allegations be treated with the “utmost” confidentiality, and information be made available only on a “strict ‘need to know’ basis;” that this duty extends during and after the investigation; and that Bank investigators who breach confidentiality will be subject to discipline. These strong confidentiality provisions should be referenced in the whistleblower protection policy, provided that this language still exists in those policies.

as they go, but they should be supplemented also to include “identifying information” that could be traced back to a particular source. Sometimes the facts are as much as a signature as the whistleblower’s name.

According to paragraph 5.2, “Except to the extent required to pursue disciplinary procedures under AO 2.04 or to impose a sanction under ADB's Integrity Principles and Guidelines, OAI and BPHR will maintain the confidentiality of any information provided by whistleblowers and witnesses where such information has not been disclosed to parties outside of OAI and BPHR, and which is (i) not made publicly known or in the public domain prior to the time of disclosure by the whistleblower or witness; or (ii) made generally available after disclosure through no action or inaction of OAI or BPHR. OAI and BPHR will use all available means, including physical, electronic and procedural controls, to maintain the confidentiality of information obtained from whistleblowers and witnesses.” This provision could be strengthened by requiring that OAI and BPHR obtain the whistleblower’s consent before releasing any confidential information provided by the whistleblower.

Recommendations for improving the Bank’s policy: The policy should explain how to make protected anonymous reports (e.g. through email or a hotline). In addition, paragraph 5.2 should state that confidentiality protection also extends to identifying information, and that OAI and BPHR will obtain the whistleblower’s consent before releasing confidential information provided by him or her.

7. Protection against Unconventional Harassment

Best Practice: The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same restraining effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from discipline to litigation.

ADB policy: The policy defines “retaliation” as “any detrimental act, direct or indirect, recommended, threatened or taken against a whistleblower or witness or person associated with a whistleblower or witness in a manner material to the complaint because of the report or cooperation with an ADB investigation by the whistleblower or witness. It includes but is not limited to harassment, discriminatory treatment, assignment of work outside the corresponding job description, inappropriate performance appraisals or salary adjustments, or the withholding of an entitlement. As retaliation constitutes misconduct, those engaged in retaliation are subject to the disciplinary provisions under AO 2.04.” (para. 2.11) This is a comprehensive definition that meets best practices criteria.

8. Shielding Whistleblower Rights from Non-Disclosure Constraints

Best Practice: Any whistleblower law or policy must include a ban on non-disclosure constraints through an organization's rules, policies or other provisions that restrict free expression rights and impose prior restraint on speech.

ADB policy: The ADB's policy states that "External reports made in accordance with paragraph 9.1 of this AO and consistent with any confidentiality obligations to concerned third parties will not be considered as a breach of staff obligations relating to disclosure of information." This provision is much weaker than the draft policy released for comments by the ADB last year. In the final version of the policy, the ADB added that external reports made in accordance with paragraph 9.1 will be protected if they are "*consistent with any confidentiality obligations to concerned third parties.*" This vague reference to "*confidentiality obligations*" is troubling, as the ADB's personnel policies⁹ appear to impose a blanket gag order on most unpublished information. Protected whistleblowing should supersede such confidentiality clauses. Instead, the ADB ironically requires that, in order to be protected for making an external report, staff must comply with confidentiality clauses that ban such external reports.

With respect to internal disclosures, the Bank deserves credit for section 4.2, which establishes an unequivocal safe channel for whistleblowers, regardless of internal obstacles: "No approvals or authorizations are needed by staff to report a suspected integrity violation or misconduct." That clear ground rule is in direct contrast to the ADB's muddied, semi-revealed rules for when employees are eligible to make external disclosures.

Recommendations for improving the Bank's policy: Consistent with recommendations above, with respect to third party confidentiality limitations the ADB should adopt a system parallel to that in 5 USC 2302(b)(8), the U.S. Whistleblower Protection Act, for analogous contexts. Define the exception in paragraph 9.1 as follows: "except for releases specifically prohibited by Bank responsibilities to concerned third parties whose violation would result in liability for the Bank." This should be reinforced by disclosing and training employees in what those restrictions are, so they will know when there is an independent ban on public disclosure due to liability. The policy also should clarify that unless it creates liability, otherwise-protected external whistleblowing rights under section 9 supersede employment confidentiality clauses or any other non-disclosure

⁹ According to GAP's 2004 review of the ADB's whistleblower protections: "No prior approval is required when a staff member discloses evidence of corruption to the OAGA. In every other circumstance, the ADB employee must obtain authorization to share information. There are no loopholes to the comprehensive constraint. Except as the ADB President expressly authorizes or as required to carry out job duties, staff members may not 'communicate any unpublished information known to them by reason of their official position to any person within or outside the Bank whom they know or should know is not authorized by the Bank to receive such information.'" The ban extends to use of unpublished information 'for any interest contrary to the interests of the Bank.' Procedures specifically apply the gag policy to management discussions with the staff association on undefined 'confidential issues.' Similarly, it applies to any media communications beyond generalized discussions about corruption that do not mention companies or nations.' This analysis was based on the ADB's personnel policies.

orders. See, for example, paragraphs 8 and 11 of the Wood Food Programme's policy, and OAS Model Law, Article 6.

9. Providing Essential Support Services for Paper Rights

Best Practice: Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

ADB policy: The policy does not contain information on promoting and making staff aware of the policy. However, the policy is currently publicly available at <http://www.adb.org/integrity/whistleblower-witness-protection.asp>.

Regarding legal assistance, the ADB permits a current staff member to serve as the employee's advocate in a disciplinary action or appeal, except for those who may have a conflict of interest such as Office of the General Counsel personnel.ⁱ The advocate is shielded from retaliation for that service.ⁱⁱ The advocate must be a current Bank employee except during an investigation¹⁰ or at the final step of Administrative Tribunal Review.¹¹ This precludes any normal right to counsel.

The informal system for protecting whistleblowers from retaliation contains a conflict of interest that could prevent it from effectively protecting whistleblowers. According to paragraph 6.1, staff who believe that they have been retaliated against for reporting a suspected integrity violation or cooperating with an Office of Anticorruption and Integrity (OAI) investigation must notify OAI of their concern "and seek relief from retaliation." Employees who believe that they have been subjected to retaliation for reporting suspected misconduct or cooperating with an investigation conducted by the Human Resources Division of Budget, Personnel and Managements Systems Department (BPHR), on the other hand, are required to notify BPHR of their concern and "seek relief from retaliation". (para. 6.1) BPHR then refers "reports of retaliation to OAI for investigation in accordance with Appendix 2 of AO 2.04." (para. 6.3) OAI considers whether to open an investigation based on whether reprisal allegation are, *inter alia*, "material" (para. 6.5), which is undefined. Because retaliation often takes the form of an

¹⁰ According to Administrative Order No. 2.04, Appendix 2, paragraph 3, "Subjects may request to be accompanied by another staff member during interviews conducted as part of an Investigation so long as such request does not delay or impede the Investigation. However, such accompanying staff members may not be from OGC, SEC, OAG, OAS, or BPMSD. Both Subjects and Witnesses may consult, at their own expense, with outside legal counsel regarding a matter under Investigation, but may not be accompanied by such legal counsel on ADB premises or during interviews conducted as part of an Investigation."

¹¹ According to Rule 13 of the Rules of the Asian Development Bank Administrative Tribunal, "The applicant may designate any person to represent him or her before the Tribunal."

adverse administrative action approved by Human Resources, it is inappropriate to involve the department in this process. In the policy BPHR is also tasked with investigating “allegations of misconduct by ADB staff other than those relating to integrity violations.” (para. 4.6) This function should also be assigned to OAI.

In addition, the informal system lacks timelines for reviewing and investigating retaliation. The lack of specific timelines for making a *prima facie* case determination and completing a misconduct investigation could be detrimental to the whistleblower. Fortunately, the policy does establish that, “within fifteen calendar days of receipt of OAI’s report, the relevant department will decide on the remedial action to be taken and will inform OAI and BPHR of the decision taken. OAI will immediately inform the whistleblower or witness of the action taken.” (paragraph 8.8) Many IGO policies lack a deadline at this stage in the process and can take months or years to take action.

The ADB also has procedures for investigating reports of retaliation by an Executive Director, Alternate Executive Director or the President (Ethics Committee and Procedures), as well as any Vice President. However, in cases in which the President is under investigation – as has recently occurred at both the World Bank and the International Monetary Fund – the Committee may not be sufficiently independent, as its members and Chair are appointed by the President. Although the President is supposed to “seek to ascertain and abide by the consensus of the Board of Directors,” in those appointments, “in the event that consensus cannot be established in a timely way, the President will appoint the Committee Members and/or Chair having regard to the views of the Board of Directors.”ⁱⁱⁱ This could allow the President to appoint members who are loyal to him, thereby impeding potential investigations into his or her misconduct.

According to ADB representatives, the ADB does not have an ombudsman. The lack of an ombudsman or independent attorney to help the whistleblower navigate the process creates a severe handicap for the whistleblower and inequity of arms between supervisors facing complaints (who typically have at their disposal professional attorneys paid for by the organization, who are obliged to mount a defense of their actions when instructed to do so) and the whistleblower.

Instead of an ombudsman, the ADB reportedly has a psychologist on staff. Although the psychologist does not report to HR, s/he is still paid with ADB resources and therefore is not sufficiently independent. As organizations have often been known to use retaliatory psychological evaluations¹² against whistleblowers, having a psychologist on staff could actually be detrimental to a whistleblower. A psychologist is therefore not a sufficient substitute for an Ombudsman.

On a positive note, the ADB policy requires OAI to provide its retaliation investigative report, including its recommendations, to the whistleblower or witness (paragraph 8.8). The Bank deserves kudos for adopting this important provision.

¹² See, for example, http://whistleblower.org/content/press_detail.cfm?press_id=1785 .

Recommendations for improving the Bank’s policy: The Bank should issue a statement specifying how the staff rule will be distributed to staff members. For example, a statement might say: “Staff members exercising supervisory functions shall communicate this policy annually to all staff members. Training opportunities should also be clarified. See, for example, OAS Model Law, Articles 29-30.

In addition, the policy should state that whistleblowers who are defending themselves from retaliation should be allowed to have counsel of their choosing for every step of the Administrative Review and Appeals process and that this right overrides the counsel limitations imposed through other Administrative Orders. See, for example, OAS Model Law, Article 13.

The Bank should delete BPHR from paragraph 6.1 and require that all reports of retaliation be made to OAI. Accordingly, paragraph 6.3 should be erased. Also, paragraph 4.6 should be revised so that OAI is tasked with investigating allegations of misconduct by ADB staff, rather than BPHR. The definition of “material” in paragraph 6.5 must be defined, so that those alleging retaliation know what is expected of them.

Timelines should be added for reviewing and investigating retaliation. For example, the United Nations Secretariat “Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations” policy (ST/SGB/2005/21) requires the Ethics Office to seek to make its decision regarding a prima facie case within 45 days. It then requires the investigative body to seek to complete its investigation and report within 120 days.

The Bank should consider creating an independent Ombudsman’s office. It should also add a provision to the policy that protects against mandatory psychiatric testing or examinations. This precedent exists in U.S. law (5 USC 2302(a)(2)(A)(x)).

10. Right to a Genuine Day in Court

Best Practice: This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual’s case for any eventual day in a due process forum.

ADB policy: A staff member can submit an appeal to the Appeals Committee, which consists of “staff members assigned to Headquarters holding regular appointments.” The President appoints “a Chairperson and one or more Alternate Chairpersons after

consultation with the Staff Council” and “one regular member and two or more Alternate Members.” The Staff Council “shall nominate one regular Member and two or more Alternate Members.”^{iv} The Appeals Committee therefore lacks the necessary impartiality that is required in order for the whistleblower to have a fair day in court, as the President has a monopoly on the Chairman, a majority of the members and the secretary. The President also makes the final decision on all appeals, thereby completely undermining any autonomy the system may have.^v

The Appeals Committee also does not have to provide an oral hearing in all cases.^{vi} The Committee decides whether it will hear the testimony of the witness,^{vii} and can therefore choose to deny the whistleblower a fair day in court with witnesses and the right to confront accusers. The Administrative Review and Appeal Procedures are also silent on essential rights like the right to transcripts of the proceedings.

An employee can make a final appeal to an Administrative Tribunal. Tribunal members cannot be a present or former staff member, President, Vice-President, Director or Alternate Director of the Bank.^{viii} Tribunal members cannot become an ADB staff member for a period of five years after their term ends. The Board approves all members from a list drawn up by the President, after appropriate consultation with the General Counsel, Secretary, Chair of the Staff Council and at least two other people.^{ix} The President controls the staff and schedule of plenary hearings for the Tribunal.^x There is no right to an oral proceeding, but one may be held in public absent exceptional circumstances.^{xi} The Tribunal may permit amicus briefs and submissions by the staff association and its decisions are published.^{xii} Again, there is no right to a genuine day in court.

Recommendations for improving the Bank’s policy: The Bank must reform its Appeals Committee and Administrative Tribunal procedures to correct the problems raised above. Without a genuine day in court, whistleblowers are usually unable to assert their rights, and any protections provided to them on paper are essentially meaningless. A good model for the formal system would be the one set out by the U.N. Redesign Panel in 2006, which recommended that the organization institute a professional system of due process, with internal autonomy from conflicts of interest. This is a credible structural model that complies with mandatory legal criteria.

In addition to these reforms, the whistleblower policy should state that whistleblowers can challenge retaliation through the formal internal recourse mechanisms. See, for example, Section 6.3 of the UN Secretariat policy.

11. Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent

Best Practice: Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a “strike” process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue of whether Intergovernmental Organizations (IGOs) waive

their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the Organization of American States Inter-American Convention Against Corruption, as well as the U.S. Whistleblower Protection Act. As a Multilateral Development Bank best practice, it was adopted by the African Development Bank in January, 2007.

Alternative dispute resolution programs can reduce some of the delay, expense, inefficiency, and hostility associated with litigation. A survey by the Center for Public Resources (CPR) found that its 652 reporting companies saved on average more than US \$300,000 each by implementing ADR programs. A similar survey indicated that 80 percent of business executives and lawyers found mediation helped preserve business relationships.^{xiii}

ADB policy: ADB staff members who request administrative review must participate in compulsory conciliation. The staff member is allowed to select a Conciliator from a “list of external Conciliators duly appointed by the President.”^{xiv} Statements made during these proceedings cannot be used in later stages of the formal system.^{xv} If the conciliation is not successful, the employee can request administrative review by the Director General, BPMSD.^{xvi} This required mediation is a step toward an Alternative Dispute Resolution program, but lacks the necessary impartiality to be effective. The conciliator list should be chosen with the input and consent of the Staff Association. According to ADB representatives, the Bank has also adopted a mediation process, in which staff members mediate some employment disputes.

According to ADB representatives, external arbitration is available for contracting parties in some situations. It is unclear whether or not this process will be available to contractors in whistleblower disputes.

The ADB policy does not currently have an external arbitration provision.

Recommendations for improving the Bank’s policy: The Bank’s whistleblower policy should explicitly provide an option for alternative dispute resolution with an independent party by mutual consent; see for examples OAS Model Law, Article 10(14) and Section 7 of the AfDB Policy. The administrative review procedures should be revised to require Staff Association consent in creating a list of possible conciliators. The parties should share costs in order to ensure the impartiality of the arbitrator.

12. Waiving Immunity from National Courts

Best Practice: Some institutions may not usually be subject to the jurisdiction of national courts in whistleblower cases. Most IGOs claim immunity from lawsuits filed in the U.S. and other courts, particularly over personnel matters, but they may waive that immunity, or they may be obliged to waive it where a national court determines the immunities to be inapplicable. The waiver process could and should be more uniform among member countries. If immunity were waived, whistleblowers would be judged by a jury of peers or other third party not subject to potential retaliation from the institution. If an IGO does

not offer aggrieved individuals independent, third party dispute resolution, waiver of sovereign immunity is unavoidable to overcome the inherent, structural conflict of interest that occurs when an organization is both the defendant and the judge in a personnel dispute. So far, U.S. and French courts have imposed this reform involuntarily in some cases, usually in breach of contract scenarios, although not always. For example, on June 19, 2009, the U.S. Court of Appeals for the District of Columbia ruled that the Inter-American Investment Corporation (IIC), the private sector lending arm of the Inter-American Development Bank (IDB), could not claim immunity from a lawsuit for unjust enrichment by an independent consultant (*Vila vs. the IIC*).

ADB policy: The Bank asserts immunity from national judicial processes.

Recommendations for improving the Bank's policy: The appropriate approach is to waive existing immunity for claims that the Bank violated or failed to enforce its own policies adequately, or that it funded violations of law, which it had reason to recognize and to correct or prevent. The waiver could expressly limit punitive damages or provide for independent expert arbitration. As an alternative, the Bank should provide for external arbitration in cases of breaches of contract or retaliation, following procedures that have proved functional within the World Trade Organization system to resolve alleged unfair trade practices.

13. Realistic Standards to Prove Violation of Rights

Best Practice: The emerging global standard for a burden of proof is that a whistleblower establishes a *prima facie* case of retaliation by establishing through a *preponderance of the evidence* that protected conduct was a “contributing factor” in challenged discrimination.¹³ The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by *clear and convincing evidence* that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a real possibility of successfully defending themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and outcomes. There is no alternative, however, for the IGO to commit to one of these proven formulas that define the hearing process – tests the whistleblower must pass to win a ruling that their rights were violated.

ADB policy: According to the policy, “if OAI determines that a staff member did experience retaliation for having reported a suspected integrity violation or misconduct or for having cooperated with an OAI or BPHR investigation and that the staff member's

¹³ If, in formal evaluations, a whistleblower's performance has been assessed as satisfactory in the year previous to the disclosure and an adverse administrative action has been applied, the office receiving complaints of retaliation should determine that a *prima facie* case has been established.

action related to the investigation was a contributory factor in the retaliation, the burden of proof will shift to ADB to show by clear and convincing evidence that the same action would have been taken in the absence of the staff member's report or cooperation.” (paragraph 6.6) This same standard exists for external whistleblowers (para. 8.7)

The initial burden-of-proof hurdle does not comply with best practice standards, which requires only that the whistleblower establish a *prima facie* case of retaliation based on a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. The confusion stems from the new clause requiring OAI to first determine “that a staff member did experience retaliation for [whistleblowing]” as an independent requirement from the normal burdens of proof used to make that same conclusion. Presumably this was a grammatical error, rather than intended to create a tautology unique in global whistleblower law.

ADB’s policy would also be strengthened by defining “contributing factor” and “clear and convincing evidence,” consistent with long-established international standards.

Recommendations for improving the Bank’s policy: GAP recommends that the initial burden of proof requirement be clarified to read more specifically: “OAI *shall* determine that a staff member *has established a prima facie case of* retaliation for having reported a suspected integrity violation or misconduct or for having cooperated with an OAI or BPHR investigation *when* the staff member’s action related to the investigation was a contributory factor in the retaliation. *The* burden of proof *then* will shift...” (para. 6.6 & 8.7) GAP also recommends that burdens of proof be defined, consistent with preexisting legal standards in all other laws that both use and define the terms, as follows: 1) “Contributing factor” means “any factor, which alone or in combination with other factors, could affect the outcome.” 2) “Clear and convincing evidence” means evidence indicating that the matter to be proved is highly probable or reasonably certain.” The contributing factor standard should be added to paragraph 6.6 and 8.7. See, for example, OAS Model Law, Articles 2(h) and 7.

14. Realistic Time Frame to Act on Rights

Best Practice: Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Three months is the minimum functional statute of limitations for claims of retaliation. One-year statutes of limitations are consistent with common law rights and are preferable.

ADB policy: The statute of limitations for reporting retaliation is one-year after the date on which the whistleblower or witness becomes aware of the alleged retaliation. (para. 6.5.) This is consistent with best practices.

15. Compensation with “No Loopholes” for Whistleblowers who Win

Best Practice: If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, comprehensive relief may require relocation, identity protection, or withdrawal of litigation against the individual. The relevant law in New Zealand, for example, protects against indirect harassment by providing immunity against civil and criminal proceedings.

ADB policy: According to the policy, “ADB will pursue all reasonable steps to protect whistleblowers and witnesses acting in good faith and to ensure that they are not subject to retaliation.” (para. 3.1) The Director General BPMSD ultimately decides on “whether the retaliation occurred” and “on recommendations for remedial action.” (para. 6.7) When the Director General, BPMSD decides that retaliation has occurred, “the appropriate remedial actions will include relief or other corrective measures for the staff member who has been subject to retaliation.” Regarding external whistleblowers, “ADB may use its good offices with the member country government to endeavor to secure transfer or adequate security protection or employ other reasonable measures to reduce the risks of retaliation.” (paragraph 8.4)

As written, the protection policy does not, in fact, “protect;” there is no specific requirement that comprehensive relief be provided. In other words, there is no guarantee incorporated into the proceedings that a vindicated whistleblower will be restored to the employment status he or she enjoyed before making the contested disclosure and compensated for associated losses.

Although the policy has already been approved, it is worth noting that there is no legal authority for the U.S. to support any whistleblower policy without a ‘make-whole’ remedy. Nor is there any rational basis for an employee to take a policy seriously, when “losing by winning” is still an acceptable result.

If an employee’s retaliation case goes to the Administrative Tribunal, the Tribunal can “order the rescission of the decision contested or the specific performance of the obligation invoked. At the same time the Tribunal shall fix the amount of compensation to be paid to the applicant for the injury sustained should the President of the Bank, within thirty days of the notification of the judgment, decide, in the interest of the Bank, that the applicant shall be compensated without further action being taken in the case; provided that such compensation may not exceed the equivalent of three years’ basic salary of the applicant. The Tribunal may, however, in exceptional circumstances, when it considers it justified, order the payment of a higher compensation.”^{xvii} Again, there is no employment guarantee for vindicated whistleblowers.

There should be an umbrella requirement for guaranteed baseline relief, such as compensatory damages to neutralize all direct and indirect losses suffered due to illegal retaliation or punitive damages that go further to deter repetitive offenses in extreme cases.

Recommendations for improving the Bank's policy: When retaliation has been established, the institution *must* make restitution through guaranteed reinstatement if desired, as well as 100% compensation for direct and indirect losses, and vindication. The whistleblower must be "made whole," i.e., the policy should guarantee that the whistleblower be restored to the position, status and income he or she held previous to the disclosure. See, for examples, the OAS Model Law, Articles 10(10) and the forms of relief recommended in paragraph 6.5 of the African Development Bank's Whistleblowing and Complaints Handling Policy.

16. Interim Relief

Best Practice: Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly become protracted. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who suffer bankruptcy while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after prevailing in a hearing or at trial, an unemployed whistleblower could continue to suffer financially while awaiting completion of a lengthy appeals process.

ADB policy: The Bank's provision on interim relief is a substantial improvement over its former policy. According to paragraph 7.1 of the policy, "Whistleblowers and witnesses who are staff will be accorded interim protection during the course of review or investigation as necessary to safeguard their security and interests. At the direction of the Director General, BPMSD, and with the consent of the concerned staff, such interim protection may include, but is not limited to, temporary reassignment to another position and if appropriate, placement on paid administrative leave for an initial period not to exceed four months. If the investigation is still ongoing, an extension of such leave may be approved by the President for the period necessary to complete the investigation." (para. 7.1) Section 7.2 requires the Bank to provide "guidance" for whistleblowers and their families threatened by retaliatory violence, but no more.

The fact that interim relief can only be awarded with the consent of the whistleblower meets best practice standards, as it prevents interim relief from being used as a form of retaliation.

Recommendations for improving Bank's policy: Interim relief can be more significant than final outcomes for whistleblowers without backup resources. They should be extended to contractors, consultants and any other whistleblowers paid with Bank funds. Further, the Bank must take responsibility for the physical security of those threatened with violence for defending the institution's integrity. It is not enough to offer advice from the sidelines to those whose lives may be threatened for blowing the whistle.

17. Coverage for Attorney Fees

Best Practice: Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise cannot afford to assert their rights. The

fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower's lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums that exceed a complainant's annual salary.

ADB policy: There is no mention of attorney fees in the policy. The Administrative Review and Appeal Procedures also fail to mention attorney fees.

According to the Statute of the Administrative Tribunal, "If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Bank, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates."^{xviii}

Recommendations for improving the Bank's policy: The policy should state that vindicated whistleblowers will receive a make whole remedy, including attorney fees. See, for examples, Section 6.5.4 of the African Development Bank policy and Article 16 of the OAS Model Law.

18. Transfer Option

Best Practice: It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer if they are to be "made whole." This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

ADB policy: The policy does mention temporary reassignment as a form of interim relief (paragraph 7.1), but does not include it as a form of final relief for ADB employees. In regards to external whistleblowers, the policy does say that "ADB may use its good offices with the member country government to endeavor to secure transfer or adequate security protection..." (para. 8.4)

Recommendations for improving the Bank's policy: The policy should provide a transfer option for vindicated whistleblowers. See, for examples, Section 6.1 of the UN Secretariat Whistleblower Policy, Section 6.5.5 of the AfDB policy and Article 10(7) of the OAS Model Law.

19. Personal Accountability for Reprisals

Best Practice: To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers are not deterred from harassment. At worst, they may not achieve their objectives, but they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability

for punitive damages by those found responsible for violations. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

ADB policy: The policy defines retaliation against whistleblowers as misconduct and states that “those engaged in retaliation are subject to the disciplinary provisions under AO 2.04.” (paragraph 2.11) The ADB’s Administrative Order No. 2.04 regarding Disciplinary Measures and Procedures also lists whistleblower retaliation as a form of misconduct. However, disciplinary measures are not mandatory for whistleblower retaliation, as they “*may* be taken by ADB when misconduct is determined to have occurred,”^{xix} (emphasis added), depending on the circumstances of the case. Some form of accountability should be mandatory for those who knowingly retaliate against whistleblowers.

Personal liability for damages in appeals is one option. There is currently no provision in the policy that compels wrongdoers to pay the relief ordered for harassment. The Bank should consider holding liable those who sustain corruption by bullying whistleblowers.

Recommendations for improving the Bank’s policy: The policy should state that established retaliation *will* lead to accountability. See for examples, the UN Secretariat Whistleblower Policy, Section 7 and the OAS Model Law, Article 18.

20. Credible Corrective Action Process

Best Practice: Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation, in order to assess whether there has been a good faith resolution. While whistleblowers are not investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, for example, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower’s comments should be a matter of public record, posted on the Organization’s website.

ADB policy: The policy fails to enfranchise whistleblowers in misconduct evaluations. There is nothing in the policy that suggests that whistleblowers will be allowed to review a draft of the misconduct report and submit comments.¹⁴ Further, according to the Bank's Disciplinary Measures and Procedures, only the President, General Counsel, the Director General, BPMSD, and the Director, BPHR, or persons designated by one of them, may examine misconduct investigative reports.^{xx} Also, only the OAI, Auditor General, President, General Counsel, Director General, BPMSD, Director, BPHR, and the Investigator or persons designated by them may examine any evidence or investigative finding not included in the investigative report.^{xxi} This is not a credible corrective action process.

To the ADB's credit, it does have a credible system for reviewing allegations of suspected integrity violation or misconduct by the staff of OAI or the Budget, Personnel and Managements Systems Department (BPMSD), which could help deter abuses by these investigators. (para. 4.3) Reports regarding retaliation by OAI or BPMSD can be made to the Vice President (Finance and Administration), who can recommend to the President that he or she appoint a person(s) from within or outside ADB to investigate.

There is a critical accountability loophole, however. Paragraphs 4.3 and 4.4 permit inside or outside investigation of charges by ADB whistleblowers, but provide Bank authorities total discretion which to choose. Outside investigations are a prerequisite for legitimacy in many instances, such as when the Bank has an institutional conflict of interest because findings supporting the whistleblower would prove liability in pending litigation. Bank authorities should be required to act consistently with criteria established to prevent conflicts of interest from tainting the results of whistleblower investigations.

Recommendations for improving the Bank's policy: The policy should state that whistleblowers will be allowed to review and comment on draft investigative reports regarding the misconduct that they disclosed. See, for example, Article 10(13) of the OAS Model Law. It also should establish criteria for when conflicts of interest or other factors require external instead of internal investigation and recommended corrective action on a whistleblowing disclosure, as well as standards for impartiality and independent review when a disclosure is handled externally.

END NOTES

ⁱ Administrative Order No. 2.06, Administrative Review and Appeal Procedures. 20 December 2006. paragraph 4.7 and 7.2.

ⁱⁱ Ibid. para. 10.2.

ⁱⁱⁱ Ethics Committee and Procedures, para. 2.

^{iv} Administrative Order No. 2.06, para. 9.1(a).

^v Ibid, para. 15.1.

^{vi} Ibid, para. 13.3.

^{vii} Ibid, para. 4.8.

¹⁴ See point 9 above for information about retaliation reports.

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- ^{viii} Statute of the Administrative Tribunal of the Asian Development Bank. Administrative Order No. 2.07, Appendix 1. Revised 8 February 2006, Article IV 1.
- ^{ix} Ibid, Article IV 2.
- ^x Rules of the Asian Development Bank Administrative Tribunal. Administrative Order No. 2.07, Appendix 2. Revised 26 September 1995. Rule 5.
- ^{xi} Ibid, Rule 14.
- ^{xii} Ibid, Rule 21.2.
- ^{xiii} Harry N. Mazdoorian, *Building an ADR program: What works, What Doesn't* (March/April 1999) <http://www.abanet.org/buslaw/blt/8-4adrprogram.html>.
- ^{xiv} Administrative Order No. 2.06, para. 3.5.
- ^{xv} Ibid, para. 3.6.
- ^{xvi} Ibid, para. 3.8.
- ^{xvii} Statute of the Administrative Tribunal, Article X para. 1.
- ^{xviii} Ibid, Article X para.2.
- ^{xix} Disciplinary Measures and Procedures, para. 4.2.
- ^{xx} Ibid, Appendix 2, para. 8.1.
- ^{xxi} Ibid, para. 9.2-9.3.