Challenging the Culture of Secrecy:

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

By The Government Accountability Project
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Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is GAP</td>
<td>5</td>
</tr>
<tr>
<td>GAP's Partners</td>
<td>6</td>
</tr>
<tr>
<td>Acknowledgements</td>
<td>7</td>
</tr>
<tr>
<td>Introduction</td>
<td>8</td>
</tr>
<tr>
<td>Executive Summary</td>
<td>10</td>
</tr>
<tr>
<td>Methodology</td>
<td>11</td>
</tr>
<tr>
<td>Checklist Assessment</td>
<td>11</td>
</tr>
<tr>
<td>Scope of Coverage</td>
<td>16</td>
</tr>
<tr>
<td>Forum</td>
<td>18</td>
</tr>
<tr>
<td>Rules to Prevail</td>
<td>19</td>
</tr>
<tr>
<td>Relief for Whistleblowers Who Win</td>
<td>22</td>
</tr>
<tr>
<td>Making a Difference</td>
<td>23</td>
</tr>
<tr>
<td>European Bank for Reconstruction and Development Report Card</td>
<td>27</td>
</tr>
<tr>
<td>Appendices</td>
<td>29</td>
</tr>
<tr>
<td>1. Assessment Chart</td>
<td>29</td>
</tr>
<tr>
<td>2. List of Acronyms and Referenced Documents</td>
<td>33</td>
</tr>
<tr>
<td>3. Leahy-McConnell Amendment Language</td>
<td>34</td>
</tr>
<tr>
<td>4. MDB Whistleblowers</td>
<td>35</td>
</tr>
</tbody>
</table>
Who is GAP

The Government Accountability Project is a nonprofit organization widely known for its defense of whistleblowers in government and corporations. GAP’s mission is to protect the public interest by promoting government and corporate accountability through advancing free speech and ethical conduct in the workplace, litigating whistleblower cases and developing policy and legal reforms of whistleblower laws.

Founded in the wake of the White House scandals of the 1970s, GAP has been on the frontlines of exposing corruption and fraud for over 27 years. GAP helps preserve the integrity of government and corporate institutions through the whistleblower, whose disclosures often bring about lasting change. By bringing whistleblower disclosures to the attention of government officials and regulatory bodies as well as to the general public through the media, GAP is recognized as an expert on laws that protect whistleblowers from retaliation by their employers.

GAP has worked in partnership with various government bodies, multilateral institutions and citizens groups to develop and enhance the use of whistleblower laws in the international context. Since 2003, GAP has implemented a program to assess and improve whistleblower protection systems within the multilateral development banks, which fund projects in developing nations. GAP has also used its substantial legislative and legal expertise in the U.S. to assist the Organization of American States in developing model legislation to implement Article III, Section 8 of the Inter-American Convention Against Corruption. The Convention requires individual nations to create a system that protects citizens who report acts of corruption and fraud.

As a public interest law firm, GAP has defended whistleblowers in hundreds of cases that have exposed billions of dollars in waste and fraud. GAP reviews over 400 potential whistleblower cases per year. It only has the resources to litigate less than ten percent of these cases. With financial support from foundations, individuals and fees from legal cases, GAP serves the public interest through a litigation team of lawyers and with program directors and experts in food safety, national security, nuclear worker safety and corporate accountability. GAP is nonpartisan and receives no government funding. It is headquartered in Washington, D.C. with a west coast office in Seattle, Washington. For more information, visit GAP at www.whistleblower.org.
The Global Accountability Project of One World Trust

The One World Trust is a United Kingdom (UK)-based charity that supports and promotes the establishment of democratic and accountable institutions of global governance. Formed in 1951 by an all-party parliamentary group and located within Parliament, the Trust provides leading research on global affairs to members of the UK and European Parliaments and the wider public. The Trust’s central mission is providing information on the political structures of globalization, highlighting key reforms that strengthen the ability of citizens worldwide to participate in, shape and, ultimately, hold accountable global processes. At a time when many people are concerned about the impacts of globalization, the Trust seeks to highlight and explore how global citizens can play a greater role in shaping and controlling their world.

The Trust is working to achieve more transparency and accountability through the Global Accountability Project. Established in 2000, the Project assesses and compares the accountability of leading global organizations from the intergovernmental, corporate and non-governmental sectors. The Project identifies the structures and processes needed to make organizations more accountable to the people they impact upon and highlight both innovative new accountability practices at the global level and disturbing accountability deficits.

In 2003, the Trust published its first report on global accountability entitled *Power without Accountability* comparing eighteen of the world’s most powerful global organizations against two key aspects of accountability and found alarming accountability gaps in many organizations’ governance and transparency.

Central and Eastern European Bankwatch

The Central and Eastern European Bankwatch Network is an international nongovernmental organization (NGO) with member organizations from twelve countries across the CEE and Commonwealth of Independent States regions. The basic aim of the network is to monitor activities of multilateral development banks (MDBs) and to propose constructive alternatives to their policies and projects in the region.

The CEE Bankwatch Network was established in 1995 and has become one of the strongest networks of environmental NGOs in Central and Eastern Europe. CEE Bankwatch monitors various regional MDB projects and also helps local and affected communities to advocate changes that bring about more environmental or social sustainability. Local communities gain influence by having adequate information and protection mechanisms.

One of the key Bankwatch campaigns targets the EBRD’s information policy and compliance mechanisms. Bankwatch regards these as important steps towards full accountability at the EBRD. Taxpayers who fund the EBRD and people who are affected by its projects have a right to such accountability mechanisms.

Bank Information Center (BIC)

BIC’s mission is to empower citizens in developing countries to influence MDB-financed operations and policies in a manner that fosters social justice and ecological sustainability. BIC aims to democratize the international financial institutions to ensure citizen participation, information disclosure, full adherence to environmental and social policies and public accountability.

Founded in 1987, BIC is supported by private foundations and organizations that work in the fields of environment and development. BIC is not affiliated with any of the MDBs, nor does it receive any funding from them.
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**GAP Board of Directors**

Conrad Martin (Chair)
Mary Brumder
Anne Cahn
Michael Cavallo
Ken Grossinger
Terri Shuck
Ronald Simon
James Turner

**GAP Team Members**

The GAP International Program team was responsible for co-authoring the report.

Tom Devine: Legal Director
John Fitzgerald: Multilateral Development Bank Program Director
Charly Moore: Consultant
Sophia Sahaf: Program Coordinator

**GAP Multilateral Development Bank Program Advisors**

J. Brian Atwood
Professor, Hubert Humphrey Institute of Public Affairs at the University of Minnesota

Daniel Bradlow
Director, International Graduate Degree Program
Washington College of Law at the American University

Simon Burall
Executive Director, One World Trust

Richard Calland
Executive Director, Open Democracy Advice Center

John Cavanagh
Director, Institute for Policy Studies

Guy Dehn
Director, Public Concern at Work

Terri Morehead Dworkin
Professor of Business, Indiana University

Jonathan Fox
Professor, Latin American and Latino Studies at the University of California, Santa Cruz

David Hunter
Visiting Professor of Law, Washington College of Law at the American University

Daphne Wysham
Coordinator, Sustainable Energy and Economy Network

* Organizational affiliations are for identification purposes only

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Introduction

The European Bank of Reconstruction and Development (EBRD) has instituted significant reforms in the last few years that have improved the transparency, governance and accountability of the institution. In 2000, a Chief Compliance Officer (CCO) position was created to promote good governance and standards of integrity at the Bank. The CCO is supposed to ensure that actions of EBRD staff, management and members of the board of directors are ethical and consistent with the Bank’s Code of Conduct. The Bank also established an Independent Recourse Mechanism that gives outside parties the ability to challenge Bank projects. These reforms reflect efforts to address fraud and corruption issues that have plagued all the multilateral development banks (MDBs).

Despite these important reforms, the EBRD’s efforts fell short. The existing employee protection system is incomplete and many of its provisions lack sufficient legal safeguards. Moreover, the EBRD does not give whistleblowers the freedom to disclose information to outside parties. Employees who break this rule are subject to disciplinary proceedings. This policy prevents the public from learning about the corruption or fraud issue and leaves the response solely to EBRD. One of the fundamental purposes of whistleblower policies is to expose fraud and corruption publicly and to ensure that the institution’s response is also subject to public scrutiny. This right to speak out has been increasingly recognized at the national and international levels as fundamental to democratic governance, fighting corruption and promoting the rule of law.

The Government Accountability Project (GAP), an international leader in promoting laws and policies to protect the rights of employees, has written a thoughtful report that provides a critique of the status of the EBRD’s whistleblower policies, relying on a comprehensive and objective checklist specifically designed for use at MDBs. Although the report finds that the Bank has met some of the criteria, it concludes that overall the Bank failed to establish a comprehensive whistleblower protection program.

The report goes well beyond criticizing, however, offering the Bank a detailed road map for both strengthening its employees’ rights and effectively fighting waste, fraud and corruption. The report makes specific recommendations for improving the Bank’s policies including:

- protecting whistleblowers who disclose information regarding fraud or corruption to outside parties;
- providing rudimentary guidelines on burden of proof to ensure that the employee has guidance about what evidence is necessary to either win or avoid being punished for using the system;
- providing an independent adjudication forum free of institutional self-interest.

Coupled with other policies to combat corruption and fraud, the recommendations in this report will help to ensure that Bank loans effectively promote the important goals of poverty alleviation and equitable development.

David Hunter
Visiting Professor of Law, American University
Executive Summary

The Government Accountability Project’s (GAP) *Culture of Secrecy* report is the first critique of the European Bank of Reconstruction and Development’s (EBRD) effort to develop an effective whistleblower program. GAP prepared a twenty-four-point checklist to score the Bank’s performance. The year-long assessment process looked at information provided by the EBRD and other sources. GAP found that the Bank had earned eight passing grades out of a possible twenty-four checklist criteria.

This is a failure under any objective evaluation. Bank employees who are eyewitnesses to corruption are prevented from bearing witness in forums available to the public or to relevant government law enforcement agencies. There are no safe channels for whistleblowers to disclose information, even when assisting management’s right to know about activities that could be damaging to the EBRD. As a result, institutional leaders are routinely deprived of early warnings about resolvable problems, and third parties are prevented from engaging in informed oversight.

**Congressional mandate**

Last year a number of highly publicized whistleblower disclosures helped educate Congress about the need for policies at the multilateral development banks (MDBs) that protect employee speech rights and improve accountability. The resulting law, known as the Leahy-McConnell Amendment, incorporated themes from the Sarbanes-Oxley Act dedicated to combating corruption and con icts of interest, and from a series of audits undertaken by the investigative unit of Congress—the General Accounting Office.

The Government Accountability Project’s *Culture of Secrecy* report is the first critique of the European Bank of Reconstruction and Development’s effort to develop an effective whistleblower program.

The Leahy-McConnell Amendment requires the U.S. Secretary of Treasury to report to Congress on progress at the MDBs toward achieving a set of speci c transparency and accountability goals, including whistleblower protections. 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 global standard, including whistleblower protection measures. GAP has also co-authored a model law for the Organization of American States 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.

**The need for this report**

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

The unfortunate reality is that the EBRD has not met its original goals. The Bank continues to make loans that fuel corruption and harm the environment. Corrupt government officials often bene t from projects financed by the EBRD. These offi cials try to silence opposition to the projects. For example, Ukrainian ofi cials attempted to end debate about the construction of two nuclear reactors by using the Ukrainian Security Service (USS) to intimidate critics. The USS was accused of committing human rights violations against individuals who opposed Khmelnitsky 2 and Rivne 4.

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

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

**Strengths:**
The EBRD has taken modest steps to reduce corruption and protect internal critics. First, the Bank hired a Chief Compliance Officer (CCO) in 2000 to promote good governance and standards of integrity for all Bank activities. The CCO is supposed to ensure that actions of EBRD staff, management and members of the board of directors are ethical and consistent with the Bank’s Code of Conduct. The CCO is also supposed to provide oversight of Bank staff on proper management of actual and potential conflicts of interest with respect to the Bank’s clients and other concerned parties.

Second, the Bank provides a wide scope of protection from harassment or discrimination for whistleblowers. This includes explicit acts of retribution such as termination or more subtle acts such as refusing to promote. The EBRD’s procedures also cover attempted or perceived retaliation.

Finally, if a whistleblower prevails, the Bank provides relief of up to three times an employee’s annual salary. This is not the main reason that employees choose to become whistleblowers. But, it is a tangible reward for the sacrifices that a whistleblower makes to reveal fraud or corruption. The EBRD also authorizes the awarding of attorney fees to a whistleblower who substantially wins.

**Challenges:**
The EBRD does not have a comprehensive whistleblower protection program. The Bank has the makings of a whistleblower policy. The existing EBRD employee protection system is incomplete and many of its provisions lack sufficient legal protections.

The most obvious omission is the lack of a provision for protected whistleblowing in the EBRD procedures, except in the context of employee appeals. Particularly troublesome is that testimony in IRM proceedings is not protected. The IRM was established specifically to resolve complaints by third parties against the EBRD. The IRM process will not work unless whistleblower testimony is protected.

A second failure is the limited scope of protection for subject matter disclosures. Protected disclosures must include any illegality, gross waste, mismanagement, abuse of authority and substantial and specific danger to public health. The Bank’s policy covers employee disclosures that protect the Bank but is silent about protecting the public’s interest. This is unacceptable.

A third failure in the EBRD’s whistleblower policies is the limit the Bank places on the duty to disclose illegality. The employee is obligated to disclose illegal activity that undermines the Bank’s interest but not the public interest. The result is a policy that protects the Bank and not the public from illegal acts.

By September 2004 the U.S. Treasury is obligated under the Leahy-McConnell Amendment to report to Congress about the status of the EBRD’s whistleblower policy. GAP’s initial goal is to work successfully with the EBRD to establish a process to fix the problems identified in this report before U.S. Treasury issues its first report to Congress. The ultimate goal is to have a credible EBRD whistleblower program by the time the next U.S. Treasury report to Congress is issued in March 2005.
This report is a comprehensive assessment of the structural integrity of EBRD policies for whistleblowers, based on an evaluation of all procedures the Bank made available. Like most other MDBs, the EBRD did not provide all the documentation of the rules governing whistleblowers at their institutions. The EBRD didn’t share large parts of the personnel policy, the official guidelines for the Chief Compliance Officer and whistleblower case histories from the internal grievance procedure. In that sense, this report reflects a reluctant transparency initiative. The EBRD’s partial compliance only came after sustained requests over several months. Secret law is an oxymoron for whistleblowing. The complete list of referenced documents is available in the appendix.

International and domestic laws provide a frame of reference for assessing MDB whistleblower protections. In addition to the Organization of American States (OAS) model law, the CD includes the United Nations Convention Against Corruption provisions for witnesses and whistleblower protection, the employee protection provision in the Council of Europe’s Anti-Corruption Treaty and guidelines from the Organization for Economic Cooperation and Development.

In a thorough attempt to understand all applicable policies, the research has been reinforced by interviews with EBRD experts and representatives. GAP also reviewed published literature including newspaper articles and academic studies. All material derived from listed websites was available as of June 14, 2004.

GAP sent its draft whistleblower checklist assessment to the EBRD on March 23, 2004, for comment and to provide notice of any inaccuracies or new developments for which the Bank had not received proper credit. On April 14, 2004, Bank officials met with GAP representatives in London. At the meeting, EBRD representatives indicated satisfaction with current procedures, and declined to discuss any weaknesses to correct or initiatives to strengthen the role of whistleblowers. Bank officials did agree to consider informing GAP of any errors in the text of this report, an offer later publicly affirmed. The Bank also has indicated a new Chief Compliance Officer will review whistleblower issues after joining the staff in June. To date, the Bank has not notified GAP that it considers the text below to contain any inaccuracies.

The following checklist and descriptive paragraphs in bold are based on GAP’s 27 years of experience in whistleblower law and practice. They were given to each MDB for comment several months prior to the release of this report. The checklist and grading represent whether the EBRD’s policies have the potential to meet each requirement in practice.

The checklist is broken down into five key areas: Scope of Coverage, Forum, Rules to Prevail, Relief for Whistleblowers Who Win and Making a Difference. The first four categories are the cornerstones for an effective whistleblower protection system—who and what activities are covered, whether there is a day in an unbiased court, whether the rules to win are fair and whether the fruits of victory will provide justice. The fifth category, making a difference, is the point for whistleblowers. It is why they take the risk in the first place. Studies repeatedly have confirmed that this factor is far more important than fears of retaliation for eyewitnesses when deciding whether to remain silent observers or blow the whistle.

**Graded Chart**

Grades are based on policies and associated records provided as of May 2004 and assigned based on the following scale.

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<thead>
<tr>
<th>Scale</th>
<th>Assessment</th>
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<tr>
<td>0</td>
<td>Issue not addressed</td>
</tr>
<tr>
<td>1</td>
<td>Attempted to address the issue</td>
</tr>
<tr>
<td>2</td>
<td>Significant but insufficient effort to address the issue</td>
</tr>
<tr>
<td>3</td>
<td>Met most elements of the standard</td>
</tr>
<tr>
<td>4</td>
<td>Fully met the standard</td>
</tr>
<tr>
<td>5*</td>
<td>Bonus point for setting new standards in MDB whistleblower protection programs</td>
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GAP uses the U.S. grading system to assign grades. The U.S. system generally requires a minimum of 70% to pass. The EBRD whistleblower program failed, earning eight passing grades out of a possible twenty-four.

* The Bank receives four bonus points for cooperating with GAP in the preparation of this report bringing the total possible score to 100.
1. “No Loopholes” Context for Free Speech Rights

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 Bank liability for breach of legally enforceable confidentiality commitments. In that circumstance, disclosures should still be protected if made to representatives of institutional leadership, or to designated law enforcement or legislative offices.

The Bank does not have a comprehensive whistleblower protection policy. The ban on retaliation against witnesses in disciplinary proceedings should be extended to all contexts challenging violations of the Bank’s Code of Conduct.

Except in the context of employee appeals, there is no provision for protected whistleblowing in EBRD appeal procedures. Particularly glaring is the absence of protection for testimony in Independent Recourse Mechanism (IRM) proceedings to resolve complaints by citizens and other stakeholders that the Bank is violating its own policies.

The Bank president must give permission for an employee to disclose information, including revealing formal institutional confirmation of misconduct to law enforcement officials or other outside parties. Employees who break this rule are subject to disciplinary proceedings. The IRM has no provision permitting whistleblowers to make protected disclosures to outside groups challenging alleged misconduct, threatening the public interest, or testifying in associated proceedings.

Assessment: Fail by default.

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

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 Bank’s mission and duties to its stakeholders, as well as any other information that assists in implementing or enforcing the law or achieving its purpose.

The point of whistleblowing is exercising free speech rights to challenge betrayals of the public trust, including violations of national and international law. The Bank’s vision of employee duty is limited strictly to institutional self-interest.

Parochial boundaries are the fatal flaw for the scope of the Bank’s accountability program. The premise for responsible employee conduct is the “[d]uty of exclusive loyalty … entirely to the Bank and to no other authority.” They must “discharge their duties solely with the interests and objectives of the Bank in view and shall not involve themselves in any conflict between their personal interests and their duty as a member[sic] of the Bank’s staff.” Of course it is necessary for the Bank to guard against conflicts of interest based on nationalism, with foreign nationals working at an international institution. That reasonable boundary, however, should not extend to canceling the rule of law in countries where the Bank finances projects.

The EBRD views the exercise of free speech like whistleblowing as personal initiatives that must be pursued with the employee’s own time and resources.

Assessment: Fail.
3. Duty to Disclose Illegality

This provision helps switch the whistleblowing context from a personal initiative for conflict to an institutional duty to bear witness.

The Bank appears to have initially adopted this principle, with an “affirmative duty” to disclose violations of the Code of Conduct, and to cooperate fully with institutional investigations.12

Unfortunately, the duty to disclose only includes activities undermining the Bank’s interest, not the public’s. The fine points of this policy confirm its counterproductive nature. It extends to alerting the CCO upon learning “that a person from outside the Bank has information about suspected misconduct” within the institution. This includes government authorities or witnesses to a government investigation, which can mean obstruction of justice. In short, the policy imposes a duty where it could undermine accountability, and is silent about the duty where it is needed to protect stakeholders from Bank misconduct.

Assessment: Fail.

4. Right to Refuse Violating the Law

This provision is fundamental to stop faits accomplis and in some cases prevents the need for whistleblowing. As a practical reality however, in many institutions, an employee 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 what is needed is a fair and expeditious means of reaching such a determination while protecting the employee 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.

Assessment: Pass.

The Bank has only created a mandatory duty to disclose threats to the institution, not to the public. The policy is more akin to intelligence gathering, rather than to defending the Bank’s mission.

While the issue is not considered in the context of a Bank officer ordering an employee to act illegally, the statement of principle is unqualified. The Bank should develop and expand this cornerstone for responsible conduct.

Here the Bank’s general policy principles subsume the principle, while not addressing it directly or offering any protection for those who act accordingly. The policy is presented as a responsibility, rather than a right. “[S]taff members have a special responsibility to avoid situations which might reflect adversely on the Bank, compromise its operations, or lead to real or apparent conflicts of interest…They shall avoid any action, in particular any public pronouncement or personal gainful activity, that may adversely reflect upon their status or on the[ir] integrity, independence and impartiality…”14

Assessment: Pass.
5. Protection Against Spillover Retaliation

The law should cover all common scenarios that could have a chilling effect on responsible exercise of free speech rights. Representative scenarios include employees who are perceived as whistleblowers, even if mistaken (to guard against guilt by association,) and employees who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection.) These indirect contexts often can have the most significant potential to lock in secrecy by keeping employees silent, and isolating those who do speak out. The most fundamental is reprisal for exercise of anti-retaliation rights.

The rating is due to the sweeping shield for witnesses and those who help an appellant in an appeal. This rating is qualified, however, because the system should be upgraded to provide rights in all the contexts that otherwise could create a chilling effect that sustains corruption.

The Bank’s appeal procedure explicitly protects all those who participate, including those who serve as witnesses or otherwise assist employees. But it has serious loopholes. For instance, the procedure does not address preemptive or mistaken harassment. These omissions should be clarified through all-inclusive language to ban any retaliation that would undermine the purposes of EBRD anti-corruption commitments. Similarly, the procedure is limited to Bank staff, excluding protection for contractors. They may use the appeal procedures to challenge reprisal for whistleblowing against corruption associated with their contracts and then find themselves blacklisted for exercising appeal rights.

Assessment: Pass.

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

Coverage should extend to all relevant applicants or personnel who challenge betrayals of the institutional mission or public trust, regardless of formal status. In addition to conventional salaried employees, Bank whistleblower systems should protect all who are applicants for funding or are paid with Bank resources to carry out activities relevant to the Bank’s 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 create a chilling effect that undermines the Bank’s public service mission, 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 such a common tactic. Most significant, whistleblower protection must extend to those who participate in spending the Bank’s funds. Their disclosures come from the front lines of corruption.

The appeals procedure only provides rights for staff members, a narrow slice of those with the potential to make significant contributions through whistleblowing disclosures.

The Bank’s Code of Conduct applies to temporary or permanent Bank staff, expert consultants and their families. This means whistleblowers from the ranks of contractors and loan recipients proceed at their own risk when challenging corruption. Unlike U.S. whistleblower law, EBRD whistleblowers are not protected if they are probationary employees. Bank procedures do not cover applicants for employment or contracts, which institutionalizes vulnerability to blacklisting.

Assessment: Fail.
7. Reliable Anonymity Protection

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 chilling effect.

The protection here is dangerous, because it is so illusory. Generalized reassurances are unenforceable and undercut by all-encompassing loopholes. Anyone who counts on receiving confidentiality could be making a fatal career mistake.

The Bank pays lip service to confidentiality in its staff regulations, Code of Conduct, appeals procedures, ombudsman and hotline programs. However, there is no capacity to enforce confidentiality pledges by making them a prerequisite for disclosures. The Bank president can designate any senior officer to review the confidential case file identifying the whistleblower.

The ombudsman is off the hook if the matters disclosed “involve a substantial threat to the Bank’s assets.” Most basic, the confidentiality shield is canceled when the allegor “is himself suspected of having engaged in misconduct by knowingly and willfully [sic] reporting false information about suspected misconduct by another staff member or bank expert.” This means confidentiality vanishes if some unidentified Bank official, acting arbitrarily and without accountability, decides he or she does not believe the whistleblower.

Assessment: Fail: 

8. Protection Against Unconventional Harassment

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. 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.

The Bank appeal procedures have a broad jurisdictional mandate--whenever a staff member claims to have been “adversely affected by an administrative decision.” The procedures also cover attempted or threatened retaliation.

Assessment: Pass. 

9. Shielding Whistleblower Rights From Gag Orders

Any whistleblower law or policy must include a ban on “gag orders” through an employer’s rules, policies or nondisclosure agreements that would otherwise override free speech rights and impose prior restraint.

The Bank’s policies offer no overriding mandate for protected disclosures and are practically a composite gag order per se.

The spirit of the EBRD’s policies are summarized by the “[d]uty to behave with discretion” provision of the Conduct and Discipline procedures. It instructs employees to “refrain from public pronouncements… that might be incompatible with their status or prove a source of embarrassment to the Bank.”24 Investigators of whistleblowing charges or cases are bound by prior restraint from the CCO.25

Assessment: Fail.

Inexcusably, communications with outside authorities such as law enforcement agencies are strictly prohibited. Except for communications between internal and external audit staff, “the President alone, after consultation with the General Counsel, may authorize disclosure of the findings of inquiries [into, inter alia, whistleblower charges] to law enforcement agencies and other parties outside the Bank.”26

Assessment: Fail.

10. Providing Essential Support Services for Paper Rights

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 speech 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.

The ombudsman exists as a no-cost source of advice and informal intervention.27 However, due to the absence of enforceable confidentiality protection or access to information, the ombudsman is no substitute for safe discussions with an attorney. Indeed, except in cases of termination the employee does not even have the right to be represented by a paid lawyer.28

Assessment: Fail.
II. Forum

The setting to adjudicate a whistleblower’s rights must be free from institutionalized conflict of interest. The records of administrative boards and grievances have been so unfavorable that as a rule, so-called adjudication in these settings have been traps, both in perception and track record.

11. Right to a Genuine Day in Court

This rule institutionalizes 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 on non-proprietary or legally confidential matters, the right to confront the accusers and witnesses, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal Bank systems must be structured to provide autonomy and freedom from institutional conflicts of interest.

The EBRD system is defined by two characteristics—institutional conflict of interest and discretionary authority for the Bank’s president to terminate employees “at his discretion.” In all employee appeals, the two parties are the employee and the Bank. But the Bank president selects and provides staff and funding for the Tribunal president. The Tribunal president has total authority to “determine all issues of law and procedure, and he shall make the decisions of the Tribunal.” The other two, more democratically selected members of the Tribunal are window dressing, limited to an advisory role and asking questions at hearings.

Similarly, while there is the right to a hearing with witnesses, the proceedings are conducted in private without a transcript.

The process is carefully sanitized. There is no right for an employee to obtain relevant records if “production would prejudice the operations of the Bank or its relations with a member country, or would infringe on the rights of privacy or reputation of the other staff members of the Bank.” The provision conceivably covers anything, including evidence that would confirm a whistleblower’s charges of misconduct. Similarly, while there is the right to a hearing with witnesses, the proceedings are conducted in private without a transcript.

Assessment: Fail.
12. Option for Alternative Disputes Resolution (ADR) With an Independent Party of Mutual Consent

Arbitration can be an expedited, less costly forum for whistleblowers, if 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 Banks 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.

The EBRD policies do not contemplate any independent ADR opportunity.

Assessment: Fail by default.

13. Waiving Immunity from National Courts

Some institutions may not usually be subject to the jurisdiction of national courts in whistleblower cases. Most MDBs claim immunity from lawsuits filed in U.S. and other courts, particularly over personnel matters, but they sometimes waive that immunity. They could do so more uniformly, or the immunity might be limited by the member nations. 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 MDB does not offer employees independent arbitration, waiver of sovereign immunity is unavoidable to overcome the inherent, structural conflict of interest that occurs when an institution is both the defendant and the judge.

The EBRD not only fails to waive sovereign immunity, but decisions of the Bank’s Administrative Tribunal may not be “the subject of any type of appeal...” The Bank’s IRM specifically states that its accountability mechanism “will not undermine the status and immunities afforded the EBRD under its constituent documents.”

Assessment: Fail.

Sakhalin II Oil and Gas Project

The Sakhalin II Oil and Gas Project has raised grave concerns among civil society, government ministries and environmentalists since construction of the first Sakhalin project began in 1994. The project is located on and offshore of Sakhalin Island in the Northwestern Pacific region. Critics contend that the project will destroy habitat of the near extinct Grey whales, devastate the livelihoods of local fishermen, and dump one million tons of waste directly into the sea.

Sakhalin II is the second phase of the largest integrated oil and gas project to date. The EBRD contributed USD 116 million in 1998 for the project’s first phase amid widespread controversy. The Bank is considering an additional USD 80 million for Phase II.

NGOs have demanded that the EBRD withhold financing of Sakhalin II unless Shell establishes essential safeguards to protect the environment and local populations. The original pipeline route would cut directly through the Grey whale’s primary feeding habitat. Rodnik, a Moscow-based law center, filed a lawsuit against the Russian government and Ministry of Natural Resources in March 2004 for not fulfilling its responsibility to safeguard their habitat.

The mounting local and international pressure over the project has resulted in some changes. In April 2004, Shell decided to postpone undersea pipeline construction, one of many measures advocated by NGOs. *The above project summary was extracted from http://www.eca-watch.org/problems/russia/sakh2_leapop.pdf*
III. Rules to Prevail

The rules to prevail control the bottom line—the tests a whistleblower must pass to prove his or her rights were violated by illegal retaliation, and win.

14. Realistic Standards to Prove Violation of Rights

The federal Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights.

The current standard is that a whistleblower establishes a prima facie case of violation by establishing through 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. Once a prima facie case is made, the burden of proof shifts to the employer 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.

The EBRD system does not provide any legal burdens of proof to decide who prevails in a retaliation case. EBRD appeal procedures offer only generic standards to enforce contracts and to maintain consistency with Bank procedures and precedent, consistent with “generally recognized principles of international administrative law.” The Tribunal may alert the Board of contradictions between Bank precedent and international law that blocked an employee from winning an appeal. Compliance with the legal requirement to institute whistleblower programs requires Bank regulations specifically to include modern burdens of proof tailored for judgment of retaliation cases.

Since the government switched the burden of proof in U.S. whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually, which institutionalizes a chilling effect, to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, for the Bank to commit to one of these proven formulas to determine the bottom line—tests the whistleblower must pass to win a ruling that his or her rights were violated.

Assessment: Fail by default.

15. Realistic Time Frame to Act on Rights

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. One-year statutes of limitations are consistent with common law rights and are preferable.

Bank procedures provide three months to start an informal “administrative review” for personnel challenges, and there is another 60 days after that stage to seek a hearing by the Administrative Tribunal.

Assessment: Pass.
IV. Relief for Whistleblowers Who Win

The twin bottom lines for a remedial statute’s effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit and by accountability for the wrongdoer.

16. “No Loopholes” Compensation

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.

Bank procedures provide for relief up to three times an employee’s annual salary. While that may not always provide full compensation, it is more generous than most federal and state civil service laws for government employees in the United States.38

Assessment: Pass.

17. Interim Relief

Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication, for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive, or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years. Relief should be awarded during the interim for employees who prevail.

There is no provision for interim relief in the Bank’s appeal procedures, other than discretionary authority in the Bank president.19 This does not qualify as an employee right, since EBRD policies give the Bank president the right to take virtually any conceivably relevant action. There should be an opportunity for the employee to seek a stay as a regular option in the Administrative Review and Administrative Tribunal procedures.

Assessment: Fail.

K2R4

The Ukrainian government began (but never completed) construction of two highly controversial nuclear reactors, Khmelnitsky 2 and Rivne 4 (K2R4). Although the project has received broad criticism from human rights, environmental and development experts, the Bank continues to consider the K2R4 for future funding. A chief concern of project opponents is that the project may actually decrease nuclear safety in the Ukraine and Europe. Moreover, CEE Bankwatch has documented the use of intimidation tactics by Ukrainian authorities against vocal project opponents such as students and environmentalists.

Originally, project costs were estimated at 1.48 billion.1 In 1997, the EBRD contracted an independent panel of experts to assess the economics of the project. The panel concluded that K2R4 was not a “productive use of one billion USD.” Moreover, a SOCIS-Gallup International poll found that only 14% of the public supported project construction in 2000.

The EBRD should ensure that individuals expressing concerns about Bank projects are protected from retaliation.

18. Coverage for Attorney Fees

Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn’t 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, employers 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. Employees can be ruined by that type victory, since attorney fees often reach five to six figures.

The appeals procedure authorizes Tribunal reimbursement of expenses to an appellant who succeeds “in whole or in part, ... including reasonable legal costs, the appellant has incurred in presenting the appeal.” The Tribunal may recommend payment of all legal expenses “even though an appeal has not succeeded,” if “the arguments and evidence presented by the appellant’s lawyer contributed materially to the Tribunal’s understanding of the issue.” GAP assumes that such authority is used generously, but the absence of case histories makes this unclear. Therefore, a presumption of an award of fees and costs to the prevailing complainant should be clarified in policy and proven in practice.

Assessment: Pass.

19. Transfer Option

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 for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

Relief may include not only transfer but also a promotion and raise.42

Assessment: Pass.

Leahy-McConnell Amendment

Senators Patrick Leahy (D-VT) and Mitch McConnell (R-KY) led the successful effort to include in the 2004 Foreign Operations Title of the Consolidated Appropriations Act a provision requiring U.S. representatives on multilateral development banks (MDBs) Boards of Directors, including the Inter-American Development Bank, to encourage the MDBs to implement a list of policy goals that increase transparency and accountability (see appendices).

The Leahy-McConnell Amendment contains benchmarks including:

- greater transparency, from project preparation to Board discussions;
- resources and conditions in each loan and strategy to ensure that applicable laws are obeyed;
- public summaries of independent audits of the institutions’ operational effectiveness, policy compliance, and internal control mechanisms;
- effective complaint mechanisms that also protect whistleblowers from retaliation;
- reports to Congress on these and all other aspects of the section by September 1, 2004 and six months thereafter.
- Achieve all the listed goals by June 2005.
20. Personal Accountability for Reprisals

To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The worst that will happen is they won’t get away with it, and 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 violating whistleblower laws. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. The most superficial is to make compliance with the whistleblower law a critical element in every manager’s performance appraisal, and for decision makers in reprisal cases to refer responsible officials for investigation to determine if sanctions are appropriate for violating this element.

Personal accountability for misconduct includes termination and financial restitution. Misconduct inquiries can be instituted against a staff member or manager who “may have…retaliated, or attempted or threatened to retaliate, against anyone for reporting or providing information about misconduct or suspected misconduct.” Again, there is no track record of results.

Assessment: Pass. 🏆🏆🏆

The concept of personal accountability for retaliation is covered in the EBRD policies. This protection reinforces the ban against harassment of witnesses who testify in administrative hearings.

Baku-Tbilisi-Ceyhan Export Oil Pipeline

The World Bank and EBRD are two principal sponsors of the controversial Baku-Tbilisi-Ceyhan (BTC) Export Oil Pipeline. The pipeline would provide oil and gas for European and United States markets by connecting the Caspian Sea oil fields with the Turkish Mediterranean coast. EBRD funding for this project totals $250 million. Local residents, international NGOs and government agencies have criticized it. An NGO fact-finding mission in Georgia and Azerbaijan documented evidence of forced resettlements without compensation, human rights abuses, and violations of borrowing country laws and policies. Critics cite disastrous environmental and social damage potentially resulting from construction and use of the pipeline.

The BTC controversy has also turned personal. Mrs. Mirvari Gahramanli, the former leader of an independent labor union opposed the pipeline construction and conducted investigations into allegations of corruption. She discovered $126 million worth of corruption in the State Oil Company of Azerbaijan (SOCAR). In a statement provided to GAP, Mrs. Gahramanli said that she and her daughter were arrested and jailed in 2002. In 2003, members of her family were beaten and their jobs terminated. The reason given for the termination was their relationship to Mrs. Gahramanli. This echoes complaints by human rights activists that they have been harassed, intimidated and painted as state enemies for their opposition to the pipeline. Mrs. Gahramanli says, “…[t]he Bank is concerned for the interest of [British Petroleum], not for the interest of any of the local people. The Bank likes to observe, not to help. After all, what would be their benefit if they help!”

3 Ibid. Information on Mirvari Gahramanli was derived from conversations with Mrs. Gahramanli and her written statements.
Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public—positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

21. Credible Internal Corrective Action Process

Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give the employer an opportunity to clean house before matters deteriorate into a public scandal or law enforcement action. The track records of these systems will determine whether Banks have that opportunity or are blindsided due to the absence of early warnings from employees. Studies repeatedly have confirmed that the primary reason would-be whistleblowers remain silent is the fear that their actions won’t make a difference and not the concern of retaliation.

While the IRM initiative is laudable, the critical factor is the lack of any internal mechanism that permits piercing the institutional veil of secrecy. Internal investigations are structured to contain evidence of misconduct within the Bank, not disclose information to affected government bodies and stakeholders. If there were a whistleblower channel to the new IRM mechanism, the Bank’s internal system would meet minimum credibility standards.

The Bank’s procedures have well-detailed channels to investigate corruption, including misconduct inquiries by the CCO and a newly created IRM. A hotline exists for allegations as well, but the flow of information is to the CCO rather than the Board’s Audit Committee. Similarly, only “in exceptional circumstances” does the Board’s Audit Committee see a CCO report that confirms evidence of fraud. The Sarbanes-Oxley Act of 2002 may stimulate the Securities and Exchange Commission to require more detailed reporting concerning the role of the audit committee in the reports required of the MDBs to the (potential bond-buying) public.

The IRM is an ambitious new initiative established to consider “complaints from groups that are, or are likely to be, directly and adversely affected by a Bank-financed project.” The IRM consists of Bank leadership, including the president, board and appointed experts. It can consider “certain social issues such as compliance with specified internationally recognized labour standards, protection of workers’ health and safety, and safety and safeguards relating to cultural property, indigenous peoples and involuntary resettlement…” The IRM process can include corrective action recommendations, follow-up monitoring and even outside problem solving through independent investigation, fact-finding, mediation or conciliation.

Structural flaws, however, prevent these channels from working effectively. For example, the IRM only considers Bank misconduct, not conduct by the recipients spending Bank loans. The process is toothless in terms of significant, enforceable authority to take corrective action. Problem solving initiatives cannot “interfere with” related legal proceedings. Moreover, IRM decisions cannot interrupt funding of a rogue loan with confirmed misconduct. The fatal omission for a whistleblower system is failure to protect those who disclose evidence in IRM proceedings that support outside challenges of alleged Bank misconduct. This blocks citizens using the IRM from the right to seek information effectively from Bank employees that is relevant to their charges.

The CCO proceedings are even more opaque. The CCO has complete authority to gag communications, which could block relevant evidence from reaching IRM proceedings. While there is a hotline to the CCO, it does not guarantee confidentiality and is limited to fraud or personal corruption allegations (about compliance). The Ombudsman is limited to problem solving efforts on behalf of personal grievances, without authority to follow through on compliance or institutional misconduct issues.

Assessment: Fail. 🐼 🐼
22. Outside Oversight and Participation in Reform

Like secret free speech rights, secret reforms are a contradiction in terms. By definition, that would be an institutional honor system for resolution of alleged institutional misconduct. As a result, it is insufficient for the Bank privately to correct betrayals of the public trust, without transparency through a public record on the nature of alleged misconduct, its causes and the evidence and corrective action to prevent recurrence. Exceptions must occur to preserve proprietary information or honor preexisting legal confidentiality commitments. However, there is no basis for trust without some ultimate public record and timely initial notice to government regulatory or law enforcement officials to permit oversight of how the institution handles the dispute. Open proceedings also are a prerequisite for affected public witnesses and others to contribute evidence for a proceeding they otherwise would not know is taking place.

While there is supportive general rhetoric, Bank policies at best provide a trickle of information to outside authorities. There is no mandate to work with external authorities and internal procedures have the effect of obstructing third party investigations. The bottom line is that the Bank has not established procedures to permit cooperation with a third party, let alone adopt transparency in its institutional checks and balances.

Bank authorities are authorized to stop an internal misconduct inquiry when necessary and seek the president’s permission to contact law enforcement agencies. Unfortunately, only the president may disclose inquiry findings to anyone outside the Bank, even law enforcement officials.\(^5\) The inquiry officer would still be gagged from those communications and the procedure institutionalizes advance notice to the alleged wrongdoer before the government has a chance to get involved.\(^6\)

Although the Bank has public information and environmental policies with strong public disclosure mandates, the policies contain huge loopholes. For example, the Bank may block disclosure because “in the Bank’s view [it] would seriously undermine the policy dialogue with the country of operations concerned.”\(^5\)\(^7\) This is a blank check to block transparency when it is needed most.

Assessment: Fail.

23. Enfranchising Whistleblowers to Participate in Follow-Up

Even more significant is enfranchising whistleblowers and citizens to file formal actions against illegality exposed by their disclosures. In government statutes, these types of suits are known as private attorney general, or “qui tam” actions in a reference to the Latin phrase for “he who sues on behalf of himself as well as the king.” These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges “doing well” with “doing good.”

This approach has been tested in the False Claims Act for whistleblower suits challenging fraud in government contracts. It is the United States’ most effective whistleblower law. Civil fraud recoveries in government contracts have increased from $27 million annually in 1985, to over a billion dollars in 2002.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for MDBs is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

Whistleblowers are clearly disenfranchised from the IRM and have no protected speech right to participate in it. At most, they can file internal allegations for a misconduct inquiry or contact the hotline.

Assessment: Fail.
24. Committed Institutional Leadership

The intangible element of leadership’s commitment to announced reforms normally is key to determining how seriously institutional staff take it, and how much is accomplished. Unless a leader demonstrates that commitment through highly visible public actions, would-be whistleblowers may dismiss the changes as public relations gestures or empty rhetoric, and the changes may not disrupt ingrained patterns of management secrecy enforced by retaliation.

While progress on inspection has been significant, whistleblowers have been left behind. Former Soviet republics particularly need institutional leadership to recruit public citizens and celebrate community heroes as they transition from a fear-ridden, Stalinist legacy. This calls for sensitive but dedicated work on the part of the EBRD to recruit voices from the field, and protect those who risk their lives and safety to protect the public interest.

This criterion is particularly significant at the EBRD where the Bank president has virtually czar-like discretionary authority over the flow of information, including whistleblower disputes and all key communications with the outside world such as law enforcement agencies.

Assessment: Fail.

TogliattiAzot Ammonia Terminal

Located on the Black Sea, TogliattiAzot Ammonia Terminal has faced harsh criticism from Russian NGO’s concerned with the project’s negative impacts on the local economy and environment. Although construction began nearly five years ago, sponsors only recently approached the EBRD for financial support. Critics contest the Bank’s involvement because of its precarious location on seismic plates, rendering the area unsuitable for large engineering structures.

Originally, project sponsors highlighted the project’s economic benefits, e.g. reduced export costs. However, after Ukrainian authorities took measures to cut transportation costs in 2003, this rationale is less convincing. Moreover, the unruly Black Sea currents create adverse conditions that may preclude transport operations 146 days out of the year, questioning the project’s viability.

Specific concerns have been raised about the silencing of public dissent. The head of local administration, a vocal critic of terminal construction, was fired from his job in 2002. The local district administration of Temryuk declared illegal a public protest organized in 2003 in opposition to project implementation. After the district court ruled in favor of the protestors the administration backed off. Whistleblowers speaking out with valid concerns should be protected from retaliation by governments. Their stories can prevent media scandals and unnecessary national debt resulting from ill-advised Bank loans. *The above summary was extracted from http://www.bankwatch.org/issues/taman/mtaman.html*
<table>
<thead>
<tr>
<th>#1</th>
<th>“No Loopholes” Context for Free Speech Rights</th>
</tr>
</thead>
<tbody>
<tr>
<td>#2</td>
<td>“No Loopholes” Subject Matter for Free Speech Rights</td>
</tr>
<tr>
<td>#3</td>
<td>Duty to Disclose Illegality</td>
</tr>
<tr>
<td>#4</td>
<td>Right to Refuse Violating the Law</td>
</tr>
<tr>
<td>#5</td>
<td>Protection Against Spillover Retaliation</td>
</tr>
<tr>
<td>#6</td>
<td>“No Loopholes” Protection for All Citizens With Disclosures Relevant to the Public Service Mission</td>
</tr>
<tr>
<td>#7</td>
<td>Reliable Anonymity Protection</td>
</tr>
<tr>
<td>#8</td>
<td>Protection Against Unconventional Harassment</td>
</tr>
<tr>
<td>#9</td>
<td>Shielding Whistleblower Rights From Gag Orders</td>
</tr>
<tr>
<td>#10</td>
<td>Providing Essential Support Services for Paper Rights</td>
</tr>
<tr>
<td>#11</td>
<td>Right to a Genuine Day in Court</td>
</tr>
<tr>
<td>#12</td>
<td>Option for Alternative Disputes Resolution With an Independent Party of Mutual Consent</td>
</tr>
<tr>
<td>#13</td>
<td>Waiving Immunity from National Courts</td>
</tr>
<tr>
<td>#14</td>
<td>Realistic Legal Standards to Prove Violation of Rights</td>
</tr>
<tr>
<td>#15</td>
<td>Realistic Time Frame to Act on Rights</td>
</tr>
<tr>
<td>#16</td>
<td>“No Loopholes” Compensation</td>
</tr>
<tr>
<td>#17</td>
<td>Interim Relief</td>
</tr>
<tr>
<td>#18</td>
<td>Coverage for Attorney Fees</td>
</tr>
<tr>
<td>#19</td>
<td>Transfer Option</td>
</tr>
<tr>
<td>#20</td>
<td>Personal Accountability for Reprisals</td>
</tr>
<tr>
<td>#21</td>
<td>Credible Internal Corrective Action Process</td>
</tr>
<tr>
<td>#22</td>
<td>Outside Oversight and Participation in Reform</td>
</tr>
<tr>
<td>#23</td>
<td>Enfranchising Whistleblowers to Participate in Follow-Up</td>
</tr>
<tr>
<td>#24</td>
<td>Committed Institutional Leadership</td>
</tr>
</tbody>
</table>
Endnotes

1 See Central and Eastern European (CEE) Bankwatch issue paper
“Public Participation on K2/R4” [hereinafter K2/R4]. Available at
2 European Bank for Reconstruction and Development, Public
3 See accompanying CD for supporting documents.
4 See Office of Merit Systems Review and Studies, Blowing the
Whistle in the Federal Government: A Comparative Analysis of
5 EBRD, Grievance and Appeals Procedure [hereinafter
6 EBRD, Independent Recourse Mechanism [hereinafter IRM].
(April 29, 2003).
7 EBRD, Procedures for Reporting and Investigating Suspected
Misconduct [hereinafter Reporting Procedures] § 2.01(a) – (d),
604 (2002).
8 IRM.
9 EBRD, Staff Handbook, “Chapter 8: Conduct and Discipline”
10 EBRD, Staff Handbook, “Annex 1: Staff Regulations”
11 Reporting Procedures § 1.03 (a).
12 Staff Handbook Chapter 8 § II.8.5.2 and Reporting Procedures
§ 2.01.
13 Reporting Procedures § 2.01(b).
14 Staff Regulations § 4(a).
15 Employee Grievance Procedures § 10.02.
Rule 1.
17 5 USC 2302 (a) and Employee Grievance Procedures §
4.04(a).
18 Staff Regulations § 3(a)(i) and Staff Handbook § 8.5.3.
19 Reporting Procedures § 3.02(d).
20 The EBRD Ombudsman [hereinafter EBRD Ombudsman]. ¶
5. 2003.
21 Reporting Procedures § 4.03(c).
22 Employee Grievance Procedures § 4.01.
23 Reporting Procedures § 6.01(a).
24 Staff Handbook Chapter § 8.2.3.
25 Reporting Procedures § 4.03(b).
26 Id § 6.04.
27 EBRD Ombudsman ¶ 3.
28 Employee Grievance Procedures § 6.03.
29 Staff Regulations § 8(b).
30 Employee Grievance Procedures § 6.01.
31 Id § 3.02(c) and 6.01.
32 Id § 7.04.
33 Id § 8.02 and 8.05.
34 Id § 9.08.
35 IRM § II.6.
36 Employee Grievance Procedures § 4.03, 4.04(b), 9.03(a).
37 Id § 2.03 and 5.02.
38 Id § 9.04 and 9.05.
39 Id § 2.04.
40 Id § 9.06.
41 Ibid.
42 Id § 9.04.
43 Staff Handbook Chapter 8.5.6; #6, supra.
44 Reporting Procedures §6.01(a).
45 Employee Grievance Procedures § 2.01(c).
46 Id § 6.02(c).
47 IRM § II (3)(b) ¶ 2.
48 Id.
49 Id Annex 1 § 1.4.
50 Id § IV.
51 Id Annex 1 § 28.
52 Id § 4.
53 Reporting Procedures § 4.03(a).
54 IRM § II.1 ¶4, footnote 3 and EBRD Ombudsman ¶
4.
55 Reporting Procedures § 6.04.
56 Id § 4.03(b) and § 4.04; #9, supra.
57 PIP p. 10, Box 2.
## I. Scope of Coverage

<table>
<thead>
<tr>
<th>Checklist Elements</th>
<th>Analysis/Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. &quot;No Loopholes&quot; Context for Free Speech Rights</td>
<td>Fail by Default: <img src="Fail.png" alt="Fail" /> The Bank does not have a comprehensive whistleblower protection policy. The ban on retaliation against witnesses in disciplinary proceedings should be extended to all contexts challenging violations of the Bank’s Code of Conduct.</td>
</tr>
<tr>
<td>2. &quot;No Loopholes&quot; Subject Matter for Free Speech Rights</td>
<td>Fail: <img src="Fail.png" alt="Fail" /> The point of whistleblowing is exercising free speech rights to challenge betrayals of the public trust, including violations of national and international law. The Bank’s vision of employee duty is limited strictly to institutional self-interest.</td>
</tr>
<tr>
<td>3. Duty to Disclose Illegality</td>
<td>Fail: <img src="Fail.png" alt="Fail" /> The Bank has only created a mandatory duty to disclose threats to the institution, not to the public. The policy is more akin to intelligence gathering, rather than to defending the Bank’s mission.</td>
</tr>
<tr>
<td>4. Right to Refuse Violating the Law</td>
<td>Pass: <img src="Pass.png" alt="Pass" /> While the issue is not considered in the context of a Bank officer ordering an employee to act illegally, the statement of principle is unqualified. The Bank should develop and expand this cornerstone for responsible conduct.</td>
</tr>
<tr>
<td>5. Protection Against Spillover Retaliation</td>
<td>Pass: <img src="Pass.png" alt="Pass" /> The rating is due to the sweeping shield for witnesses and those who help an appellant in an appeal. This rating is, however, qualified. The system should be upgraded to provide rights in all the contexts that otherwise could create a chilling effect that sustains corruption.</td>
</tr>
<tr>
<td>6. &quot;No Loopholes&quot; for All Citizens With Disclosures Relevant to the Public Service Mission</td>
<td>Fail: <img src="Fail.png" alt="Fail" /> The appeals procedure only provides rights for staff members, a narrow slice of those with the potential to make significant contributions through whistleblowing disclosures.</td>
</tr>
<tr>
<td>7. Reliable Anonymity Protection</td>
<td>Fail: <img src="Fail.png" alt="Fail" /> The protection here is dangerous because it is so illusory. Generalized reassurances are unenforceable and undercut by all-encompassing loopholes. Anyone who counts on receiving confidentiality could be making a fatal career mistake.</td>
</tr>
</tbody>
</table>
8. Protection Against Unconventional Harassment

**Pass:**

The Bank appeal procedures have a broad jurisdictional mandate—wherever a staff member claims to have been “adversely affected by an administrative decision.” The procedures also cover attempted or threatened retaliation.

9. Shielding Whistleblower Rights From Gag Orders

**Fail:** 0

The Bank’s policies have no overriding mandate for protected disclosures and are practically a composite gag order per se.

10. Providing Essential Support Services for Paper Rights

**Fail:**

The ombudsman exists as a no-cost source of advice and informal intervention. However, due to the absence of enforceable confidentiality protection or access to information, the ombudsman is no substitute for safe discussions with an attorney. Indeed, except in cases of termination, the employee does not even have the right to be represented by a paid lawyer.

II. Forum

11. Right to a Genuine Day in Court

**Fail by Default:**

The structural flaw is an institutional conflict of interest. The administrative due process system is a tool of the Bank president. While a three-member “Administrative Tribunal” conducts hearings, the available day in court is an illusion for meaningful due process. This system is not a credible opportunity for a whistleblower to achieve justice through legitimate due process.

12. Option for Alternative Disputes Resolution With an Independent Party of Mutual Consent

**Fail by Default:** 0

The EBRD policies do not contemplate any independent ADR opportunity.

13. Waiving Immunity From National Courts

**Fail:** 0

Not only does the EBRD fail to waive sovereign immunity, decisions of the Bank’s Administrative Tribunal may not be “the subject of any type of appeal…” The Bank’s IRM specifically states that its accountability mechanism “will not undermine the status and immunities afforded the EBRD under its constituent documents.”
### III. Rules to Prevail

<table>
<thead>
<tr>
<th>14. Realistic Legal Standards to Prove Violation of Rights</th>
<th>Fail by Default:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The EBRD system does not provide any legal burdens of proof to decide who prevails in a retaliation case. EBRD appeal procedures offer only generic standards to enforce contracts and maintain consistency with Bank procedures and precedent consistent with “generally recognized principles of international administrative law.” The Tribunal may alert the Board of contradictions between Bank precedent and international law that blocked an employee from winning an appeal. Compliance with the legal requirement to institute whistleblower programs requires Bank regulations specifically to include modern burdens of proof tailored for judgment of retaliation cases.</td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>15. Realistic Time Frame to Act on Rights</th>
<th>Pass:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank procedures provide three months to start an informal “administrative review” for administrative challenges and there is another 60 days after that stage to seek a hearing by the Administrative Tribunal.</td>
<td></td>
</tr>
</tbody>
</table>

### IV. Relief for Whistleblowers Who Win

<table>
<thead>
<tr>
<th>16. “No Loopholes” Compensation</th>
<th>Pass:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank procedures provide for relief up to three times an employee’s annual salary. While that may not always provide full compensation, it is more generous than most federal and state civil service laws for government employees in the United States.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>17. Interim Relief</th>
<th>Fail: 0</th>
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<tbody>
<tr>
<td>There is no provision for interim relief in the Bank’s appeal procedures other than discretionary authority in the Bank president. This does not qualify as an employee right, since EBRD policies give the Bank president the right to take virtually any conceivably relevant action. There should be an opportunity for the employee to seek a stay as a regular option in the Administrative Review and Administrative Tribunal procedures.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th>18. Coverage for Attorney Fees</th>
<th>Pass:</th>
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<tbody>
<tr>
<td>The appeals procedure authorizes Tribunal reimbursement of expenses to an appellant who succeeds “in whole or in part, … including reasonable legal costs, the appellant has incurred in presenting the appeal.” The Tribunal may recommend payment of all legal expenses “even though an appeal has not succeeded,” if “the arguments and evidence presented by the appellant’s lawyer contributed materially to the Tribunal’s understanding of the issue.” GAP assumes that such authority is used generously, but the absence of case histories makes this unclear. Therefore, a presumption of an award of fees and costs to the prevailing complainant should be made clear in policy and proven in practice.</td>
<td></td>
</tr>
<tr>
<td>Section</td>
<td>Pass/Fail</td>
</tr>
<tr>
<td>---------</td>
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<tr>
<td>19. Transfer Option</td>
<td>Pass: 🟢 🟢 🟢 🟢</td>
</tr>
<tr>
<td>20. Personal Accountability for Reprisals</td>
<td>Pass: 🟢 🟢 🟢</td>
</tr>
<tr>
<td>21. Credible Internal Corrective Action Process</td>
<td>Fail: 🟡 🟡</td>
</tr>
<tr>
<td>22. Outside Oversight and Participation in Reform</td>
<td>Fail: 🟡</td>
</tr>
<tr>
<td>V. Making a Difference</td>
<td></td>
</tr>
<tr>
<td>23. Enfranchising Whistleblowers to Participate in Follow-Up</td>
<td>Fail: 🟡</td>
</tr>
<tr>
<td>24. Committed Institutional Leadership</td>
<td>Fail: 🟡 🟡</td>
</tr>
</tbody>
</table>
APPENDIX TWO: List of Acronyms

ADR – Alternative Disputes Resolution
BIC – Bank Information Center
BTC – Baku-Tbilisi-Ceyhan
CEE – Central and Eastern European
CCO – Chief Compliance Officer
EBRD – European Bank of Reconstruction and Development
GAP – Government Accountability Project
GAO – General Accounting Office
GOSRP – General Oil Spill Response Plan
IRM – Independent Recourse Mechanism
K2R4 – Khmelnitsky 2 and Rivne 4
MDB – multilateral development bank
NGO – non-governmental organization
OAS – Organization of American States
OECD – Organization for Economic Cooperation and Development
OWT – One World Trust
SOCAR – State Oil Company of Azerbaijan
USAID – United States Agency for International Development
USS – Ukranian Security Service

List of Referenced Documents

3. Grievance and Appeals Procedures, EBRD.
4. Independent Recourse Mechanism, EBRD.
5. Letter to President Aliev Regarding Harassment of Human Rights Defenders, Human Rights Watch.
6. Public Information Policy, EBRD.
7. The EBRD Ombudsman, EBRD.
8. Procedures for Reporting and Investigating Suspected Misconduct, EBRD.

For copies of the documents listed above, please contact GAP.
APPENDIX THREE: Leahy-McConnell Amendment

ADMINISTRATIVE PROVISIONS RELATED TO MULTILATERAL DEVELOPMENT INSTITUTIONS
SEC. 581. Title XV of the International Financial Institutions Act (22 U.S.C. 262o--262o-2) is amended by adding at the end the following:

`SEC. 1504. ADMINISTRATIVE PROVISIONS.
`(a) ACHIEVEMENT OF CERTAIN POLICY GOALS- The Secretary of the Treasury should instruct the United States Executive Director at each multilateral development institution to inform the institution of the following United States policy goals, and use the voice and vote of the United States to achieve the goals at the institution before June 30, 2005:

`(1) No later than 60 calendar days after the Board of Directors of the institution approves the minutes of a Board meeting, the institution shall post on its website an electronic version of the minutes, with material deemed too sensitive for public distribution redacted.

`(2) The institution shall keep a written transcript or electronic recording of each meeting of its Board of Directors and preserve the transcript or recording for at least 10 years after the meeting.

`(3) All public sector loan, credit and grant documents, country assistance strategies, sector strategies, and sector policies prepared by the institution and presented for endorsement or approval by its Board of Directors, with materials deemed too sensitive for public distribution redacted or withheld, shall be made available to the public 15 calendar days before consideration by the Board or, if not then available, when the documents are distributed to the Board. Such documents shall include the resources and conditionality necessary to ensure that the borrower complies with applicable laws in carrying out the terms and conditions of such documents, strategies, or policies, including laws pertaining to the integrity and transparency of the process such as public consultation, and to public health and safety and environmental protection.

`(4) The institution shall post on its website an annual report containing statistical summaries and case studies of the fraud and corruption cases pursued by its investigations unit.

`(5) The institution shall require that any health, education, or poverty-focused loan, credit, grant, document, policy, or strategy prepared by the institution includes specific outcome and output indicators to measure results, and that the indicators and results be published periodically during the execution, and at the completion, of the project or program.

`(6) The institution shall establish a plan and schedule for conducting regular, independent audits of internal management controls and procedures for meeting operational objectives, complying with Bank policies, and preventing fraud, and making reports describing the scope and findings of such audits available to the public.

`(7) The institution shall establish effective procedures for the receipt, retention, and treatment of: (A) complaints received by the Bank regarding fraud, accounting, mismanagement, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the Bank of concerns regarding fraud, accounting, mismanagement, internal accounting controls, or auditing matters.

`(b) Not later than September 1, 2004, and 6 months thereafter, the Secretary of the Treasury shall submit a report to the appropriate congressional committees describing the actions taken by each multilateral development institution to implement the policy goals described in subsection (a), and any further actions that need to be taken to fully implement such goals.

`(c) PUBLICATION OF WRITTEN STATEMENTS REGARDING INSPECTION MECHANISM CASES- No later than 60 calendar days after a meeting of the Board of Directors of a multilateral development institution, the Secretary of the Treasury should provide for publication on the website of the Department of the Treasury of any written statement presented at the meeting by the United States Executive Director at the institution concerning--

` `(1) a project on which a claim has been made to the inspection mechanism of the institution; or

` `(2) a pending inspection mechanism case.

`(d) CONGRESSIONAL BRIEFINGS- The Secretary of the Treasury or the designee of the Secretary should brief the appropriate congressional committees, when requested, on the steps that have been taken by the United States Executive Director at any multilateral development institution, and by any such institution, to implement the measures described in this section.

`(e) PUBLICATION OF `NO’ VOTES AND ABSTENTIONS BY THE UNITED STATES- Each month, the Secretary of the Treasury should provide for posting on the website of the Department of the Treasury of a record of all ‘no’ votes and abstentions made by the United States Executive Director at any multilateral development institution on any matter before the Board of Directors of the institution.

`(f) MULTILATERAL DEVELOPMENT INSTITUTION DEFINED- In this section, the term ‘multilateral development institution’ shall have the meaning given in section 1701(c)(3).‘.
Bank whistleblowers are distinct from their counterparts in national governments or foreign services. They are often away from their homes on extended work visas. Staff can easily be dismissed and sent home. The work culture is extremely insular. Many documents are labeled “for official use only.”

Notwithstanding these inherent impediments to the ow of information, whistleblower activities have a long-standing tradition at the MDBs. Bank staff who uncover problems with loans or policies often share documents with outside watchdog groups. This “leaked” information has led to the discovery of countless ill-conceived and harmful projects. These unnamed whistleblowers are unsung heroes who have contributed greatly to efforts to improve the transparency and accountability of the Banks.

The MDBs have been known to retaliate against employees who dare to speak out. In addition to many lesser-known whistleblowers, two well-known authors and professors were once World Bank whistleblowers. A World Bank employee William Easterly lost his job despite being promised a leave of absence to promote a book that criticized the Bank. The book, entitled *The Elusive Quest for Growth: Economists’ Adventures and Misadventures in the Tropics*, chronicled the numerous failures of World Bank development assistance projects and policies.

A higher level World Bank whistleblower is Dr. Joseph Stiglitz, the former Chief Economist who fell out of favor with the Bank after speaking out publicly in opposition to the “Washington Consensus.” The Consensus is for the use of massive privatization schemes and the removal of barriers to capital flows to stimulate economic growth in developing countries and, indirectly, help the poor. While these results are often mixed at best, some involved make large profits, and the countries’ debts are undeniably real.

Dr. Stiglitz, a Nobel prize-winning member of the Columbia University faculty, continues to call for greater accountability at the MDBs. He was quoted in a newspaper article describing the steps that MDBs employ to strip the assets of developing countries. The *Observer* summarize Stiglitz’s argument as follows:

Step one is privatization, or “briberization”. National leaders are persuaded to sell national assets cheaply. “Stiglitz noted that ‘you could see their eyes widen’ at the prospect of ten percent commissions paid to Swiss bank accounts for simply shaving a few billion off the sale price of a national asset.”

Step two is “capital market liberalization,” where foreign investors speculate in everything from currency to real estate, create a bubble as prices inflate and then take profits.

Step three is to cut subsidies for food and fuel to balance the government’s books.

Step four is to insist on “free trade”, for example, allowing cheaper subsidized foreign food products to undercut local foodstuffs.

It is equally important to note what happens to Bank employees who “play by the rules”. The MDBs provide extremely generous retirement plans that allow employees to come back as highly paid consultants. Many of the senior management assume highly lucrative positions in the private sector such as Mr. Stanley Fischer, who retired from the IMF to become the head of the new Sovereign Clients Group of CitiGroup International.

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APPENDIX FIVE: U.S. Government Loan Review Process

The process of reviewing proposed MDB loans relies upon several departments and agencies. The agencies work together to assess risks and propose measures, including alternative courses of action, to eliminate loan-associated risks. An underlying goal of sustainable development is maintaining the natural resources base on which economic and social development depend. Even for programs with narrower goals such as reducing poverty, USAID has found that success is transitory unless environmental soundness is fully assessed and integrated into such programs.

Congress determined in the late 1980’s that U.S. assistance to the MDBs should promote the sustainable use of natural resources, the protection of the environment, public health and the status of indigenous peoples. Congress also found that “MDB projects, polices and loans have failed... to provide adequate safeguards” and that borrowers do not ensure that appropriate policies and procedures are in place to use natural resources sustainability.

Congress mandated that Treasury, State, the Environmental Protection Agency, the National Oceanographic and Atmospheric Administration, the Council on Environmental Quality and USAID help develop and promote mechanisms and institutional and procedural arrangements within the MDBs to ensure sustainable use of natural resources and protection of these values. Congress set out several elements of USAID’s role in Title XIII:

In the course of reviewing assistance proposals of the multilateral development banks, the Administrator of the Agency for International Development shall ensure that other agencies and...overseas missions...analyze...the environmental impacts of multilateral development loans well in advance of such loans' approval to determine whether the proposals will contribute to the sustainable development of the borrowing country...

Such reviews shall address the economic viability of the project, adverse impacts on the environment, natural resources, public health, and indigenous peoples, and recommendations as to measures, including alternatives, that could eliminate or mitigate adverse impacts...

If...any such loan is particularly likely to have substantial adverse impacts, the Administrator...in consultation with the Secretary of the Treasury and the Secretary of State, shall ensure that an affirmative investigation of such impacts is undertaken in consultation with relevant Federal agencies. If not classified under the national security system of classification, the information collected pursuant to this paragraph shall be made available to the public...

The Administrator...shall identify those assistance proposals likely to have adverse impacts on the environment, natural resources, public health, or indigenous peoples. The proposals so identified shall be transmitted to the Committees [of jurisdiction in the U.S. Congress].

Other sections of the law require U.S. departments and representatives to encourage MDBs to promote renewable, nonpolluting energy and other environmentally benign technologies to enhance development and the environment and, in the process, to coordinate those efforts with USAID.

USAID sends information about proposed MDB loans to its missions around the world for review and comment through its Early Project Notification (EPN) system. USAID is directed to share information derived from the EPN with Treasury, other agencies, and the public.

Complementing the interagency process is the Tuesday Group of concerned NGOs and government agencies. Meeting monthly in Washington for more than a decade, the Tuesday Group reviews MDB projects and policies. USAID and the Bank Information Center co-chair the meetings. Minutes from the meetings are shared with about 165 NGOs worldwide.

The Pelosi Amendment, Environmental Assessments and the Interagency and Public Review Process (International Financial Institutions Act, Title XIII)

The Pelosi amendment in most cases requires that the United States not vote in favor of:

…any MDB action which would have a significant effect on the human environment, unless for at least 120 days before the date of the vote an assessment analyzing the environmental impacts of the proposed action and of alternatives ... has been completed by the borrowing country or the institution, and made available to the board of directors of the institution.

The Pelosi amendment also requires that the assessment or a comprehensive summary must, in most cases, have been made available in the same time frame to the “bank, affected groups, and local non governmental organizations.” Consideration of the adequacy of such assessments is part of the USAID and interagency process of reviewing proposals and making recommendations to the U.S. Executive Directors (U.S. government representatives to each MDB.)
An international review system was required in Title XIII, section 1304 but has not been put in place:

The Secretary of the Treasury, in consultation with the Secretary of State and the Administrator of the Agency for International Development, shall create a system for cooperative exchange of information with other interested member countries on assistance proposals of the multilateral development banks.

From 2000 to 2002, USAID worked with Treasury, State and other government agencies on implementing this process, in a few instances. For example, in the case of the Chad-Cameroon pipeline, USAID received an analysis by the Netherlands Commission on an Environmental Impact Assessment of the project’s General Oil Spill Response Plan (GOSRP) from concerned NGOs. USAID asked other U.S. agencies with special expertise to review the GOSRP. The government experts agreed with the Dutch position and shared this information with USAID. The concern was incorporated into the official U.S. position and led to a requirement that the more detailed response plans be prepared earlier in project’s development.

The Netherlands Commission proposed that an international body be established to review each year a selection of important environmental assessments, particularly ones with international ramifications, to improve the practice worldwide and to provide decision-makers with the best available analysis.

USAID and other core reviewing agencies were encouraging other federal agencies and, as appropriate, other governments, to review the environmental soundness of MDB proposals in 2001. For example, the Interior Department has expertise in migratory birds and other internationally shared wildlife. The National Oceanographic and Atmospheric Administration has special expertise in coastal pollution from oil tanker operations.

In the case of other countries, the G-8 nations have expressed interest in improving the transparency and performance of the MDBs regarding safeguard policies and due diligence. In 2001 and 2002, USAID began to reach out, for example, to the Netherlands, the United Kingdom and Japan, because those nations have indicated a desire to cooperate on these issues.

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1 United States Agency for International Development Report.
2 Title XIII of the International Financial Institutions Act, 22 USC 262m.
3 Ibid.
4 22 U.S.C. 262j and 262f.