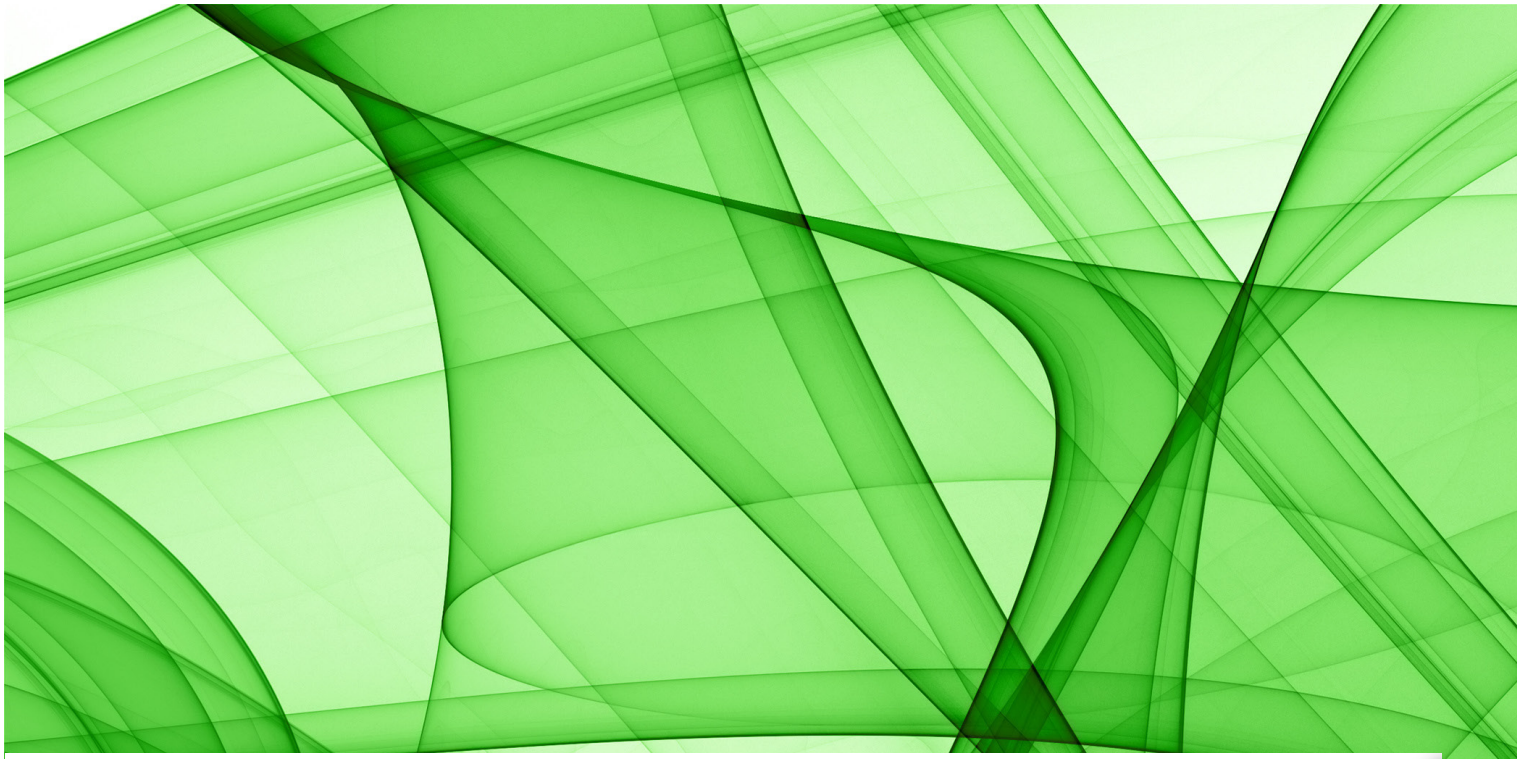
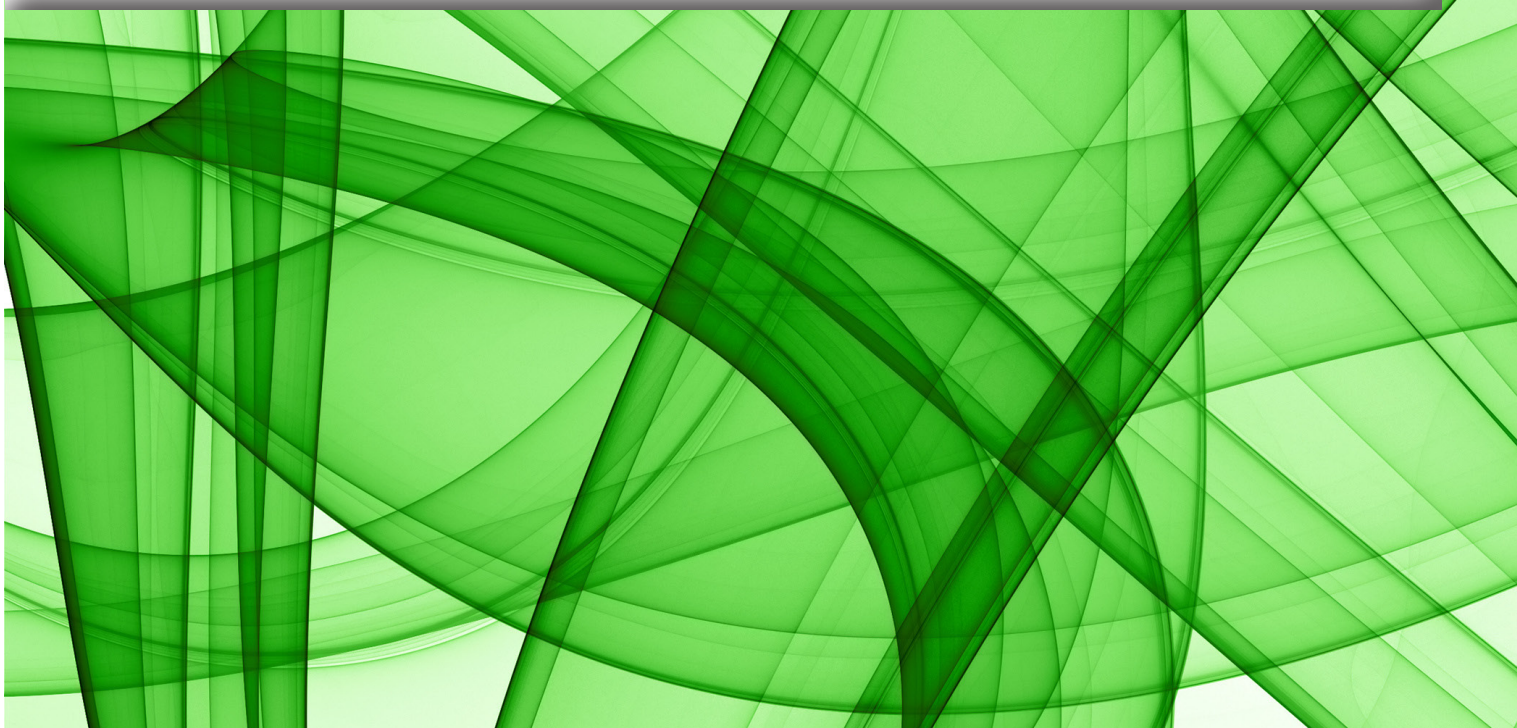
G20 Anti-Corruption Action Plan
Protection of Whistleblowers



Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation



G20 Anti-Corruption Action Plan

PROTECTION OF WHISTLEBLOWERS

STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION

At the 2011 G20 Summit in Cannes, G20 Leaders provided, in the endorsed Monitoring Report of the G20 Anticorruption Working Group:

"*support [to] the compendium of best practices and guiding principles for whistleblower protection legislation, prepared by the OECD, as a reference for enacting and reviewing, as necessary, whistleblower protection rules by the end of 2012*."

The supported compendium of best practices and guiding principles are reproduced in the annex of this document.

Preface

At the Seoul Summit in November 2010, G20 Leaders identified the protection of whistleblowers as one of the high priority areas in their global anticorruption agenda.

Recognizing the importance of effective whistleblower protection laws, Leaders, in point 7 of the G20 Anti-Corruption Action Plan, called on G20 countries to lead by:

> *To protect from discriminatory and retaliatory actions whistleblowers who report in good faith suspected acts of corruption, G-20 countries will enact and implement whistleblower protection rules by the end of 2012. To that end, building upon the existing work of organisations such as the OECD and the World Bank, G-20 experts will study and summarise existing whistleblower protection legislation and enforcement mechanisms, and propose best practices on whistleblower protection legislation.*

The G20 Anti-Corruption Working Group (AWG), in charge of carrying out the Action Plan assigned the OECD the task of preparing a concept note with proposals to implement this point. Following a discussion of the concept note at their meeting on 25-26 February 2010 in Paris, the G20 Members reiterated the value of a study of the main features of whistleblower protection frameworks currently in place in G20 countries, together with guiding principles and best practices, to help them carry out their commitment under Action Point 7.

For that purpose, the Members asked the OECD:

> *To prepare a blue print of the study on best practices for discussion and adoption at the Bali meeting; leading to the preparation of a compendium of best practices and guidelines for legislation on the protection of whistleblowers by the Cannes Summit.*

A blueprint of this Study was presented by the OECD and agreed upon at the Bali meeting of the AWG on 12-13 May.

In further response to the call by the G20 Leaders and the members of the AWG, the OECD, under the authority of the Secretary-General, now puts forth the following Study as well as a set of guiding principles and examples of best practices to support the implementation of the G20 commitment to strengthen the protection of whistleblowers.

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WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION

STUDY PREPARED BY THE OECD

I. INTRODUCTION

1. Whistleblower Protection and the Fight against Corruption

1. Whistleblower protection is essential to encourage the reporting of misconduct, fraud and corruption. The risk of corruption is significantly heightened in environments where the reporting of wrongdoing is not supported or protected. This applies to both public and private sector environments, especially in cases of bribery: Protecting public sector whistleblowers facilitates the reporting of passive bribery, as well as the misuse of public funds, waste, fraud and other forms of corruption. Protecting private sector whistleblowers facilitates the reporting of active bribery and other corrupt acts committed by companies.

2. Encouraging and facilitating whistleblowing, in particular by providing effective legal protection and clear guidance on reporting procedures, can also help authorities monitor compliance and detect violations of anti-corruption laws. Providing effective protection for whistleblowers supports an open organisational culture where employees are not only aware of how to report but also have confidence in the reporting procedures. It also helps businesses prevent and detect bribery in commercial transactions. The protection of both public and private sector whistleblowers from retaliation for reporting in good faith suspected acts of corruption and other wrongdoing is therefore integral to efforts to combat corruption, promote public sector integrity and accountability, and support a clean business environment.

3. International instruments aimed at combating corruption have also recognised the importance of having whistleblower protection laws in place as part of an effective anti-corruption framework. Whistleblower protection requirements have been introduced in the United Nations Convention against Corruption,[1] the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation),[2] the 1998 OECD Recommendation on Improving Ethical Conduct in Public Service[3], the Council of Europe Civil and Criminal Law Conventions on Corruption,[4] the Inter-American Convention against Corruption,[5] and the

[1] UNCAC Articles 8, 13 and 33.
[2] OECD Anti-Bribery Convention, 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section IX.iii. and Section X.C.v., and Annex II to the Recommendation, *Good Practice Guidance on Internal Controls, Ethics and Compliance*, Section A.11.ii.
[3] OECD Recommendation on Improving Ethical Conduct in the Public Service, Principle 4
[4] Council of Europe Civil Law Convention on Corruption, Article 9; Council of Europe Criminal Law Convention on Corruption, Article 22.
[5] Inter-American Convention against Corruption, Article III(8).

African Union Convention on Preventing and Combating Corruption.[6] Such provisions have strengthened the international legal framework for countries to establish effective whistleblower protection laws.

2. Outline of the Study

4. G20 countries have undertaken varied approaches to the protection of whistleblowers within their respective jurisdictions, and most are at different stages of development of their laws. Recognising that there is no uniform legislative means for establishing and implementing effective whistleblower protections, this Study focuses on the main features of whistleblower protection laws, and provides examples throughout of certain approaches and trends across most G20 countries in the scope and application of their laws.

5. The first substantive section of the Study (Section II.) focuses on the main features of whistleblower protection mechanisms. The section begins with an overview of the various sources of whistleblower protections under domestic laws. It then proceeds by setting out in more depth the key features of such mechanisms, including definitions and scope of application; mechanisms for protection; reporting procedures and mechanisms; enforcement mechanisms, and; awareness-raising and evaluation mechanisms.

6. While a number of the main features of whistleblower protection mechanisms can apply to both the public and private sector, the Study recognises that there are also key differences where the government is the employer and where the private sector is the employer. The Study also recognises that there are certain issues that are specific to the public or private sector. Accordingly, Sections III. and IV. of the Study focus specifically on public and private sector whistleblower protection mechanisms respectively by expanding on certain issues highlighted in Section II., and discussing in further depth approaches that are specific to each of these sectors.

3. Approach and methodology for the Study and Annexed Guiding Principles

7. As noted above, this Study is not the result of a survey carried out with each G20 countries, but instead relies on publicly available information to present a general picture. It is therefore not intended to provide an in-depth account nor a critical analysis of the systems in place in such countries. Instead, the Study is only provided to the G20 AWG as a general background document to, and basis for, the guiding principles for legislation on whistleblower protection set out in the Annex.

8. The guiding principles provide reference for countries intending to establish, modify or complement whistleblower protection frameworks. In this sense, they are prospective and offer guidance for future legislation. They do not constitute a benchmark against which current legislation should be tested. They are broadly framed and can apply to both public and private sector whistleblower protection systems. To supplement these principles, a non-exhaustive menu of examples of best practices sets out more specific and technical guidance that countries may choose to follow. Taking into account the diversity of legal systems in G20 countries, the guiding principles furthermore offer sufficient flexibility to enable countries to effectively apply such principles in accordance with their respective legal systems.

[6] African Union Convention on Combating Corruption, Article 5(6).

II. MAIN FEATURES OF WHISTLEBLOWER PROTECTION MECHANISMS

1. Sources of Whistleblower Protections under Domestic Laws

9. Legal provisions for the protection of whistleblowers can be found in numerous sources of law. These can include dedicated legislation on whistleblower protection, such as Japan's Whistleblower Protection Act (WPA)[7], South Africa's Protected Disclosures Act (PDA)[8], or the United Kingdom's Public Interest Disclosure Act (UK PIDA).[9] Whistleblower protections may also be provided for in a country's Criminal Code; for example, the Canadian Criminal Code prohibits retaliation against an employee who provides information about a crime.[10] Similarly, the United States Federal Criminal Code was amended by the Sarbanes-Oxley Act (SOX Act) to impose a fine and/or imprisonment for retaliation against a whistleblower who provides truthful information about the commission or possible commission of any Federal offence to law enforcement authorities.[11]

10. Sectoral laws, such as anti-corruption laws, competition laws, accounting laws, environmental protection laws, employment laws, and company and securities laws, may also make provision for whistleblower protections. Under these sources of law, protection may only be afforded to specific persons or for the reporting of specific offences. For example, Korea's Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption and Civil Rights Commission (ACRC Act) provides whistleblower protection to anyone who reports an act of corruption to the Commission.[12] France's Code du Travail also provides some protection measures for employees who report health or safety issues, or instances of sexual harassment.[13] The United States Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) protects whistleblowers who provide information to the Securities and Exchange Commission (SEC) relating to a possible violation of securities law that has occurred, is ongoing or is about to occur.

11. Laws regulating public servants may also be a source of whistleblower protections for public sector employees. Canada's Public Servants Disclosure Protection Act[14] (PSDPA), for example, provides protection from reprisals for public servants who disclose wrongdoings in or relating to the public sector. Public service codes of ethics and conduct may additionally provide for whistleblower protections within the public sector. For example, the Australian Public Service Code of Conduct makes express reference to whistleblower protections for public service employees who report breaches (or alleged breaches) of the Code to an authorised person.[15] (A more detailed discussion of public sector whistleblower protection mechanisms is provided under Section III. of this Study).

12. Some G20 countries have included protection of private sector employees in their dedicated whistleblower protection legislation. For example, Japan's WPA and South Africa's PDA expressly

[7] Act No. 122 of 2004.
[8] Act No. 26 of 2000.
[9] UK PIDA (1998).
[10] Section 425.1, Criminal Code of Canada.
[11] 18 U.S.C. §1513(e). Furthermore, this provision of the SOX Act is not limited in its application to only publicly-traded companies; it covers all employers in the United States. See: Stephen M. Kohn, "Sarbanes-Oxley Act: Legal Protection for Corporate Whistleblowers", National Whistleblowers Centre.
[12] ACRC Act (2009), Chapter V, Article 62. Article 2(4) defines "act of corruption".
[13] France Code du Travail, Article L1152.
[14] PSDPA (2005).
[15] Australian Public Service Code of Conduct, Chapter 17 (Whistleblowing).

provide protection for both public and private sector employees.[16] As noted above, company and securities laws can also be important sources for private sector whistleblower protections. For example, the Australian Corporations Act provides for protected disclosures, including for certain criminal offences.[17] As noted above, the Dodd-Frank Act also covers private sector whistleblowers. (A more detailed discussion of private sector whistleblower protection mechanisms is provided under Section IV. of this Study).

13. Accordingly, a range of sources of law may serve as the bases for providing whistleblower protections. The enactment of a comprehensive, dedicated law could be one effective legislative means of providing such protection.[18] Comprehensive and stand-alone legislation may give the law heightened visibility, thereby making its promotion easier for governments and employers.[19] This approach also allows for the same rules and procedures to apply to public and private sector employees, rather than the more piecemeal approach of sectoral laws, which often only apply to certain employees and to the disclosure of certain types of wrongdoing.[20] The enactment of stand-alone legislation could also contribute to ensuring legal certainty and clarity.[21]

2. Specific Features of Whistleblower Protection Mechanisms

a. Definitions and Scope

i) Whistleblowing

14. There is no common legal definition of what constitutes whistleblowing. The International Labour Organization (ILO) defines it as "the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers."[22] In the context of international anti-corruption standards, the 2009 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Recommendation) refers to protection from "discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities..."[23] The UNCAC refers to "any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."[24] The Council of Europe Civil Law Convention on Corruption refers to "employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."[25]

[16] Whistleblower Protection Act (Act No. 122 of 2004), Article 7.
[17] Corporations Act (2001), Part 9.4AAA.
[18] See also: Council of Europe Parliamentary Assembly Resolution 1729 (2010) on the Protection of Whistleblowers, Article 6.1: "Whistleblowing legislation should be comprehensive."
[19] See: D. Banisar, Whistleblowing: International Standards and Developments, (2009), pp. 19-21.
[20] *Ibid*..
[21] See also: Transparency International, Recommended Principles for Whistleblowing Legislation, Recommendation 23: "Dedicated legislation - in order to ensure certainty, clarity and seamless application of the framework, stand-alone legislation is preferable to a piecemeal or a sectoral approach."
[22] International Labour Organization Thesaurus (2005).
[23] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Recommendation IX(iii). See also OECD Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service and OECD Guidelines for Multinational Enterprises, Section II.9.
[24] UNCAC (2005), Article 33.
[25] Council of Europe Civil Law Convention on Corruption (1999), Article 9.

15. Similar language has also been applied in national whistleblowing legislation. For example, the U.K.'s PIDA refers to "any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following…" (the provision continues by listing a series of acts, including in relation to the commission of criminal offences).[26] Key characteristics common to whistleblowing could therefore include: i) the disclosure of wrongdoings connected to the workplace; ii) a public interest dimension, *e.g.* the reporting of criminal offences, unethical practices, etc., rather than a personal grievance; and, iii) the reporting of wrongdoings through designated channels and/or to designated persons.[27]

ii) 'Good Faith' and 'Reasonable Grounds'

16. A principal requirement in most whistleblower protection legislation is that the disclosures be made in "good faith" and on "reasonable grounds." Accordingly, protection is afforded to an individual who makes a disclosure based upon his or her belief that the information disclosed evidenced one of the identified conditions in the given statute, even if the individual's belief is incorrect. South African courts, for example, have asserted that "good faith" is a finding of fact; "the court has to consider all the evidence cumulatively to decide whether there is good faith or an ulterior motive, or, if there are mixed motives, what the dominant motive is."[28] The onus is not on the employee to prove good faith; an allegation of lack of good faith must be pleaded and proved by the employer.[29] Under U.S. law, the test for determining whether a purported whistleblower had a "reasonable belief" is based on whether "a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government" evidence the wrongdoing as defined by the statute.[30]

17. It follows that individuals who deliberately make false disclosures should not be afforded protection. Some laws expressly refer to this; for example, Korea's ACRC Act states that "a person who reports an act of corruption despite the fact that he or she knew that his/her report was false shall not be protected by this Act."[31] Some laws may also impose a criminal penalty for making a false disclosure. India's Bill on Public Interest Disclosure and Protection to Persons Making the Disclosure (PID Bill), for example, punishes "any person who makes any disclosure *mala fidely* and knowingly that it was incorrect or false or misleading"[32] by imprisonment for a term of up to two years and a fine.[33] However, whistleblower protection laws would normally not impose sanctions for misguided reporting, and protection would be afforded to disclosures that are made in honest error.

iii) Scope of Coverage of Persons Afforded Protection

18. At present, while most whistleblower protection laws do not extend to include private sector employees, some G20 countries, such as Japan, Korea, South Africa and the U.K. have enacted dedicated whistleblower protection legislation that expressly applies to both public and private sector employees.

[26] UK PIDA (1998), Part IV.A., Section 43B.
[27] U4 Anti-Corruption Resource Centre, *Good Practice in Whistleblowing Protection Legislation* (2009), p. 3.
[28] Tshishonga v Minister of Justice and Constitutional Development and Another (JS898/04) [2006] ZALC 104.
[29] *Ibid.*
[30] Lachance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999), cert. denied, 528 U.S. 1153, 120 (2000).
[31] Korea ACRC Act (2009), Chapter V, Article 57.
[32] India PID Bill (2010), Chapter VI., Section 16.
[33] The adoption of criminal sanctions for false reporting is controversial; some argue that it may deter whistleblowing and have a chilling effect. See: D. Banisar, *Whistleblowing: International Standards and Developments,* (2009), p. 24.

Korea's newly enacted Act on the Protection of Public Interest Whistleblowers (PPIW Act), for example, expressly applies to "any person" who reports a violation of the public interest.[34]

19. A "no loophole" approach to the scope of coverage of protected persons would ensure that, in addition to public servants and permanent employees, coverage also includes consultants, contractors, temporary employees, former employees and volunteers. Australia's Public Service Act, for example, provides whistleblower protection for persons performing functions "in or for an Agency", thereby including external contractors.[35] Similarly, under U.K. law, contractors' disclosures are also protected. A more expansive approach to the "no loophole" principle could also extend protection to a wider range of persons, including job applicants, the unemployed, persons who have been blacklisted and family members.[36]

20. Some whistleblower protection laws expressly exclude certain categories of public sector employees from protection for instance those in the intelligence services or the army. In other countries, public sector employees who are engaged in particularly sensitive areas of work may be subject to special whistleblower protection legislation. For example, the Intelligence Community Whistleblower Protection Act[37] provides some protections for those working in federal intelligence agencies in the United States. (See also Section III. of this Study for further discussion of specific issues concerning public sector whistleblower protection mechanisms).

iv) Scope of Subject Matter of Protected Disclosures

21. One of the main objectives of whistleblower protection laws is to promote and facilitate the reporting of "illegal, unethical or dangerous" activities.[38] Whistleblower legislation should thus provide a clear definition of the scope of disclosures that are afforded protection. Japan's WPA, for example, expressly lists violations of food, health, safety and environmental laws. Provisions under the WPA are also extended to those who report the bribery of foreign public officials, as provided under the Unfair Competition Prevention Laws. Again, a "no loophole" approach would be most effective when identifying the breadth of subject matter to be afforded protection.[39] In the context of using whistleblower protection mechanisms as a means of combating corruption, for purposes of clarity and legal certainty, the disclosure of corruption offences may explicitly be referred to in the legislation, or the reporting of crime more generally. The latter is reflected in South Africa's PDA, for example, which expressly includes the commission of a criminal offence.[40] It is important to establish protection measures for whistleblowers when they report acts of corruption that might not be recognised as crimes but could be subject to administrative investigations.[41]

22. Some countries set minimum thresholds on the extent of the wrongdoing before whistleblower protection may be triggered. Protected disclosures under U.S. law, for example, include *inter alia* gross mismanagement and gross waste of funds. To qualify as "gross" there must be something more than a debateable difference in opinion; the agency's ability to accomplish its mission must be implicated.

[34] Act on the Protection of Public Interest Whistleblowers (enacted 29 March 2011, to enter into force on 30 September 2011).
[35] Australia Public Service Act (1999), Article 16.
[36] U4 Anti-Corruption Resource Centre, *Good Practice in Whistleblowing Protection Legislation* (2009), p. 4.
[37] Intelligence Community Whistleblower Protection Act (1999).
[38] D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 22.
[39] U4 Anti-Corruption Resource Centre, *Good Practice in Whistleblowing Protection Legislation* (2009), p. 5.
[40] South Africa PDA (2000), Section 1(i).
[41] See, for example, MESICIC, Mexico Final Report, 29 June 2007, p. 26; MESICIC, Guatemala Final Report, 27 June 2008, p. 29; MESICIC, Argentina Final Report, 15 December 2006, p. 28.

Furthermore, under U.S. law, disclosures of "trivial" violations do not constitute protected disclosures.[42] Australia's Public Service Regulations also state that there is no obligation to investigate whistleblower reports that are "frivolous or vexatious".[43]

b. Mechanisms for Protection

i) Protection against Retaliation

23. Whistleblower protection laws should provide comprehensive protection against discriminatory or retaliatory personnel action[44]. For example, the French Law on the Fight Against Corruption, sets out broad employment protections for whistleblowers including direct or indirect disciplinary action, dismissal or discrimination, particularly with regard to remuneration, training, classification and reclassification, assignment, qualification, professional promotion, transfer or contract renewal, as well as exclusion from recruitment or access to internships or training.[45] Similar provisions protecting whistleblowers against employment-related reprisals are expressly listed in detail under South Africa's PDA.[46] In Italy, proposed amendments to the Anti-Corruption Bill state that whistleblowers cannot be "penalized, fired or submitted to any direct or indirect discrimination, which would have an impact on the working conditions directly or indirectly linked to the report."[47] Under U.S. law, protection is also provided against less severe disciplinary actions, such as admonishments or reprimands. Korea's ACRC Act also provides protection against financial or administrative disadvantages, such as the cancellation of a permit or license, or the revocation of a contract.[48]

ii) Criminal and Civil Liability

24. Some countries impose criminal sanctions if employees disclose information concerning official secrets or national security. In establishing whistleblower protection legislation, countries may consider waiving such criminal liability for protected disclosures, or only affording protection if the disclosure is made through a prescribed channel. In the U.S., for example, if a purported whistleblower makes a disclosure that is specifically ordered by law or Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs, the disclosure is "prohibited by law" and will not be afforded whistleblower protection unless it is made to the agency's Inspector General or the Office of Special Counsel. (See also Section III. of this Study for further discussion of specific issues concerning public sector whistleblower protection mechanisms).

25. More comprehensive whistleblower protection laws may also provide protection against libel and defamation suits, as such actions can pose a serious deterrent to whistleblowing. Korea's PPIW Act, for example, provides protection from a claim for damages caused by the public interest whistleblowing.[49]

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[42] The Federal Circuit defined "trivial" as, "arguably minor and inadvertent miscues occurring in the conscientious carrying out of one's assigned duties." Drake v. Agency for Int'l Dev., 543 F.3d 1377, 1381 (Fed. Cir. 2008). However, the Federal Circuit has also held that disclosing a seemingly-minor event can be a qualified disclosure when the purpose of the disclosure is to show the existence of a repeated practice. Horton v. Dep't of the Navy, 66 F.3d 279, 283 (Fed. Cir. 1995).

[43] Australia Public Service Regulations (1999), Reg. 2.5.

[44] See Eur. Ct. H.R., Heinisch v. Germany, Application no. 28274/08, 21 July 2011, in which dismissal of a nurse after having brought a criminal complaint against her employer alleging deficiencies in the care provided constituted a violation of article 10 of the European Convention of Human Rights.

[45] France Law No. 2007-1598 (13 November 2007) on the Fight against Corruption.

[46] South Africa PDA (2000), Section 1(vi).

[47] Draft amendment no. 2.0.3 to Bill No. 2156.

[48] Korea ACRC Act (2009), Chapter V, Article 62(3).

[49] Korea PPIW Act (2010), Article 14(4).

iii) Anonymity and Confidentiality

26. Most whistleblower laws provide for the protection of the identity of the whistleblower, which is kept confidential unless the whistleblower provides his/her consent to disclose it[50]. U.S. law, for example, prohibits the disclosure of the identity of the whistleblower without consent, unless the Office of the Special Counsel "determines that the disclosure of the individual's identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."[51] Some countries also impose sanctions for disclosing the identity of the whistleblower; for example, India's PID Bill imposes a penalty of imprisonment and fine for revealing the identity of the whistleblower.[52] Although anonymity can provide a strong incentive for whistleblower to come forward, a number of whistleblower protection laws exclude anonymous disclosures. For instance, Brazil's Supreme Court has explored the investigative difficulties that arise with anonymous reporting, and has held that an anonymous tip cannot by itself warrant the opening of a criminal investigation.[53] Other obstacles to protecting anonymous whistleblowers can also be cultural, because in certain contexts whistleblowers can be seen negatively. In certain countries, the term whistleblower is often associated with being an informant, a traitor or spy or even a snitch[54].

iv) Burden of Proof

27. Whistleblower protection laws may lower the burden of proof whereby the employer must prove that the conduct taken against the employee is unrelated to his or her whistleblowing. This is in response to the difficulties an employee may face in proving that the retaliation was a result of the disclosure, "especially as many forms of reprisals maybe very subtle and difficult to establish."[55] In this regard, South Africa's PDA, for example, states that any dismissal in breach [of Section 3] of the Act is deemed to be an automatically unfair dismissal.[56]

28. U.S. law applies a burden-shifting scheme pursuant to which a Federal employee who is a purported whistleblower must first establish that he or she: 1. Disclosed conduct that meets a specific category of wrongdoing set forth in the law; 2. Made the disclosure to the "right" type of party (depending on the nature of the disclosure, the employee may be limited regarding to whom the report can be made); 3. Made a report that is either outside of the employee's course of duties or communicated outside of normal channels; 4. Made the report to someone other than the wrongdoer; 5. Had a reasonable belief of wrongdoing (the employee does not have to be correct, but the belief must be reasonable to a disinterested observer); 6. Suffered a personnel action, the agency's failure to take a personnel action, or the threat to take or not to take a personnel action. If the employee establishes each of these elements, the burden shifts to the employer to establish by clear and convincing evidence that it would have taken the same action in absence of the whistleblowing

c. Reporting Procedures and Mechanisms

i) Channels for Reporting

[50] For a more in depth discussion on this issue, see: D. Banisar, *Whistleblowing: International Standards and Developments*, (2009).
[51] U.S. Whistleblower Protection Act (1989); 5 U.S.C.§ 1213(h).
[52] India PID Bill (2010).
[53] Supreme Court of Brazil, Inquiry No. 1.957, *en banc*, 11 May 2005.
[54] See Transparency International report: *Alternative to silence: Whistleblower protection in 10 European Countries* available at*:* http://www.transparency.lt/new/images/alternative_to_silence_whistleblower_protection.pdf
[55] U4 Anti-Corruption Resource Centre, *Good Practice in Whistleblowing Protection Legislation* (2009), p. 7.
[56] South Africa PDA (2000), Section 4(2)(a)

29. Whistleblowing legislation may refer to one or more channels by which protected disclosures can be made. These generally include internal disclosures, external disclosures to a designated body, and external disclosures to the public. The UK PIDA, for example, applies a "tiered" approach whereby disclosures may be made to one of the following "tiers" of persons: Tier 1. Internal disclosures to employers or Ministers of the Crown; Tier 2. Regulatory disclosures to prescribed bodies (e.g. the Financial Services Authority or Inland Revenue), and; Tier 3. Wider disclosures to the police, media, Members of Parliament and non-prescribed regulators. Each tier incrementally requires a higher threshold of conditions to satisfy for the whistleblower to be protected. This is intended to encourage internal reporting and the use of external reporting channels as a last resort.[57] Similarly, in Canada, disclosures may also be made to the public[58] where there is not sufficient time to make the disclosure under other sections of the PSDPA and where the public servant believes on reasonable grounds that the subject-matter of the disclosure is an act or omission that (a) constitutes a serious offence or (b) constitutes an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment.[59] As noted above, certain categories of employees, such as those working in the intelligence sector, may also be subject to narrower reporting channels in order to be afforded protection.[60]

ii) Hotlines

30. A number of G20 countries have also established whistleblower hotlines as a mechanism to facilitate the reporting of wrongdoing. These are particularly prevalent with the reporting of acts of corruption. Indonesia's Corruption Eradication Commission (KPK), for example, has established a designated whistleblowing website.[61] Korea's ACRC has also established a telephone hotline to receive whistleblower reports. A number of companies have also established hotlines for the reporting of corruption and other forms of misconduct or illegal behaviour within their organisations, particularly in response to the SOX Act and Dodd-Frank Act. (Private sector whistleblower reporting mechanisms are discussed in further details under Section IV. of this Study).

iii) Use of Incentives to Encourage Reporting

31. To encourage whistleblowing, some G20 countries have adopted rewards systems, including monetary rewards. In the U.S., for example, the False Claims Act, allows individuals to sue on behalf of the government in order to recover lost or misspent money, and can receive up to 30 percent of the amount recovered.[62] The Dodd-Frank Act also authorizes the SEC to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions (and certain related actions). Rewards may range from 10 percent to 30 percent of the funds recovered. Korean law also provides monetary rewards for whistleblowers who disclose acts of corruption. The ACRC may provide whistleblowers with rewards of up to USD 2 million if their report has contributed directly to recovering or increasing revenues or reducing expenditures for public agencies. The ACRC may also grant or recommend awards if the whistleblowing has served the public interest.[63] Indonesian law also makes

[57] D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 27.
[58] Provided the disclosure is not prohibited under the law.
[59] Canada PSDPA (2005), Section 16.
[60] See para. 11 on U.S. Intelligence Community Whistleblower Protection Act (1999).
[61] Corruption Eradication Commission of Indonesia (KPK), Whistleblower System, available at: http://kws.kpk.go.id/
[62] False Claims Act, 31 U.S.C.§3729.
[63] Anti-Corruption and Civil Rights Commission of Korea, "Protecting and Rewarding Whistleblowers", available at: http://www.acrc.go.kr/eng_index.html

provision for the granting of "tokens of appreciation" to whistleblowers who have assisted efforts to prevent and combat corruption.[64]

d. Enforcement Mechanisms

i) Oversight and Enforcement Authorities

32. Whistleblower legislation could designate an independent body that is empowered to receive and investigate complaints of retaliatory, discriminatory or disciplinary action taken against whistleblowers. In Canada, for example, the Public Sector Integrity Commissioner is empowered to receive and investigate complaints of wrongdoings and reports of reprisals. If violations of a whistleblower's rights under PSDPA are found, the Public Servants Disclosure Protection Tribunal can order remedies and impose sanctions.[65] Under U.S. law, the Office of the Special Counsel (OSC) has the authority to investigate and, where appropriate, prosecute claims of "prohibited personnel practices" taken against Federal employees, including reprisals for whistleblowing. Sectoral whistleblower protection laws may also establish specific bodies to receive reports and handle complaints. Korea's ACRC, for example, is empowered under the ACRC Act to launch an inquiry into claims of reprisals against whistleblowers who have reported corruption offences. In the U.S., the Dodd-Frank Act has also called upon the SEC to create an Office of the Whistleblower to work with whistleblowers, handle their tips and complaints, and help the SEC determine whistleblower awards.

ii) Availability of Judicial Review

33. An identified best practice for whistleblower legislation is to ensure that whistleblowers are entitled to a fair hearing before an impartial forum with a full right of appeal ("genuine day in court").[66] A number of G20 countries have adopted such provisions within their laws. The UK PIDA, for example, allows for appeals to the Employment Tribunal. Similarly, under South Africa's PDA, an employee who has been subjected, is subject, or may be subjected to an occupational detriment in breach of the Act may approach any court with jurisdiction, including the Labour Court.[67] Under U.S. law, Federal employees who are whistleblowers are also afforded legal standing to bring complaints before the Merit Systems Protection Board and the US Court of Appeals, rather than rely on the OSC to prosecute the case.

iii) Remedies and Sanctions for Retaliation

34. Whistleblower protection laws will most often include remedies for whistleblowers who have suffered harm. The importance of such provisions is highlighted in the Council of Europe's Parliamentary Assembly Resolution on Whistleblower Protection, which states that the "relevant legislation should… seek corrective action from the employer, including interim relief pending a full hearing and appropriate financial compensation if the effects of the retaliatory measures cannot reasonably be undone."[68] Such remedies may take into account not only lost salary but also compensatory damages for suffering.[69] Under

[64] Law No. 31 of 1999 on the Eradication of the Criminal Act of Corruption, Article 42.
[65] See generally: Public Servants Disclosure Protection Tribunal, available at: http://www.psdpt-tpfd.gc.ca/Home-eng.html
[66] Transparency International, Recommended Principles for Whistleblowing Legislation, Recommendation 20.
[67] South Africa PDA (2000), Section 4(1).
[68] Council of Europe Parliamentary Assembly Resolution 1729 (2010) on the Protection of Whistleblowers, Article 6.2.5.
[69] D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 32.

UK law, for example, the courts have ruled that compensation can be provided for suffering, based on the system developed under discrimination law.[70]

35. Legislation may also limit the amount of damages that may be sought. Under South Africa's PDA, for example, damages may not exceed the equivalent of 12 months' salary for an occupational detriment that amounts to an unfair labour practice, and 24 months' salary for an automatically unfair dismissal.[71] Some G20 countries also impose criminal sanctions against employers who retaliate against whistleblowers. As noted above, in the United States, the SOX Act imposes a criminal penalty of imprisonment of up to ten years and/or a fine against those who retaliate against a whistleblower who reveals a violation of any criminal act to law enforcement authorities.

e. Awareness-Raising and Evaluation Mechanisms

36. Whistleblower protection legislation should be supported by effective awareness-raising, communication, training and evaluation efforts. Communicating to public or private sector employees their rights and obligations when exposing wrongdoing is essential as outlined by the 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service[72]. A number of G20 countries have undertaken such efforts. Indonesia's KPK, for example, has been actively promoting whistleblowing programmes within government agencies and state-owned enterprises. Some G20 countries have also adopted express provisions within their laws to this effect. For example, in the United States, the Occupational Safety and Health Administration Act (OSHA) requires Federal agencies to post certain information about whistleblower protection in order to keep employees informed of their rights in connection with protected disclosures. Similarly, in France, the Commission Nationale de l'Informatique et des Libertés issued guidelines on the implementation of whistleblowing systems which include reference to the need to have clear and complete information communicated to potential users.[73]

37. Some G20 countries have also taken steps to evaluate the effectiveness of their whistleblower protection system. Japan's WPA, for example, expressly makes provision for its evaluation, stating that "approximately five years after this Act comes into force, the Government shall examine the state of enforcement of this Act and shall take necessary measures based upon those results."[74] Systematically collecting data and information is another means of evaluating the effectiveness of a whistleblowing system. In the United States, for example, the Merit Systems Protection Board has gathered information by conducting surveys with employees about their experiences as whistleblowers.[75] Such efforts play a key role in assessing the progress – or lack thereof - in implementing whistleblower protection legislation.

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[70] *Ibid.*
[71] P. Martin, *The Status of Whistleblowing in South Africa: Taking Stock*, Open Democracy Advice Centre (June 2010), p. 90.
[72] The Recommendation stresses in its Principle 4 that "public servants need to know what protection will be available to them in cases of exposing wrongdoing". It can be accessed at: http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=129&InstrumentPID=125&Lang=en&Book=False
[73] CNIL Guidelines for the Implementation of Whistleblowing Systems (November 2005), Article 4.
[74] Japan WPA (2004), Supplementary Provisions, Article 2.
[75] D. Banisar, *Whistleblowing: International Standards and Developments*, (2009), p. 41.

III. PUBLIC SECTOR WHISTLEBLOWER PROTECTION

1. Brief overview of the benefits of public sector whistleblower protection

38. Encouraging the whistleblowing on acts of suspected corruption is essential in safeguarding public interest and promoting a culture of public accountability and integrity. Public officials have access to up-to-date information concerning their workplaces' practices, and are usually the first to recognise wrongdoings.[76] In most jurisdictions, it is an obligation for them to report corruption and other malpractices. However, public officials who report wrongdoings may be subject to intimidation, harassment, dismissal and violence by their fellow officials or superiors. In many countries, whistleblowing is even associated with treachery or spying.[77] This notion may be the result of the influence of cultural connotations and, in turn, may also have an impact on individual careers and on the internal organisational culture.[78]

39. As a result, encouragement of whistleblowing must be associated with the corresponding protection for the whistleblower. In the public sector, public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing.[79]

40. Translating whistleblower protection into legislation legitimises and structures the mechanisms under which public officials can disclose wrongdoings in the public sector, protects public officials against reprisals, and, at the same time, encourages them to fulfil their duties in performing efficient, transparent and high quality public service. If adequately implemented, legislation protecting public sector whistleblowers can become one of the most effective tools to support anti-corruption initiatives, detecting and combating corrupt acts, fraud and mismanagement in the public sector.[80] The absence of appropriate legislation impedes the fight against corruption and exposes whistleblowers to risks of retaliation.[81]

41. Although in some countries whistleblower protection is still in its infancy, it is increasingly recognised as an essential anti-corruption mechanism and a key factor in promoting a culture of public accountability and integrity. For example, in OECD countries between 2000 and 2009, legal protection for whistleblowers grew from 44% to 66% (see Figure 1).[82]

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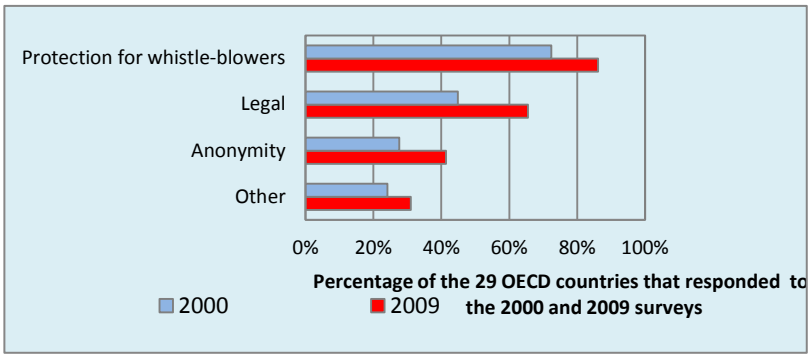
[76] United Nations Office on Drugs and Crime, UN Anti-Corruption Toolkit, 3rd Edition, Vienna, 2004, p. 67.
[77] See David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p. 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180 (hereinafter Banisar) and Transparency International, Alternative to Silence: Whistleblower Protection in 10 European Countries (2009).
[78] A.J. Brown, ed. Whistle-blowing in the Australian Public Sector: Enhancing the theory and Practice of Internal Witness Management in Public Sector Organisations, ANU E-Press, Australian national University, Canberra.
[79] OECD Recommendation on Improving Ethical Conduct in the Public Service, 1998.
[80] See, for example Council of Europe Parliamentary Assembly, The protection of "whistleblowers": Introductory memorandum (2008) 09, 3 April 2008, available at http://omtzigt.cda.nl/Portals/13/docs/whistle%20blowers%20memo%20Omtzigt.doc.
[81] David Banisar, "Whistleblowing: International Standards and Developments" in Sandoval, I. (editor), Corruption and Transparency: Debating the Frontiers between State, Market and Society, World Bank-Institute for Social Research, UNAM, Washington, D.C. 2011, p. 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180 (hereinafter Banisar).
[82] OECD, Government at a Glance (2009), p. 108-109.

Figure 1. Countries that offer protection for whistleblowers (2000 and 2009)



42. However, not all legal frameworks are effective and provide sufficient protection for whistleblowers.[83] The below sections provide a brief overview of the sources of legal protection for whistleblowers among G20 countries and the main elements of existing national legislations.

2. Sources of protection

a. International law

43. The source of whistleblower protection is found at the highest level in international law. Whistleblower protection has been recognised by all major international treaties concerning corruption. The international legal framework against corruption requires countries to incorporate - or consider incorporating - appropriate measures into their domestic legal systems to provide protection for persons who report any facts concerning acts of corruption in good faith and on reasonable grounds to the competent authorities.[84]

44. Moreover, several international soft law instruments also provide for the protection of whistleblowers. The 1998 OECD Recommendation on Improving Ethical Conduct in the Public Service including the Principles for Managing Ethics in the Public Service and the 2003 OECD Recommendation on Guidelines for Managing Conflict of Interest in the Public Service were among the first. The latter includes guidelines to advise countries to "[p]rovide clear rules and procedures for whistle-blowing, and take steps to ensure that those who report violations in compliance with stated rules are protected against reprisal, and that the complaint mechanisms themselves are not abused."[85] In addition, the OECD 2009 Anti-bribery Recommendation also provides for the protection of whistleblowers in the public and private sectors.

45. There is also important international jurisprudence concerning human rights law that reinforces the protection of whistleblowers, explicitly in circumstances when they are the only person aware of the reported situation and in the best position to alert the employer or the public at large. For instance, in 2008,

[83] Transparency International, Alternative to Silence: Whistleblower Protection in 10 European Countries (2009) [revealing that in many countries, legislation is fragmented and weakly enforced].
[84] UNCAC, Art. 33; Inter-American Convention against Corruption, Art. 3(8).Under the CoE Civil Law Convention and AU Convention against Corruption States Parties are required to establish appropriate protection for persons reporting corruption. See, CoE Civil Law Convention, Art. 9; and AU Convention against Corruption, Art. 5(6). For a similar provision, see CoE Criminal Law Convention, Art. 22(a).
[85] OECD, Guidelines for Managing Conflict of Interest in the Public Service (2003) p. 35, 28 May 2003.

the European Court of Human Rights ruled that the dismissal of a public servant who released unclassified documents revealing political manipulation of the judiciary system was a violation of article 10 of the European Convention of Human Rights. Recently, the Court ruled in the same fashion, when a nurse working for a State-owned corporation was dismissed after filing a criminal complaint against her employer for its knowingly failure "to provide the high quality care promised in its advertisement … putting the patients at risk."[86]

b. Domestic Laws

46. At the national level the source of protection for whistleblowers may originate either from comprehensive and dedicated laws on whistleblower protection and/or specific provisions in different laws. Among G20 countries, Australia,[87] Canada,[88] Japan,[89] South Africa,[90] the United Kingdom,[91] and the United States[92] have passed comprehensive and dedicated legislation to protect public sector whistleblowers.[93] The U.K. and South Africa are considered to have one of the most developed comprehensive legal systems,[94] having adopted a single disclosure regime for both private and public sector whistleblowing protection.[95] The U.K. also covers the hybrid scheme - when public sector functions are outsourced to private contractors[96] - while South Africa explicitly excludes them from whistleblowing protection.[97]

47. In the United States, the Whistleblower Protection Act was enacted in 1989, and subsequently has been complemented by the whistleblowing provisions in the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. These last two Acts are primarily targeted to the private sector, yet also constitute part of the framework that protects whistleblower employees of the federal government from reprisal and provides for redress. The Canadian Public Servants Disclosure Protection Act of 2005 applies only to disclosures made by the Canadian federal public service and to some federal Crown corporations. Australia's whistleblower legislation only provides protection in the public sector, even though some jurisdictions in Australia provide protection for the hybrid scheme. The Japanese whistleblowing protection act protects both public and private employees for public interest disclosures. Specifically, article 7 provides for the "Treatment of National Public Employees in the Regular Service", and prohibits the dismissal or any disadvantageous treatment on the basis of whistleblowing.[98]

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[86] Eur. Ct. of H. R., Heinisch v. Germany, application no. 28274/08, 21 July, 2011.
[87] All Australian jurisdictions, except for the Commonwealth, have stand-alone acts that provide for the establishment of whistleblowing schemes and some form of legal protection against reprisals. See, for example the Australian Capital Territory Public Interest Disclosures Act, the New South Wales Protected Disclosures Act of 1994, the Northern territory Public Interest Disclosures Act of 2008, Queensland Whistleblowers Protection Act of 1993, Tasmania Public Interest Disclosures Act of 2002, Victoria Whistleblowers Protection Act of 2001, and the Western Australia Public Interest Disclosures Act of 2003.
[88] Public Servants Disclosure Protection Act of 2005.
[89] Whistleblower Protection Act of 2004.
[90] Protected Disclosures Act of 2000.
[91] Public Interest Disclosure Act of 1998.
[92] Whistleblower Protection Act of 1989.
[93] In India, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill was approved by the Union Cabinet in 2010 and is awaiting being passed as law.
[94] Banisar, p. 19.
[95] Marie Chene, Good Practice in Whistleblowing Protection Legislation, U4 Anti-Corruption Resource Centre Expert Answer (2009), p. 4 (hereinafter Chene).
[96] Under section 230(3) of the Employment Rights Act of 1996.
[97] Chene, p. 4.
[98] Whistleblower Protection Act No. 122 of 2004.

48. On the other hand, the majority of countries that have adopted whistleblower protection have done so in specific provisions in one or more laws. Yet, many of these provisions only cover specific persons or acts resulting in limited protection.

49. Some examples of provisions are as follows:

- At a Constitutional level, Article 41 of the Chinese Constitution provides for whistleblower protection, giving citizens the right to report unlawful conduct and forbidding retaliation.[99]

- Criminal codes may also provide for protection of whistleblowers such as in Mexico. Article 219 (I) of the Federal Criminal Code provides that a crime of intimidation is committed when a civil servant, or a person acting on their behalf, uses physical violence or moral aggression to intimidate another person in order to prevent them from reporting, lodging a criminal complaint, or providing information concerning the alleged criminal act punished by the criminal laws of the Federal Law on Administrative Liability of Civil Servants.

- Labour laws or codes may also be a legal source of protection for whistleblowers, such as in Italy where the Labour Code protects workers against dismissal, but not against other forms of reprisal, and in Germany[100] which allows the existence of whistleblowers by containing basic protection provisions.[101] In Germany, at the constitutional level, the legal framework protecting whistleblowers is taken from Art. 20(3) of the German Constitutional Law. Art 4 of the *Grundgesetz,*[102] guaranteeing the freedom of conscience,[103] of information and expression,[104] and the right to petition,[105] that includes the right to address requests or complaints to government agencies, as well asthe general freedom of action[106] and the right to report offences to the public prosecutor also form part of the framework.[107] This, along with the provisions contained in the Labour Law forbidding discrimination caused by a permitted exercise of rights, has been considered[108] to contain the basic protections for whistleblowers.[109] More recently, the Federal Labour Court has established the protection of workers who cooperate with the public prosecutor or make a voluntary notification to the law enforcement agencies in good faith, if the crime reported refers to a government's interference with a fundamental right.[110]

[99] Constitution of the People's Republic of China, Adopted on December 4, 1982, Article 41: Citizens of the People's Republic of China have the right to criticize and make suggestions to any state organ or functionary. Citizens have the right to make to relevant state organs complaints and charges against, or exposures of, violation of the law or dereliction of duty by any state organ or functionary; but fabrication or distortion of facts with the intention of libel or frame-up is prohibited. In case of complaints, charges or exposures made by citizens, the state organ concerned must deal with them in a responsible manner after ascertaining the facts. No one may suppress such complaints, charges and exposures, or retaliate against the citizens making them. Citizens who have suffered losses through infringement of their civil rights by any state organ or functionary have the right to compensation in accordance with the law. (unofficial translation).

[100] Bundesarbeitsgericht vom 3.7.2003 – 2 AZR 235/02 und vom 7.12.2006, 2 AZR 400/05

[101] Guido Strack, Whistleblowing in Germany, pp. 7, 8. See German Civil Code, Section 612.

[102] Also known as the Basic Law.

[103] German Grundgesetz, art. 4.

[104] Id., art. 5, paragraph 1.

[105] Id., art. 17.

[106] Id., art. 2, paragraph 1.

[107] Criminal Code , Section 138.

[108] For instance, this has been recognized as such by the Whistleblower Netzwerk e.V. is a German organization founded to support whistleblowers and educate on subjects related to their protection. See www.whistleblower-netzwerk.de.

[109] Guido Strack, Whistleblowing in Germany, pp. 7, 8. See German Civil Code, Section 612.

[110] Bundesarbeitsgericht vom 3.7.2003 – 2 AZR 235/02 und vom 7.12.2006, 2 AZR 400/05

- Anti-corruption laws may include whistleblower protection, such as in France where the 2007 Anti-Corruption Act protects public and private employees from a diverse variety of sanctions.[111] Similarly, the Russian Federal Law on Combatting Corruption (Art. 9.4) provides for the protection of public officials, in accordance with the laws of the Russian Federation, who report corrupt offences committed by other public officials.[112] The Korean Act on Anti-Corruption and the Foundation of the Anti-Corruption and Civil Rights Commission (Article 56) requires public organization employee to report an act of corruption committed by another public organization employee to any investigative agency, the Board of Audit and Inspection, or the Anti-Corruption and Civil Rights Commission (ACRC).

- Laws regulating public servants may also be a legal source of protection for whistleblowers. In Mexico, Article 8 (XXI) of the Federal Law on Administrative Liability of Civil Servants provides for the obligation of civil servants to, *inter alia*, abstain from any acts that would impede the presentation of complaints, or from any acts or omissions that would prejudice the interests of those who formulate or present such complaints. Article 13 provides penalties for administrative misconduct to be imposed on anyone who violates such obligations.

- Protection of whistleblowers may also originate in regulations of specific agencies. In Argentina, cases of corruption can be reported to the central anti-corruption office (*Oficina Anticorrupción*),[113] and it is the regulation governing the anti-corruption office that allows for whistleblower anonymity and confidentiality, if desired.

3. Trends across countries' legislation ensuring whistleblower protection

50. Limitations concerning public sector whistleblower protection legislation may arise from several facts:

- legal frameworks are not comprehensive enough,
- enforcement is weak, allowing continued cases of retaliation against whistleblowers,
- weak oversight, and
- lack of implementation of internal procedures.[114]

51. It is therefore important to highlight elements of best practices across countries' legislation to ensure comprehensive and effective protection of whistleblowers and to protect public interest. A broad definition of who a whistleblower is may be considered the first step.While the reporting of misconduct within the public sector is usually covered by law,[115] it is important to consider the fact that public sector functions may be outsourced to contractors. Thus, the U.K. extends whistleblower protection to contractors under section 230(3) of the 1996 Employment Rights Act where a worker includes an employee and an

[111] Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption, Art. 9, JORF 14 novembre 2007.
[112] Yet, there is no specific legal protection for whistleblowers besides the general rules that appear in the Federal Law On Combating Corruption. As of August 2011, the Prosecutor General's Office has prepared a draft Federal Law On Making Amendments to separate and specific legal acts in order to protect persons who voluntarily report suspicions of corruption in the state administration. Amendments to this end are planned to be made to the Federal Labour Code and to the 2004 Federal Law on State Protection of Victims, Witnesses and other Participants of Criminal Proceedings No. 119 (GRECO (2008), para. 112).
[113] Law No. 2.233 of 1999.
[114] Banisar, p. 39.
[115] See, U.K. PIDA §43(K); Korean ACA arts. 25, 26; Japanese WA arts. 2.2, 7; US WPA §2(a)(1); and Australian PDA §3.

independent contractor who himself or herself provides services other than in a professional/client or a business/client relationship.

52. Regarding misconduct, the legal framework should provide a clear definition of the protected disclosures, specifying the acts that constitute violations in any legal hierarchy, mismanagement, abuse of authority, dangers to the public health or safety, or corrupt acts.[116] Practice shows that the procedures for disclosures should reflect a balance between being overly prescriptive and thus making it difficult to disclose, or overly relaxed, allowing for unlimited disclosures, that in the end do not encourage internal resolution of issues within the organisation.[117] The U.K. legislation provides a balanced approach with a detailed definition including exceptions (Box 1).

Box 1. A detailed definition of protected disclosures in the U.K.

Part IVA: Protected disclosures
43A: Meaning of "protected disclosure"
In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
43B:Disclosures qualifying for protection
(1)In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
(a)that a criminal offence has been committed, is being committed or is likely to be committed,
(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d)that the health or safety of any individual has been, is being or is likely to be endangered,
(e)that the environment has been, is being or is likely to be damaged, or
(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.
(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.
(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.
(4)A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.
(5)In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).
Source: U.K. Public Interest Disclosure Act of 1998, Part IVA

a. Protection and remedies

53. Retaliation for whistleblowing usually presents itself in the form of disciplinary actions or harassment in the workplace. Therefore, legislation focuses on providing ample protection of the whistleblower's employment status, including unfair dismissal.[118] South Africa prohibits that whistleblowers be subject to any disciplinary actions and provides one of the most comprehensive list of

[116] As established in the UK PDA §43(a), (b); the Japanese WA art. 2.3; the US WPA §2(a)(2); the Uganda WPA §II.2; South African PDA §1; Korean ACA art. 2; Australian PDA §4; and Canadian PSPDA art. 8. See also, Government Accountability Project, International Best Practices for Whistleblowers Policies (June 20, 2011) p. 2.
[117] Banisar, p. 23.
[118] See, UK PIDA §5, 47(B); Korean ACA arts. 31-33; Japanese WA arts. 3-5; US WPA §2(b)(2)(C), 5; South African PDA §2(1)(a-b), 3, 4; Australian PDA §25 ; Canadian PSPDA art. 19)

measures for protection. Along these same lines, the 2007 French Law on the Fight against Corruption provides broad employment protection for persons that, in good faith, have reported acts of corruption acknowledged in the exercise of their functions, and cannot be excluded from recruitment and internships, or be disciplined, dismissed or discriminated.[119]

Box 2. Comprehensive protection in South Africa

Definitions
(vi) *"occupational detriment",* in relation to the working environment of an *employee*, means—
(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;
(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
*(f)*being refused a reference. or being provided with an adverse reference, from his or her *employer;*
(g) being denied appointment to any employment, profession or office;
(h) being threatened with any of the actions referred to paragraphs (a) to (g) above; or
(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security.

Source: South Africa Protected Disclosures Act of 2000, Section vi.

54. The confidentiality or anonymity of the whistleblower is also generally considered a way of protecting him/her.[120] The U.S. Whistleblower Protection Act prohibits the Office of Special Counsel from disclosing the identity of an individual without consent, unless it is necessary due to an imminent danger to public health, safety or violating criminal law.[121] In certain states, Germany has implemented an anonymous hotline which allows interactions with the whistleblower while keeping the exchange anonymous.[122]

55. These implementations and legislations may cover all direct, indirect, and future consequences of reprisal,[123] and can vary from return to employment after unfair termination,[124] transfers to comparable job positions,[125] compensations where they have suffered harms that cannot be remedied by injunctions, as difficulty or impossibility to find a new job and suffering,[126] and criminal sanctions for the employers when they take retaliatory actions, like in Canada[127] and the U.S.[128] The German law allots claims for damages (*Schadensersatzansprüche*) and/or claims for compensation (*Entschädigungsansprüche*) for the

[119] Loi n°2007-1598 du 13 novembre 2007 relative à la lutte contre la corruption, Art. 9, JORF 14 novembre 2007.
[120] See, Australian PDA §33; Canadian PSPDA art. 11(b)), anonymity (Canadian PSPDA §28.17(1-3), 28.20(4), 28.24(2), 28.24(4); Korean ACA arts. 15, 33(1); US WPA 5USC §1212(g), 1213(h); Australian PDA §16)
[121] See, 5 U.S.C. § 1213(h).
[122] German companies, such as Siemens, have also established anonymous hotlines.
[123] See, Korean ACA art. 33; UK PIDA §4; US WPA 5USC §1221(h)(1); US False Claims Act 31USC §3730(h))
[124] As in the UK.
[125] As in the US, South Korea, and South Africa.
[126] As prescribed in the UK and South Africa legislation.
[127] Criminal Code, art. 425.1 (1)(a)(b).
[128] 18 U.S.C. §1513(e).

whistleblower. Moreover, when protection is not provided or the remedy is insufficient, whistleblowers have the right to take action in court proceedings.[129]

b. Use of incentives to encourage reporting

56. Providing incentives and rewards for reporting wrongdoings in the public sector is not a fundamental measure in providing protection to whistleblowers; nevertheless these mechanisms are increasingly included in the regimes to protect whistleblowers. The U.S. provides ample rewards to whistleblowers. This practice has been in force for fraud against the government through the U.S. False Claims Act "qui tam" actions,[130] which allow a whistleblower to receive up to 30% of the amount retrieved by the government.[131] This is also the case in South Korea, where its Anti-Corruption Act allows whistleblowers to recover up to 20% of the recovered amount.[132] The success of this practice has encouraged countries such as Canada to also consider its implementation.[133]

c. Procedures and prescribed channels for facilitating the reporting of suspected acts of corruption

57. The laws in the U.K., South Africa and Canada state that institutions should adopt procedures for the administrative handling of disclosures internally, e.g.to higher level superiors, legal counsels and the agency of the Inspector General, and these procedures must be followed before a whistleblower decides to go to an outside independent body. The Canadian Public Servants Disclosure Protection Act requires that every government agency has a senior officer for the handling of these disclosures. However, the Public Sector Integrity Commissioner can also receive reports, both from public servants and from the general public,[134] as well as give legal advice.[135] This is also the case in the South African legislation, which allows disclosures to the Public Protector and the Auditor General.[136]

58. Similarly, concerning disclosures to the media, laws in South Africa and the U.K. recognise this action as a last resort after internal procedures have been met. In the case of Canada, disclosures can be made to the public if it is not prohibited under the law and there is not sufficient time to make a disclosure of what constitutes a serious offence or "an imminent risk of a substantial and specific danger to the life, health and safety of persons, or to the environment."[137] In some of its states, Australia provides that a public interest disclosure can be done to a journalist if the entity to which the disclosure was made decided not to investigate it, or investigated it but did not recommend any action, or did not notify the whistleblower after six months.[138]

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[129] As contained in the UK PIDA §3, 5; South African PDA §4(1); Korean ACA art. 33; and US WPA 5USC §1221. See also, Government Accountability Project, International Best Practices for Whistleblowers Policies (June 20, 2011) p. 6.
[130] Paul Latimer and A. J. Brown, Whistleblower Laws: International Best Practice (November 01, 2008). Monash U. Department of Business Law & Taxation Research Paper No. 1326766, pp. 21, 22.
[131] Public Concern at Work & Open Democracy Advice Centre, Whistleblowing: The State of the Art, p. 11.
[132] Korean Anti-corruption Act, Arts. 11.7, 36, 37. See also, Stuart Gilman, Ethics Codes and Codes of Conduct as Tools for Promoting an ethical and professional Public Service: Comparative Successes and Lessons (2005), p. 63.
[133] Banisar, p. 37.
[134] See http://www.psic-ispc.gc.ca.
[135] Banisar, p. 27.
[136] South Africa PDA § 8(1).
[137] Public Servants Disclosure Protection Act of 2005, c. 46, §16(a)(b).
[138] Queensland Public interest Disclosure Act of 2010, part 4.

d. Effective protection mechanisms

59. In certain countries, the establishment of specific independent agencies with the legal capacity to receive complaints related to retaliation, investigate them and provide remedies has proved effective. The Office of the Civil Service Commissioners in the U.K. is an independent body appointed by the Crown which can receive public sector disclosures as a last resort. In the U.S., the Office of the Special Counsel (OSC), an independent federal investigative and prosecutorial agency that protects federal employee whistleblowers, receives, investigates and prosecutes complaints from whistleblowers who claim to have suffered reprisals. In addition, there is the Merit Systems Protection Board (MSPB), an independent quasi-judicial agency with the power to adjudicate decisions and established to protect federal employees against political and other prohibited personnel practices as well as to ensure that there is adequate protection from abuses by agency management.[139]

60. In Canada, the Public Sector Integrity Commissioner is required to report annually to the Parliament and has the power to give recommendations to the heads of public offices. The Public Servants Disclosure Protection Tribunal is in charge of determining remedies and sanctions when violations of whistleblowers' rights occur.[140] Conversely, other countries that do not count on these specialised bodies can rely on the action of the Ombudsman or information commissioners created by Freedom of Information Acts, as most of them have the power to order releases of information and remedies. In fact, the ombudsman's mission typically lays on the investigation of maladministration, so they usually receive complaints from whistleblowers and order investigations in public agencies.[141] Both types of bodies have limited jurisdiction, can only protect whistleblowers in specific areas.

Box. 3 Independent central and integrity agencies

Best practice provides for the existence and the identification of independent central and integrity agencies for a whistleblower to report to such as:

- "proper authorities", administrative agency or administrative organ, a public interest disclosure agency, public employment agencies or a "prescribed person"
- the Auditor-General
- the Counsel
- Anti-corruption bodies
- Ombudsman
- the police and the Director of Public Prosecutions (DPP)
- Public Protector (South Africa)
- relevant policy agencies
- trade unions

Source: Paul Latimer and A. J. Brown, Whistleblower Laws: International Best Practice (November 01, 2008). Monash U. Department of Business Law & Taxation Research Paper No. 1326766, pp. 12.

e. Awareness raising, communication and training

61. Whistleblower protection cannot be effectively implemented without raising awareness, strengthening communication and training. Certain countries provide that the Ombudsman prepare and

[139] The MSPB and the OSC were set up under the Civil Service Reform Act (CSRA) of 1978.
[140] Banisar 34.
[141] Banisar, p. 35. See New Zealand, where the Ombudsman can receive complaints and provide advice to whistleblowers, but defers to the Human Rights Commission in the handling of retribution cases; and in Ireland, where the Ombudsman functions also as the Information Commissioner.

publish guidelines and periodic reports regarding public servants whistleblowing.[142] The Canadian Commissioner not only has the responsibility to submit annual reports to the Parliament, but also the duty to make special reports whenever it considers there is an urgent matter concerning disclosures in the public sector.[143] Also, the Minister is required by law to promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating knowledge of the Act – specially its purposes and processes – by any means considered appropriate.[144] In the same sense, the South African PDA requires the Minister to issue guidelines explaining the Act and requiring government departments to disseminate them to every public officer.[145]

62. In the U.S., there are special programmes for awareness raising and training, especially in agencies that deal with public procurement, such as the Department of Defense. Its Whistleblower Program commands the Inspector General to supervise whistleblower protection and inform personnel of their rights through training. Its programme has significantly increased public awareness through articles and briefings to public servants. Within the agency, there is also the Directorate for Whistleblowing and Transparency, which provides advice, counsel and oversight capability to the Inspector General. There is also a Deputy Inspector General whose mission is to ensure that allegations of whistleblower reprisal are resolved in an objective and timely manner. Finally, through a Certification Programme developed under Section 2302(c) of the Office of the Special Counsel, the department has made efforts on promoting outreach, investigations and training as the three core methods for raising awareness.[146]

f. Barriers to whistleblowing

63. It is important to consider the most common barriers to whistleblowing. The burden of current procedures imposed on whistleblowers is also a matter of concern. For example, in Germany, the Federal Labour Court has upheld in certain occasions that public servants wishing to disclose wrongdoings have to first seek in-house clarification and determine the appropriateness of their disclosure or they could face a legal dismissal if they fail to correctly outweigh the public interest versus their loyalty obligation.[147] Usually, courts undertake their own appreciation of situations, which in practice constitutes a disincentive to become a whistleblower.[148] The legal qualification based on notions of responsibility is present in many countries. Many civil service acts require that information collected is kept confidential, as in the Australian Public Service Code, prohibiting its disclosure and sanctioning with demotions or even termination of employment.[149] In the case of the U.S., the Supreme Court ruled in May 2006 that public employees were not protected by the Constitution when speaking as part of their official duties.[150]

64. Also, to qualify for the protection that the Civil Code offers, the public servant is charged with the burden of proof, having to demonstrate that his/her disclosure was legally permissible, that discrimination took place, and that retaliation happened because of his/her disclosure.[151] This proof has

[142] Paul Latimer and A. J. Brown, Whistleblower Laws: International Best Practice (November 01, 2008). Monash U. Department of Business Law & Taxation Research Paper No. 1326766, p. 14. See Public Interest Disclosure Act 1994 (ACT) s. 11; Public Service Act, RSO 1990, c P.47, s 28.41; Whistleblowers Protection Act 1994 (Qld) s. 30; Whistleblowers Protection Act 2001 (Vic) s. 103A.
[143] Public Servants Disclosure Protection Act, c. 46, s. 38.
[144] Id., art. 4.
[145] Paul Latimer and A. J. Brown, Whistleblower Laws: International Best Practice (November 01, 2008). Monash U. Department of Business Law & Taxation Research Paper No. 1326766, p. 14.
[146] See, www.defense.gov/ and http://www.dodig.mil/.
[147] In-house clarification is not required if the employer is the one allegedly committing the wrongdoing or if there are valid reasons to expect that the employer will not act.
[148] Guido Strack, Whistleblowing in Germany, p. 8.
[149] Banisar, p. 8.
[150] Garcetti v. Ceballos, No 04-473. May 30, 2006.
[151] German Civil Code, Section 612a.

proved to be almost impossible to provide as long as the employer has not explicitly mentioned this as the reason for termination. For that reason, several legislations provide for a flexible approach to the burden of proof, assuming that retaliation has occurred where adverse action against a whistleblower cannot be clearly justified on management grounds unrelated to the fact or consequences of the disclosure.[152]

65. In addition to the above mentioned legal barriers based on notions of responsibility to employers, protection of classified information by secret acts deter whistleblowers from speaking out. Many countries count on Official Secrets Acts, which prohibit the release of information obtained under government employment, as in the U.K., under certain circumstances.[153] In Canada, public employees involved in national security cannot complain to the Public Service Integrity Commissioner.[154] In the U.S., the 1999 Intelligence Community Whistleblower Protection Act only allows national security whistleblowing to the House and Senate Intelligence Committees and the agency's Inspector general, providing limited protection for intelligence employees.[155]

66. Experience also shows that a similar barrier exists in the form of libel and defamation laws, which are used to deter whistleblowers from disclosing illegal activities. Whistleblower protection legislation needs to be balanced when contrasted against the duty of loyalty to their organisations and other agreements of non-disclosure. Certainly, as the European Court of Human Rights held on a recent case, the public interest in being informed about the quality of public services outweighs the interests of protecting the reputation of any organisation.[156] An effective whistleblowing protection law needs to take into account these obstacles and other legal hurdles to disclosure, and to protect "good faith" whistleblowers from civil and criminal liability. This includes the regulation of ways of relieving whistleblowers from civil liability for defamation or breach of confidentiality and statutory secrecy provisions.

67. Finally, in certain countries the cultural perception of whistleblowers may also constitute a significant barrier to introduce legislation on whistleblowing. Such cultural connotations need to be taken into account when developing and implementing whistleblower protection legislation. It would require tackling deeply engrained cultural attitudes which date back to social and political circumstances such as dictatorship and/or foreign domination under which distrust towards "informers" of the despised authorities was only normal.[157]

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[152] See, U.S. WPA 5USC §1214(b)(2)(4) and §1221(e)). See also, Anti-Corruption Resource Centre, U4 Brief, Making Whistleblower Protection Work: Elements of an effective approach (2008) p. 3 & Government Accountability Project, International Best Practices for Whistleblowers Policies (June 20, 2011) p. 7.

[153] In 2002 the House of Lords reinforced the legislation by stating that there is no public interest in the OSA. See Regina v. Shayler. http://www.parliament.thestationeryoffice.co.uk/pa/ld200102/ldjudgmt/jd020321/shayle-1.htm.

[154] Because the 2005 Public Servants Disclosure Protection Act has only required the Canadian Security Intelligence Service to adopt procedures similar to other departments.

[155] There is no whistleblower protection in agencies like the CIA, FBI, Defense Intelligence Agency, Justice Department, Transportation Security Administration, and the National Security Agency. See Homeland and National Security Whistleblower Protections: the Unfinished Agenda (2005) Project on Government Oversight < http://www.pogo.org/p/government/go-050402-whistleblower.html at 18 August 2008.

[156] European Court of Human Rights, Heinisch v. Germany, application no. 28274/08, July 21st, 2011.

[157] Council of Europe, Parliamentary Assembly Report of the Committee on Legal Affairs and Human Rights, The Protection of Whistleblowers, 14 September 2009, available at http://assembly.coe.int/Mainf.asp?link=/Documents/WorkingDocs/Doc09/EDOC12006.htm

IV. PRACTICE OF PRIVATE SECTOR WHISTLEBLOWER PROTECTION

1. Private sector whistleblower protection: Legal provisions and voluntary measures

68. Domestic legal provisions expressly devoted to the protection of whistleblowers in the private sector are less common than for the public sector. However, the private sector is increasingly taking voluntary measures to create internal channels for safely and confidentially reporting misconduct. This could be for a number of reasons. An effective whistleblowing regime deters wrongdoing; facilitates the reporting of misconduct without fear of retaliation; helps identify misconduct early on and thereby prevent potentially grave disasters; and reduces the risk of potentially damaging external reports, including to regulators or the media. Whistleblower protections are also an important element of an internal controls, ethics and compliance programme, which—taken in the programme's entirety—could demonstrate to shareholders and law enforcement that a company has made efforts to prevent, detect and address corrupt behaviour. This could be especially relevant to companies subject to the jurisdiction of anti-bribery and anti-corruption laws that include a defence against liability for certain offences by having "adequate procedures"[158] in place to prevent bribery, or where sentencing guidelines provide more lenient sentences on companies with such programmes in place.

69. There is no consensus as to which approach works best for ensuring the protection of private sector whistleblowers: enacting domestic legal provisions, promoting voluntary measures among the private sector, or combining the two. For example, the International Chamber of Commerce (ICC) warns against over-regulation of private sector whistleblowing regimes, emphasising that self-regulation and voluntary integrity programmes provides for effective protection of corporate interests and adaptability to different workplace environments.[159] Others have argued that current legal provisions for private-sector whistleblowers can be narrow, inconsistent and/or difficult to navigate[160]; for example when legislation limits the scope of private sector employees afforded protection, or when multiples laws may apply to the same persons.

2. Sources of protection prescribed under international law, domestic law, and private sector anti-corruption instruments

70. As previously mentioned, the 2009 OECD Anti-bribery Recommendation calls on Parties to ensure that whistleblower protections are in place for both public and private sector employees[161] and, in its Annex II, on companies to ensure appropriate and confidential whistleblower reporting channels and protections.[162] Article 33 of the UNCAC calls on Parties to consider adopting whistleblower protections 'for any person who reports in good faith and on reasonable grounds to the competent authorities any facts

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[158] Section 7 of the UK Bribery Act (2010) establishes the offence of "Failure of Commercial Organisations to Prevent Bribery" where strict liability is imposed for active bribery. The only defence is that a company had in place "adequate procedures" designed to prevent persons associated with the company from engaging in bribery.
See also: British Standards Institute (BSI), *PAS 1998:2008 Whistleblowing Arrangements Code of Practice* (2008), p. 6.

[159] ICC Commission on Anti-Corruption, *ICC Guidelines on Whistleblowing* (2008), Section B.5. (See: http://www.iccwbo.org/uploadedFiles/ICC%20Guidelines%20Whistleblowing%20%20as%20adopted%204_08(2).pdf)

[160] Hearing before the Subcommittee on Workforce Protections, committee on Education and Labor, U.S. House of Representatives, 110th Congress, First Session, 15 May 2007, Serial No. 110-37 (See: http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35185/html/CHRG-110hhrg35185.htm)

[161] OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, (2009), Section XI.iii.

[162] Ibid, Annex II, Section A.11.i-iii.

concerning offences established in accordance with this Convention.'[163] At a regional level, the African Union Convention on Preventing and Combating Corruption,[164] the Council of Europe Criminal Law Convention on Corruption[165], the Council of Europe Civil Law Convention on Corruption,[166] and the Inter-American Convention against Corruption[167] make similar provisions and do not expressly distinguish between private and public sector employees in their call for Parties to require or consider adopting whistleblower protection measures.

71. As noted in Section II.1 of this Study, some G20 countries have included whistleblower protections that expressly cover private sector employees. In some cases, such protections are provided under dedicated legislation, such as Japan's WPA, South Africa's PDA, and the UK's PIDA. Likewise, some criminal code provisions—such as Section 425.1 of the Canadian Criminal Code—do not differentiate between public and private employees in the protections afforded. Sector-specific laws can also provide private sector protections, such as the Australian Corporations Act, Korea's ACRC Act, and the U.S. Sarbanes-Oxley Act and Dodd-Frank Act. The Dodd-Frank Act also authorizes the SEC to pay rewards to individuals who provide the Commission with original information that leads to successful SEC enforcement actions (and certain related actions). Rewards may range from 10 percent to 30 percent of the funds recovered. In this regard, the SEC has recently established a Whistleblower Office to work with whistleblowers, handle tips and complaints, and help the SEC determine the awards for each whistleblower. Labour laws, anti-money laundering laws and even environmental laws can also provide protection for private sector whistleblowers, such as in Germany. Finally, in some cases, case law, as in Germany, confirms that employees who report misconduct by the employer in good faith cannot be dismissed for this reason.[168]

72. A number of internationally recognised anti-corruption compliance tools for the private sector also promote the voluntary adoption of whistleblowing measures, including the aforementioned OECD Good Practice Guidance on Internal Controls, Compliance and Ethics, the Business Principles for Countering Bribery,[169] the ICC Rules of Conduct to Combat Extortion and Bribery,[170] the OECD Guidelines for Multinational Enterprises,[171] the World Bank Integrity Compliance Guidelines,[172] and the World Economic Forum Principles for Countering Bribery.[173]

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[163] UNCAC (2005), Article 33.
[164] African Union Convention on Preventing and Combating Corruption (2003), Article 5, Section 6.
[165] Council of Europe Criminal Law Convention on Corruption (1999), Article 22.
[166] Council of Europe Civil Law Convention on Corruption (1999), Article 9.
[167] Inter-American Convention against Corruption (1996), Article III, Section 8.
[168] See decisions by the German Federal Constitutional Court of 2 July 2001 and the Federal Labour Court of 3 July 2002. (See also paragraphs 198-199 of the Germany Phase 3 Report on the Application of the OECD Anti-Bribery Convention).
[169] Business Principles for Countering Bribery (2003), Section 5.5. (See: http://www.transparency.org/global_priorities/private_sector/business_principles)
[170] ICC Rules of Conduct to Combat Extortion and Bribery (2005), Article 7. (See: http://www.iccwbo.org/uploadedFiles/ICC/policy/anticorruption/Statements/ICC_Rules_of_Conduct_and_Recommendations%20_2005%20Revision.pdf)
[171] OECD Guidelines for Multinational Enterprises (updated 2011), Chapter 2, Section 9.
[172] World Bank Group Integrity Compliance Guidelines (2010), Section 9. (See: http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/ORGANIZATION/ORGUNITS/EXTDOII/0,,contentMDK:21182440~menuPK:2452528~pagePK:64168445~piPK:64168309~theSitePK:588921,00.html)
[173] World Economic Forum Partnering against Corruption Initiative (PACI) Principles for Countering Bribery, Section 5.5. (See: https://members.weforum.org/pdf/paci/principles_short.pdf)

3. Specific issues concerning private sector whistleblowing procedures; data protection[174]

73. Data protection laws in some G20 countries may impose legal restrictions on internal private sector whistleblowing procedures. For example, companies may have to ensure that such mechanisms meet the requirements of European data protection laws as set out under the EU Data Protection Directive 95/43/EC. In France, courts have invalidated companies' internal whistleblowing procedures on such grounds, including where the whistleblowing provisions were too broad in scope and could apply to actions which could harm the vital interests of the company, or physical or moral integrity of an individual employee; where the provisions did not sufficiently detail the rights of the individual subject of a whistleblowing complaint[175]; or where there was a risk of slanderous denunciations in the workplace.[176]

4. Summary of whistleblower reporting and protection mechanisms in B20 companies' ethics and compliance programmes

74. An informal survey of companies from G20 countries that have volunteered to work on anti-corruption issues within the G20 context[177] (referred to as B20 companies) shows that whistleblower reporting mechanisms and protections—where provided—are, in many cases, clearly articulated as part of companies' internal controls, ethics and compliance programmes. For example, Saudi Arabia's SABIC Basic Industries includes in its May 2010 Code of Ethics a special section on reporting compliance concerns.[178]

75. Whistleblower provisions in the B20 companies generally reflect the provisions set out in the business principles mentioned in paragraph 74 above, in that they provide internal and where possible confidential reporting to staff and, where appropriate, business partners, who seek guidance and advice or to report misconduct. For example, South Africa's AngloGold Ashanti's Confidential Reporting Process[179] encourages shareholders, the public, employees, suppliers, contractors and any other interested parties to report misconduct.

76. Provisions also include protection from retaliation or discrimination. For example, the United States' GE states retaliation for reporting misconduct as 'grounds for discipline up to and including dismissal.'[180] Some B20 companies also outline what actions management should take to respond to whistleblower reports. Whistleblower reports are often received, investigated and acted upon by internal control or audit committees, such as at Singapore's Capitaland[181] or Italy's Eni.[182] Efforts are also made to

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[174] Other specific issues may include culture barriers, confidentiality, commercial interests, competition, loyalty which must be taken into account when regulating whistleblower protection and are mentioned in Section II of this Study.

[175] December 8 2009 Decision of the French Cour de Cassation

[176] See also: Sullivan & Cromwell, *Whistleblowing: Revised French Procedures*, 23 December 2010.

[177] Companies referenced for this study are limited to those participating in the B20 Anti-Corruption Working Group, led by the Mouvement des Entreprises de France (MEDEF) for the French Presidency of the G20. These companies include: Odebrecht (Brazil), Thales (France), Sanofi (France), ENI (Italy), Mahindra & Mahindra (India), Severstal (Russia), Capitaland (Singapore), AngloGold Ashanti (South Africa), GE (United States), Sabic (Saudi Arabia), as well as the national business associations of South Korea (FKI) and Kadin (Indonesia).

[178] SABIC Basic Industries, *CODE OF ETHICS: 'Performance With Integrity'* (2010) (See: http://www.sabic.com/corporate/en/binaries/sabic%20code_tcm4-5211.pdf)

[179] AngloGold Ashanti, *CONFIDENTIAL REPORTING/WHISTLE BLOWING POLICY* (updated 2010) (See: http://www.anglogold.co.za/NR/rdonlyres/2EC07695-447E-4039-9AB0-3CE52C5D964F/0/CONFIDENTIALREPORTINGApril2010.pdf)

[180] GE, *The Spirit and the Letter* (See: http://files.gecompany.com/gecom/citizenship/pdfs/TheSpirit&TheLetter.pdf

[181] Capitaland, Corporate Governance *REPORT FOR THE PERIOD FROM 1 JANUARY 2010 TO 31 DECEMBER 2010* (See: http://investor.capitaland.com/phoenix.zhtml?c=130462&p=irol-govhighlights)

raise awareness of, and to provide training on, internal controls, ethics and compliance provisions, including with regard to whistleblowing, such as at France's Thales[183] and India's Mahindra & Mahindra.[184]

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[182] Eni, *Annual Report 2010* (See: http://www.eni.com/attachments/publications/reports/reports-2010/Annual-Report-2010.pdf)
[183] Thales, *Corporate Responsibility Report 2010* (See: http://www.thalesgroup.com/Group/Corporate_Responsibility/Business_Ethics/Prevention_of_Corruption/)
[184] Mahindra & Mahindra, Sustainability Review 08-09 (See: http://www.mahindra.com/resources/RHS-Elements/5.0-How-we-help/Environment/Mahindra-Sustainability-Report-2008-09.pdf)

ANNEX: G20 COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION ON THE PROTECTION OF WHISTLEBLOWERS

The following guiding principles and examples of best practices build on the preceding Study and provide reference for countries intending to establish, modify or complement whistleblower protection frameworks. In this sense, they are prospective and offer guidance for future legislation. They do not constitute a benchmark against which current legislation should be tested.

The guiding principles are broadly framed and can apply to both public and private sector whistleblower protection. To supplement these principles, a non-exhaustive menu of examples of best practices sets out more specific and technical guidance that countries may choose to follow.

Taking into account the diversity of legal systems among G20 countries, the guiding principles offer flexibility to enable countries to effectively apply them in accordance with their respective legal systems.

1. **Clear legislation and an effective institutional framework are in place to protect from discriminatory or disciplinary action employees who disclose in good faith and on reasonable grounds certain suspected acts of wrongdoing or corruption to competent authorities.**

   Examples of best practices in support of this principle could include, *inter alia***:**

   - Enactment of dedicated legislation in order to ensure legal certainty and clarity, and to avoid a fragmented approach to establishing whistleblower protection;

   - Requirement or strong encouragement for companies to implement control measures to provide for and facilitate whistleblowing (e.g. through internal controls, ethics and compliance programmes, distinct anti-corruption programmes, fraud risk management, etc.).

2. **The legislation provides a clear definition of the scope of protected disclosures and of the persons afforded protection under the law.**

   Examples of best practices in support of this principle could include, *inter alia***:**

   - Protected disclosures include: a violation of law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or types of wrongdoing that fall under the term "corruption", as defined under domestic law(s);

   - Individuals are not afforded whistleblower protection for disclosures that are prohibited by domestic laws in the interest of national defense or the conduct of foreign affairs, unless the disclosures are made in the specific manner and to the specific entity/entities those domestic laws require;

- Public and private sector employees are afforded protection, including not only permanent employees and public servants, but also consultants, contractors, temporary employees, former employees, volunteers, etc.;

- Clear definition of "good faith" or "reasonable belief"; although individuals are not afforded protection for deliberately-made false disclosures, protection is afforded to an individual who makes a disclosure based upon the individual's reasonable belief that the information disclosed evidenced one of the identified conditions in the statute, even if the individual's belief is incorrect.

3. The legislation ensures that the protection afforded to whistleblowers is robust and comprehensive.

Examples of best practices in support of this principle could include, *inter alia***:**

- Due process for both parties (the whistleblower and the respondent), including, *inter alia*, the need for protecting confidentiality;

- Protection from any form of discriminatory or retaliatory personnel action, including dismissal, suspension, or demotion; other disciplinary or corrective action; detail transfer, or reassignment; performance evaluation; decision concerning pay, benefits, awards, education or training; order to undergo medical test or examination; or any other significant change in duties, responsibilities, or working conditions;

- Protection from failure to take personnel actions, such as selection, reinstatement, appointment, or promotion;

- Protection from harassment, stigmatisation, threats, and any other form of retaliatory action;

- Protection from other forms of retaliatory conduct, including through waiver of liability/protection from criminal and civil liability, particularly against defamation and breach of confidentiality or official secrets laws;

- Protection of identity through availability of anonymous reporting;

- Clear indication that, upon a *prima facie* showing of whistleblower retaliation, the employer has the burden of proving that measures taken to the detriment of the whistleblower were motivated by reasons other than the disclosure;

- Protection against disclosures an individual reasonably believes reveal wrongdoing even if the whistleblower is incorrect";

- Protection of employees whom employers mistakenly believe to be whistleblowers.

4. **The legislation clearly defines the procedures and prescribed channels for facilitating the reporting of suspected acts of corruption, and encourages the use of protective and easily accessible whistleblowing channels.**

   Examples of best practices in support of this principle could include, *inter alia*:

   - Provision of protection for disclosures made internally or externally;
   - Establishment of internal channels for reporting within the public sector;
   - Strong encouragement for companies to establish internal reporting channels;
   - Protection afforded to disclosures made directly to law enforcement authorities;
   - Specific channels and additional safeguards for dealing with national security or state secrets-related disclosures;
   - Allowing reporting to external channels, including to media, civil society organisations, etc.;
   - Incentives for whistleblowers to come forward, including through the expediency of the process, follow-up mechanisms, specific protection from whistleblower retaliation, etc.;
   - Positive reinforcements, including the possibility of financial rewards for whistleblowing;
   - Provision of information, advice and feedback to the whistleblower on action being taken in response to disclosures.

5. **The legislation ensures that effective protection mechanisms are in place, including by entrusting a specific body that is accountable and empowered with the responsibility of receiving and investigating complaints of retaliation and/or improper investigation, and by providing for a full range of remedies.**

   Examples of best practices in support of this principle could include, *inter alia*:

   - Appointment of an accountable whistleblower complaints body responsible for investigating and prosecuting retaliatory, discriminatory, or disciplinary action taken against whistleblowers who have reported in good faith and on reasonable grounds suspected acts of corruption to competent authorities;
   - Rights of whistleblowers in court proceedings as an aggrieved party with an individual right of action, and to have their "genuine day in court";
   - Penalties for retaliation inflicted upon whistleblowers, whether this takes the form of disciplinary or discriminatory action, of civil or criminal penalties.

6. **Implementation of whistleblower protection legislation is supported by awareness-raising, communication, training and periodic evaluation of the effectiveness of the framework of protection.**

Examples of best practices in support of this principle could include, *inter alia***:**

- Promoting awareness of whistleblowing mechanisms, provide general advice, monitor and periodically review the effectiveness of the whistleblowing framework, collect and disseminate data, etc.;

- Raising awareness with a view to changing cultural perceptions and public attitude towards whistleblowing, to be considered an act of loyalty to the organisation;

- Training within the public sector to ensure managers are adequately trained to receive reports, and to recognise and prevent occurrences of discriminatory and disciplinary action taken against whistleblowers;

- Requirement in the law that employers post and keep posted notices informing employees of their rights in connection with protected disclosures.

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