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Whistleblower Best Practices and Country Models

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Emerging Global Consensus

- **Whistleblowing Laws**: now legally promoted, and economically justified and sanctioned in global marketplace – in anti-corruption treaties, in sectors, in public laws (labor, FOIA, criminal codes, civil service laws, anti-corruption laws), in private sector laws (SOX) and in model codes of conduct for companies (ICC)
- **Growing Demand**: addressing corruption and promoting open government/whistleblowing driven by national and international economic, legal, political and technological forces (transparency and accountability)
- **Key Anti-Corruption Tool** – universally acknowledged as effective, proven and important tool for fighting corruption and establishing an ethical and legal ROL cultural guidepost for officials and the public

Global Problem – Individual Whistleblower Solution

- **Corporate Whistleblowing:** 2008 ICC report says whistle blowing remains one of the most important issues for all businesses -- in every sector – in every size company

- **Corporate Corrupt Fraud Detected (25%+):** recent KPMG global study notes that 25% of fraud incidents in enterprises surfaced thru inside corporate whistleblowers

- **Corporate WB Reporting Surging (doubled)**: Increased reporting/WB on fraud and corruption, misuse of assets or information, conflicts of interest and bribery is surging (doubled in 3 years among Fortune 500 companies; 44 % of fraud was reported by WB's in Africa in KPMG 2005 Study; 25% in Australia and New Zealand

- **Government Fraud and Corruption:** virtually all developing countries now acknowledge that endemic corruption is one of the most important issues; for many, it is the biggest barrier to promoting human rights, implementation of the law and sustainable development

Whistleblower and Anti-Corruption Legal Evolution/Revolution

- **Roman Law:** Qui Tam originated as effective means to promote enforcement of **Emperor's** law

- **1300's: "**Qui Tam" actions/writs under English common law – suing on behalf of the **King** and one's self in the public interest and being rewarded for it (promoted enforcement of King's law at local level)

- **1700's to date**: US whistleblower laws birthed in the legal cribs of various programs and myriad sectors, - - military, health, environment, labor, procurement and food safety

- **1863**: US adopted the False Claims Act -- first country-wide law anywhere to create both protection and financial incentives for whistleblowers (civil war public procurement); $400 hammer 1986 amendments

Whistleblower and Anti-Corruption Legal Evolution/Revolution

- **1912:** US adopted a Whistleblower Law guaranteeing right of federal employees to provide government corruption information to the Congress; US WB law has been amended numerous times
- **1996**: Inter-American Development Bank adopted the OAS Anti-Corruption Convention – 1st regional treaty to recommend whistleblower laws as a best practice (Art VI)
- **1999/2001:** Council of Europe's Civil and Criminal Conventions on Corruption – 2nd regional treaty(ies) requiring all member states to protect those who report criminal or corruption offenses in good faith
- **2000**: OECD Guidelines for MNE's and Principles of Corporate Governance (2003)
- **2002**: US passed SOX -- Sarbanes/Oxley 1st national law to protect corporate whistleblowers of all US and foreign companies traded on the NYSE (S 301; SEC Rule 10A-3(b)(3)); Enron, Worldcom

Fair Implementation of UNCAC, IACC, COE, AUCAC, UDHR and Whistleblower Laws

- **2003**: UN adopted the UNCAC: 1st international treaty to recommend whistleblower laws anticorruption best practice (Art 33)
- **2003**: African Union Convention on Corruption (Art 5)
- **2004**: ADB/OECD Asia Pacific Anti-Corruption Initiative (Chp B)
- **2009 -- Developed/Developing World/Two-Steps Behind?**: developing countries and companies not far behind developed world in passing and implementing comprehensive WB laws (only have in US, NZ, SA, Ghana, Canada, UK, Romania and some Australian states)
- **21st Century ROL**: endemically corrupt justice systems are biggest barrier to fair implementation of WB laws as well as to fair implementation of the UDHR, UNCAC and other anti-corruption and human rights treaties (UNCAC A11)

Rationale: 10 Key Whistleblowing Best Practices Principles

1. **Protects freedom of expression, speech and media** (no loopholes)
2. **Realistic subject matter scope** (C&C)
3. **Duty to disclose illegal acts; define wrongdoing clearly** (public duty)
4. **Right not to violate the law** and reporting on crime and corruption (ROL)
5. **Broad whistleblower protection** (for all related activities and career)

Rationale: Key Whistleblowing Best Practices Principles

6. **Broad employee coverage** (public, private and publicly funded contractors)
7. **Anonymous disclosure/hotlines**
8. **Protection from all forms of harassment** (active or passive in various forms)
9. **No anti-gag policies or agreements**
10. **Transparent whistleblower Rights; define wrongdoing clearly in the law**

Best Practices: Minimal Career Incentives

- **Comprehensive damages/injunctive relief/financial incentives (US, S Korea)**
- **Interim relief and salary for successful whistleblowers when on appeal**
- **Attorneys fees for those who prevail**
- **Job transfer preference**
- **Personal accountability for harassers**
- **Whistleblower laws should supplement not supplant basic Legal/Human Rights**

Best Practices: Holistic Package of Inter-Related Reforms

- **Holistic Reform Framework**: Balance and link passage of this reform to a range of related open government, privacy and institution-building reforms:
  - -- **Access to information**
  - -- **Privacy and data protection**
  - -- **Secrecy Laws (close loopholes)**
  - -- **Criminal defamation (repeal)**
  - -- **Criminal law and human rights**
  - -- **Judicial/prosecutorial independence and judicial integrity/justice reform**

Emerging Best Practices Laws/Guidelines/Court Decisions/Surveys

- **International Law:** UNCAC (20+ WB and 30+ FOI laws passed since 2004)
- **50/50/70/120 countries:** now have laws on Whistleblowing, Privacy, FOI and Ombudsman
- **UN Special Rapporteur/OAS/OSCE:** Freedom of Expression Joint Resolution (2004)
- **Balancing Whistleblower, Privacy and Security issues:** McDonalds and Walmart (Fr/German 2005 privacy cases)
- **Protecting WB rights**: Guja v. Moldova (ECHR 2008)

Emerging Best Practices Laws/Guidelines/Cases/Surveys

- **EU/US**: Balancing whistleblowing, privacy and safe data keeping best practice (EU Art 29 Working Party Guidelines 2005)
- **ICC:** Rules of Conduct on Combating Extortion and Bribery and Guidelines on Whistleblowing (2005/2008)
- **Economic Corporate Crime**: 5428 companies; 40 countries;43% reported economic crimes; 25% revealed thru WB (PWC 2007)
- **Global Free Speech Issues**: Over 150 countries still criminalize defamation/libel (all Arab countries but Jordan)
- **Criminalize unlawful retaliation:** protect WB's (only Hungary/Canada/US SOX criminalize)

Government/NGO Whistleblower Partnerships and Best Practices

- **ALAC Country Model:** TI chapter Advocacy Legal Advice Center partnerships (Azerbaijan, Liberia, Bosnia, Bulgaria, Romania, Pakistan, Zambia, Macedonia, Lebanon and Palestine)
- **Other Human Rights and Business NGOs/Trade and Professional Associations:** Community Legal Advisors
- **Third Party Referral Mechanisms**: Corruption complaint resolution/referral and whistleblowing mechanisms -- role of third party consulting firms
- **Multiple Governmental, Third Party/Business and NGO Reporting**: Anonymous, in person, written, telephone and Web-based systems from multiple governmental/NGO sources
- **Government/NGO Model and Third Party/Business mechanisms:** particularly needed and effective where no public trust in ACC or other government institutions and where justice system is endemically corrupt, effective and untimely
- **Special Vetted/Trained Justice System Anti-Corruption Tribunals and Anti-Corruption Courts**: Haiti, Iraq, Kyrgystsan, Slovakia and Georgia

ALAC Country Model (s)

- **4 main components**: (i) hotline; (ii) legal advice; (iii) advocacy; (iv) capacity building
- **Informal or Formal Government partner**: receives and processes WB info and provides government sanctioned referral/resolution assistance with bureaucracy
- **Supplements not supplants:** governmental hotlines and assistance
- **Human capacity and systems building**: government institutions, employees, NGOs, law students
- **Promotes access to justice, ROL and good governance**

Human Rights and Career Concerns: Lessons Learned

- **Research and experience**: protecting whistleblowers and implementing whistleblower laws is very problematic in both developing and developed countries (see: www.gap.org and www.oas.org)
- **Officials in endemically corrupt institutions:** sell and use whistleblower info to abuse political enemies and economic competition
- **Whistleblowers**: generally suffer both financially and professionally
- **Whistleblower laws:** need to be passed and implemented alongside access to information and privacy/data protection laws
- **Whistleblowers:** need various forms of protection and incentives

Lessons Learned: The Right to Blow the Whistle; Keys to Success

- **Anonymous whistleblowing:** telephone and Internet hotlines are key to promoting WB
- **Integrity and independence of the justice system:** within targeted areas thru "**islands of integrity"** country models, is key to enforcing whistleblower rights fairly and effectively and addressing and preventing human rights in general (Uganda, Tanzania)

Lessons Learned: The Right to Blow the Whistle; Keys to Success

- **Systematic Monitoring and Reporting**: Implementation of Anti-Corruption reforms, human rights and treaties in general is key to success
- **Breaking the culture of secrecy and fear of retaliation/jail:** passage and implementation of a series of inter-related open government laws and free speech/independent media laws is another key to success
- **Endemic corruption within the justice system:** the biggest key to fairly, effectively and successfully implementing international treaties, key human rights laws (including whistleblower protection laws)