



World Bank Administrative Tribunal

2010

No. 402

**AI,
Applicant**

v.

**International Bank for Reconstruction and Development
Respondent**

**World Bank Administrative Tribunal
Office of the Executive Secretary**

**AI,
Applicant**

v.

**International Bank for Reconstruction
and Development,
Respondent**

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, and composed of Jan Paulsson, President, and Judges Zia Mody and Francis M. Ssekandi. The Application was received on 15 September 2008. The Applicant's request for anonymity was granted on 26 September 2008.
2. The Applicant challenges the Bank's decision not to assign him the function or title of the Global Manager of the International Comparison Program ("ICP").

FACTUAL BACKGROUND

3. The Applicant, who holds a Ph.D. in economics and had several years of relevant experience, joined the Bank's Development Economics Data Group ("DECDG") in 1995 as a consultant. In 1999 he received a Term appointment as an Economist at the GG level. In 2000 his title changed from Economist to Senior Economist to conform to the nomenclature for grades and titles in the Bank. In 2003 his Term appointment was converted to an Open-Ended appointment.
4. At DECDG, the Applicant worked with the ICP, which he describes (in his Application) as a "program ... managed by a consortium of international organizations." The ICP was indeed established in 1968 as a joint venture of the United Nations ("UN") and the University of Pennsylvania, supported by the Ford Foundation and the World

Bank. The ICP carries out multilateral price comparisons and computes purchasing power parities (“PPPs”). Since 1993, the World Bank has coordinated the global price collection for countries that do not belong to the Organisation for Economic Co-operation and Development (“OECD”). It is generally accepted that the methodology to produce PPPs is among the most complex and difficult statistical activities in the world. The comparison program involved some 146 national economies with vast variations in size and structure. It covered all components of gross domestic product (“GDP”). PPPs are conceived as a type of common currency, inasmuch as nominal GDPs were converted into PPPs to avoid the deficiencies of official and unofficial exchange rates. The value of reliable PPPs to policy-makers should be self-evident.

5. In 2002 a new governance structure for the ICP was established at the 33rd session of the UN Statistical Commission, comprising: (i) an international governing body (“the ICP Executive Board”); (ii) a technical advisory group (“the ICP Technical Advisory Group”); and (iii) an international secretariat (“the ICP Global Office”).

6. The ICP Global Office is hosted by the World Bank, and is financed by a Global Trust Fund established at the Bank. The ICP Global Office follows the administrative and fiduciary rules and regulations of the Bank and reports through its Global Manager to the Director, DECDG, of the Bank. For administrative matters, the ICP Global Office is managed by the Manager, DECDG.

7. From the outset, the ICP Global Manager function has been performed by a Senior Statistician holding a position at the GG level at the Bank. The ICP Global Manager operates under the directives provided by the ICP Executive Board and within the framework of the work programs approved by that Board.

8. The ICP Governance Framework provides that: “The appointment of the ICP Global Manager will be approved by the Executive Board on a recommendation of the selection committee chaired by the Director, DECDG.”

9. The Applicant, who had played a leading role in ICP matters at the Bank for some time, applied for the ICP Global Manager position when it was advertised in 2002. Mr. X, who was recruited from outside the Bank, was ultimately selected. The process by which Mr. X was selected is criticized by the Applicant in the Application on the grounds that it was not in conformity with the Bank’s normal procedures. The following description of the circumstances reveal why the complaint cannot be sustained and need not be the object of detailed consideration in this judgment. It is a fact that the ICP Global Manager was selected in 2002 (and thereafter) only after consultations involving the other institutions participating in the Program. The ICP had initially been established in 1968 as a joint venture of the UN and the University of Pennsylvania, with the support of the Bank and the Ford Foundation. Although the ICP is hosted by the Bank, its work is conducted under the auspices of the UN Statistical Commission and is subject to the directives of an Executive Board on which its participants are represented. This Executive Board was established in 2002 at the 33rd session of the UN Statistical Commission. As the Global Manager function needed to be filled before the new Executive Board could commence formal operations, an interim body known as the Friends of the Chair conducted the consultations and deliberations that led to the selection of Mr. X from a group of candidates that also included the Applicant. It is a fact that the Applicant was entitled to be treated in accordance with the Staff Rules of the Bank, but he has never explained what rule in particular he believes the Bank infringed in

the process of making the decisions of which he complains. Certainly it would not be reasonable, given the institutional nature of the ICP, to postulate that the ICP Global Manager should be recruited exclusively by the Bank without any involvement of the Friends of the Chair. Indeed the Bank's Human Resources ("HR") Manager explained in her testimony before the Tribunal, unsurprisingly and without contradiction, that the Bank normally solicits the views of its outside partners in such circumstances. It cannot seriously be contended that it was the Bank's duty to override the consensus so established. (The Applicant's contentions that the consultations themselves have been misrepresented before the Tribunal are examined below in connection with other claims.)

10. Mr. X joined the Bank in 2002 as the ICP Global Manager under a three-year Term appointment expiring in October 2005. The reason for this term (which was part of the job advertisement) was that the ICP anticipated that its objective of gathering a new set of PPPs would be completed in three years. Indeed the work conducted during this period (2002 through 2005) was referred to as "the 2005 Global Round." Although the work was not completed in 2005 as anticipated, the ongoing work continued to be referred to as the 2005 Global Round until it was completed sometime in 2008.

11. According to the Applicant, the Manager and the Director of DECDG promised him, at the time of Mr. X's selection in 2002, that he would become the ICP Global Manager upon Mr. X's anticipated retirement in October 2005. Instead, Mr. X's appointment was extended for a year beyond his mandatory retirement age. One year later Mr. X's employment was extended, now as a Short-Term Consultant ("STC"), to allow him to continue his function as the ICP Global Manager because, according to the

Bank, the ICP Executive Board wanted to have Mr. X continue in the ICP Global Manager function to avoid any disruption in the work of the 2005 Global Round.

12. The Applicant was unhappy that Mr. X continued to serve as the ICP Global Manager beyond 2005, deeming it to be a continuous breach of promise. The Applicant believes moreover that not giving him the title of the ICP Global Manager amounted to discrimination. Indeed, referring to Mr. X, he wrote to the Director on 17 December 2006 to complain about “keeping an absolutely incompetent, spectacularly dysfunctional and shamelessly wasteful white man and pushing a black man ... behind the scene.” (*See* paragraph 85.)

13. On 21 February 2007 the Applicant filed a Statement of Appeal with the Appeals Committee, challenging the decision of his managers not to assign him the function of the ICP Global Manager despite their alleged promises to do so. On 11 July 2007 the Applicant filed a second appeal alleging *inter alia* that his managers retaliated against him for filing his first appeal in February 2007.

14. The Appeals Committee consolidated the two appeals and conducted a hearing. Its report of 28 January 2008 recommended the dismissal of the Applicant’s appeals. In April 2008 the Vice President of Human Resources advised the Applicant that he had accepted this recommendation.

15. The Applicant filed his Application with the Tribunal on 15 September 2008. He has raised three main claims: (i) the Bank breached its promises to make him the ICP Global Manager and to propose him for promotion to level GH; (ii) the Bank discriminated against him and did not give him the ICP Global Manager title because of his race and national origin as a “black Sub-Saharan African”; and (iii) the Bank

retaliated against him because he filed an appeal with the Appeals Committee. As remedies the Applicant requests that the Tribunal order the Bank to (i) award him the title of the ICP Global Manager; (ii) promote him to level GH; (iii) desist from retaliation; and (iv) pay him compensation and legal costs.

16. In his Application and subsequent pleadings, the Applicant made requests for documents. The Tribunal granted most of these requests and ordered the Bank to produce them. In addition, the Tribunal *suo motu* called upon the Bank to produce certain documents. The Bank duly submitted numerous documents, but requested that the Tribunal review a number of them *in camera*, without disclosing them to the Applicant. The Tribunal rejected the Bank's request and decided to release all the documents to the Applicant except for the following: (i) documents relating to salary information of certain staff members; (ii) documents relating to the 360 Degree Feedback evaluation of the Director and the Manager of DECDG; (iii) documents containing "copies of e-mails from ICP Executive Board members showing concerns with threatening e-mail received" from the Applicant; and (iv) documents containing personal details about certain individuals who applied for the Global Manager position in 2008. The Tribunal considered that these documents were either not relevant or contained private information.

17. Acceding to the Applicant's request, the Tribunal moreover sought information from three ICP Executive Board members. Their written statements to the Tribunal were disclosed to the Applicant, who submitted comments thereon. Finally, the Tribunal granted the Applicant's request for oral proceedings, which were held on 5 October 2009.

The transcript of the proceedings was provided to the parties. Both submitted post-hearing briefs.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

I. BREACH OF PROMISE

18. The Applicant claims that DECDG management promised both to make him the ICP Global Manager and to propose him for promotion to level GH. He asserts that both the Manager and the Director of DECDG promised that he would be made the ICP Global Manager after Mr. X's anticipated retirement in 2005. The Applicant claims that in July 2004 the Manager, DECDG, sent him an e-mail message about the need to develop a good strategy "in the next few years" to meet the criteria for a level GH position. In a subsequent meeting, according to the Applicant, the Manager clarified orally that his promotion to level GH "could not happen before [Mr. X's] retirement. I would say three years down the road." The Applicant adds that it meant he would be promoted in 2007. The Applicant also claims that in June 2005, during an Overall Performance Evaluation ("OPE") discussion, the Manager, DECDG, promised orally: "You will take over the program when [Mr. X] retires in November 2005. We will not advertise the [ICP Global Manager] position."

19. The Applicant asserts that in May or June 2005, the Director of DECDG made a similar promise. He adds that the Director's plan to transfer the ICP Global Manager function from Mr. X to the Applicant was also entirely consistent with her comments on the Applicant's 2005 OPE, in which she wrote in June 2005:

[The Applicant] continues to be a very strong performer managing one of the most critical statistical programs that the Bank has ever managed. Overall, the project is moving well, although there have been many challenges along the way. [The Applicant] will have a major role during

the coming year and I look forward to working with him to ensure that the global round will be a success and its many expected benefits are materialized. I know [the Applicant's] job is particularly complicated during the critical time of the ICP, but I have no doubt that he will continue to be a high performer and use his excellent technical and interpersonal and client skills to make this a successful project.

20. The Applicant states that similarly in July 2006, the Director wrote in his 2006 OPE:

[The Applicant] brings much value to our work and I have the highest regards for his expertise and for his dedication and hard work. [The Applicant] will have an even more important role in the coming year as we get closer to the end of the ICP global round with many managerial and technical tasks that we would rely on [the Applicant] to implement. I am fully confident that [the Applicant] will be able to face the challenges ahead and help us successfully complete this round and develop a sustainable process for the future rounds.

21. The Applicant asserts that, at the time the Director made these comments, he (as the Deputy Global Manager) basically managed the entire ICP program. In this context, the Director's comments about the Applicant having a "major" or "even more important role" in the coming years is consistent with her promise to appoint the Applicant as the ICP Global Manager. In the Applicant's words: "I was already managing virtually the entire program, and only if I were to be given greater outside exposure as Global Manager could I have an 'ever more important role.'"

22. The Applicant adds that consistent with the promise, on 23 October 2006, the Director sent him an e-mail message stating:

I heard ... that you are rather upset today based on the fact that [Mr. X] will continue his function with us as a consultant after his mandatory retirement with the Bank and that we will not be announcing any changes for the ICP global manager for the time being. I did look for you to have a chat but understand that you have left the office. I hope we will get a chance to talk soon. We have discussed this before and how we can have a win-win for maintaining management continuity with this round until we are closer to its official end date and how we can use this opportunity to

also advance your career aspirations. I am still on the same path as we discussed a few months ago and am still managing the win-win approach.

23. The Applicant explains that in the “win-win” situation promised by the Director, the first “win” was for management to keep Mr. X as the ICP Global Manager until the end of 2007 “to maintain management continuity”; and the second “win” was supposed to be his obtaining the Global Manager title.

24. The Applicant states that when he informed the Director in December 2006 that he was going to file an appeal because of broken promises, she assured him that she would appoint him as the ICP Global Manager after informing the ICP Executive Board at its 25 February 2007 meeting in New York. According to the Applicant, she said she could not give him the title without informing the Board, out of courtesy to the Board members. She said, according to the Applicant, “I will do so unless my plane crashes on my way to NY.”

25. Based on the foregoing, the Applicant claims that management made a binding promise to give him the title of the ICP Global Manager but failed to honor it.

26. The Bank answers that the Director of DECDG promised the Applicant that she would propose to the ICP Executive Board at its meeting on 25 February 2007 that the Applicant be considered for appointment as the ICP Global Manager. This was the only promise that the Director made to the Applicant, and it was honored. At no time was the Applicant promised an appointment and promotion to the GH level, especially considering that the ICP Global Manager function had always been held by a level GG staff member.

27. The Tribunal, when reviewing a claim of breach of promise, examines “whether there was in fact a promise made by [the Bank] ... and if so the nature of the promise.”

Bigman, Decision No. 209 [1999], para. 6. The Tribunal emphasized in *Chavakula*, Decision No. 277 [2002], para. 15, that:

[E]vidence that a promise ... was made ... would in any event have to be proven unequivocally as was required in prior cases. (*See Bigman*, Decision No. 209 [1999], paras. 6-7; and *Brebion*, Decision No. 159 [1997], paras. 27, 35-38.)

28. The Applicant claims that in July 2004 and June 2005, the Manager, DECDG, promised that he would be made the ICP Global Manager and be promoted to GH level. During the oral proceedings before the Appeals Committee and as well as before the Tribunal, the Manager, DECDG, denied making such a promise. He testified before the Appeals Committee that:

From the very beginning, my understanding, and I believe everybody's understanding, is that the decision to, on the Global Manager, lied with the [ICP] Executive Board. That was written in the governance arrangements ...

I never, ever discussed the Global Manager position [with the Applicant], because I never believed – and I don't believe now – that this is in the hands of the Bank, either [the Director] or me, to appoint anybody to the Global Manager's position. ...

Therefore, we never discussed any relationship with the Global Manager's position. The Global Manager position was as – there is no Global Manager position in the Bank. It was the function of a Global Manager in the International Comparison Program. And when we were asked to host that office, the Global Office, we made a decision that the person will be hired at the level GG.

29. During the oral proceedings before the Tribunal, the Manager, DECDG, testified that he never promised a level GH position to the Applicant; rather, he told the Applicant that “if you want to be a GH, you have to go outside the department, because the global manager is a GG position. It was a GG at that time and recognized now [as] the GG. All the team leaders in the department are GGs.”

30. The Director, DECDG, similarly denied making any promise that the Applicant would be given the title of the ICP Global Manager after Mr. X's retirement, or that he would be promoted to the GH level, especially considering that the ICP Global Manager function had always been held by a level GG staff member. According to the Bank, the Director's only verbal promise was that she would propose to the ICP Executive Board at its meeting on 25 February 2007 that the Applicant be considered for appointment as the ICP Global Manager. She testified before the Appeals Committee that this was the only promise that she made to the Applicant, and that she kept it:

On the matter of what promises were or were not made to [the Applicant], I expect the testimony today to establish that the actual promise made to him to place his name before the ICP Board for consideration as ICP Global Manager was honored.

...

So, as we got closer to the retirement of [Mr. X], I did consult, and also did the chair of the Executive Board consulted, with a number of members as to what would be a suitable way to proceed. And since we were getting very close to the end of the program anyway, the feedback that we were receiving was that the majority of the Board members wanted to – continuity, it was very important for [Mr. X] to stay on board.

But I decided, because of [the Applicant's] – he was very stressed over this matter of [Mr. X] being a consultant and running the program, and that, you know, it was his chance for becoming a Global Manager, I promised him that I will go to the Executive Board on the 25th of February and I'd present the case and, in fact, put in on the table for the Executive Board as an alternative that [the Applicant] will take over the Global Management, and [Mr. X] will become a Senior Advisor to the program.

And this is the promise that I actually honored, and I made the extensive presentation at the Board, and they ultimately wanted for the continuity. They recognized [the Applicant's] contributions. ... It wasn't that they didn't want [the Applicant]. It was that they wanted [Mr. X] to stay on and finish the program. And that was the nature of the promise.

31. During the oral proceedings before the Tribunal, the Director, DECDG, explained that the Applicant was very unhappy that he had not been selected as the Global Manager

in 2002. In response, she encouraged him in a number of ways but never promised to make him the Global Manager or to promote him to the level GH. She said:

So I was trying to, always with [the Manager's] help ... encourage him, not to get him dissuaded ... to come up with an environment for him that he is happy and he can function and we can get what we need for the program out.

...

So it was always an encouraging way. But I'm also a very experienced manager. ... One of the first things I always teach people is don't promise promotions. ... We don't promise promotions to anybody. We encourage people to do their best.

...

A promotion to GH in my department is the biggest deal you can imagine. We only have three GHs in the whole department and they are what's called cluster leaders. They run about 20 people and they are cleared as managers.

So promotions to GH is not – maybe in the operations part of the Bank or finance part of the Bank where GHs are a lot, but in my line of work in the Bank, GHs are not given to us very easily. So how could I have been giving him a GH promise?

And then the Global Manager position, you've heard that it has to go through some kind of advertisement, competitive selection. I have to get input from the executive board. So I couldn't have promised that to him either.

...

So prospects for promotion are very rare, that's one more reason [the Manager] and I are very careful when we discuss these things with staff. We try to actually come up with other ways of rewarding the staff, good OPEs, good salary increases, recognizing them in big meetings, mentioning their names, giving them spot awards, sending them on special conferences and training where they get exposure.

32. Thus, both the Manager and the Director of DECDG clearly denied making any promise that the Applicant would be given the title of the ICP Global Manager or would be proposed for promotion to the GH level. This circumstance is entirely opposite to the circumstance in *Bigman*, Decision No. 209 [1999], where the Bank itself acknowledged that it had made a promise to the applicant “with respect to the terms and conditions of

the Applicant's appointment, beyond and in addition to what was included in the letter of appointment" (para. 7).

33. The Applicant has not provided any convincing reasons why the Tribunal should disregard the testimony of the Manager and the Director of DECDG. The Applicant affirms that he took a lie detector/polygraph test of himself at his own expense, and the test result supports his assertion. The Tribunal cannot give weight to the alleged results of such initiatives. The Applicant did not memorialize in writing any of the conversations during which he alleges that the promise from management was made or reiterated. None of the Applicant's colleagues have provided any corroborating evidence. The only direct written evidence with respect to the alleged promise is the Applicant's own e-mail message of 19 January 2007, asking the Director to confirm her intention to "nominate" him as the ICP Global Manager at the 25 February 2007 ICP Executive Board meeting. Even on the premise that the Applicant's message was accurate, the only promise the Director made is that she intended to propose the Applicant's name; nomination is not appointment. The Executive Board's decision not to accept this proposal appears in the record of its meeting on 25 February 2007. The Applicant seeks to rely on the Director's e-mail message of 23 October 2006 quoted in paragraph 22. This message in fact confirmed (and put the Applicant on notice well in advance of the 27 February meeting) that Mr. X would continue to serve as the Global Manager. Nothing in this message denotes a promise that the Applicant would be appointed as the Global Manager.

34. In sum, the record does not demonstrate that his supervisors promised the Applicant that he would be made the ICP Global Manager or would be proposed for

promotion to the GH level. The Applicant insists that such a promise should yet be inferred from the fact that the Director in his 2006 OPE wrote that: “The Applicant will have an even more important role in the coming year” and referred to a “win-win situation.” The Bank explains that what the Director meant by “an ever more important role in the coming year” is the role that the Applicant would play in completing the 2005 Global Round in its last year, when all important deadlines and promised products were to be delivered. The Bank states that such an important role would be a professional accomplishment for the Applicant that could boost his career, but was never intended as a promise or an assurance that he would be appointed as the Global Manager. The Bank explains further that the Director’s reference to a “win-win” situation was not meant as a promise that the Applicant would be appointed as the Global Manager; it was rather her expression of the goal to have the program succeed (first win) and for all those responsible for the success of the program to enjoy a meaningful professional accomplishment (second win). The Director testified before the Appeals Committee that:

So, the promises that I made to [the Applicant] was that I would create an environment for him. You know, this is the win-win situation that I have explained even in my e-mails, personal e-mails, I must say, to [the Applicant] – the win-win situation has been to succeed with the program and also for him to have exposure where he can actually be recognized by not only me, by others, to be able to perform that function.

...

So, the conversation has always been, you know, “[the Applicant], be patient.” You know, “Let’s get you exposed.” You know, “Let’s work out all the details of the program. Just make sure that the focus is on the result and the program. And while we’re making the program successful, we’ll give”, – you know, “you will see that your career, as a result of it, and your career aspirations as a result of it will benefit.”

So, this is the win-win that I’ve always talked to him about it.

[The Applicant] has always recognized that – and I hope he has – that the Executive Board has had a governing rule over this program, you know, he applied in 2002, recognizing this. You know, the advertisement had two logos, the World Bank and the ICP logos.

35. In *Kopliku*, Decision No. 299 [2003], para. 10, the Tribunal insisted that circumstances must “warrant the inference by a staff member that the Bank has indeed made a promise ... either expressly or by unmistakable implication.” Considering the testimony of the Manager and the Director of DECDG and the governing framework of the ICP, the Tribunal cannot conclude that comments on his OPEs and regarding “win-win” prospects permit the inference that the Applicant was promised the ICP Global Manager function or promotion to the level GH, yet alone an “unmistakable implication” to this effect. The Applicant knew that the ultimate decision in the appointment of the ICP Global Manager rests with the ICP Executive Board, as clearly stated in the governance document of the ICP. Given this context, it is not believable that the Manager or the Director made any unequivocal promise or that the Applicant could reasonably infer a promise by unmistakable implication from the circumstances. It is even more unlikely that DECDG management made any promise regarding promotion to the GH level given that the Global Manager function is performed by a GG level staff member. Bank staff members are normally promoted to the GH level through a competitive process. The Applicant could not have reasonably relied on the Director’s general words of encouragement to have the specific effect he now seeks. Rather, it is quite plausible to infer that he did not request an explicit written assurance because he did not expect it would have been given.

36. The Tribunal considers that, as a senior member of the Bank’s staff who had worked in the Bank since 1995, the Applicant must have been aware that if indeed any

promise is made by a manager, that promise is subject to and must comply with the Bank's Staff Rules and procedures. He must also have been aware that, as is well-established in the Tribunal's case-law, the position of Global Manager, like any other position, would not be filled solely on the basis of his past performance (*see Riddell*, Decision No. 255 [2001], para. 23); that input from the Board is an important part of the selection process for this position (as described in paragraphs 8-9 above); and that the opinion of his managers is also an important part of the process.

37. All alleged manifestations of concrete promises invoked by the Applicant are his own assertions as to words spoken to him some years ago. All are denied by the alleged promisor, and both the Director and the Manager not only emphatically deny that such promises were given, but give cogent reasons why it would have been highly imprudent for experienced managers to make such premature undertakings which were in fact not matters within their exclusive personal authority. Any senior staff members being given such important and unusual promises would have sought to ensure that they were reduced to writing. The Applicant can point to no such evidence. Certainly managers should not be dissuaded from encouraging and motivating staff members by giving them praise and fostering their ambitions, and it would therefore be perverse to hold the Bank liable for breach of promise whenever praise is given and staff members draw over-optimistic inferences. This is why the Tribunal said in a case (where the applicant happened to be a Vice President of the Bank) that: "it is notoriously difficult for any judicial body to have confidence in recollections of unrecorded one-to-one conversations." (*Conthe*, Decision No. 271 [2002], para. 69.) In sum, the Tribunal finds that the evidence does not

demonstrate that the Bank promised the Applicant that he would be given the title of the ICP Global Manager or be proposed for promotion to the GH level.

II. THE TREATMENT OF THE APPLICANT IN THE SELECTION PROCESS FOR THE GLOBAL MANAGER POSITION

38. The Applicant claims that he is a victim of discrimination and that he was not given the ICP Global Manager title because he is “a black Sub-Saharan African,” notwithstanding his qualifications and consistent excellent performance.

39. This Tribunal unhesitatingly invalidates discretionary decisions if the evidence shows that the decision was discriminatory based on race, gender, or other prohibited grounds. Equally, however, as the Tribunal observed in *Njovens*, Decision No. 294 [2003], para. 16, that:

Just as the Tribunal is prepared to be firm on any question of racial discrimination supported by the evidence, so too it is prepared to dismiss outright any unfounded allegation in this context.

40. The Tribunal’s established practice regarding the burden of proof in cases of alleged discrimination was set out in *de Raet*, Decision No. 85 [1989], para. 57, as follows:

it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power – not, that is, until an Applicant has made out a *prima facie* case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner. (*See also Bertrand*, Decision No. 81 [1989]).

In *Bertrand*, the Tribunal stated at para. 20 that:

The Tribunal concludes, in light of ... the detailed allegations and factual support presented by the Applicant in his pleas, that his case should properly be treated as one in which the burden of proof moved to the Respondent to show that Bank management acted fairly to the Applicant, rather than resting upon the Applicant the burden to show that the Bank acted unfairly. In the typical case in which the Applicant points to specific

reasons for casting serious doubt upon the fairness of the Bank's selection process, it is for the Bank to dissipate this doubt by providing the facts that are readily available to it in order to show no more than that its discretion has been fairly exercised. The Bank has not attempted to discharge this burden, other than with conclusory statements relating to the content and manner of assertion of the Applicant's policy views, and the perceived superiority of other candidates for managerial positions. The Tribunal believes that these statements are insufficiently detailed to discharge the Respondent's burden of demonstrating that its decision-making process was based upon giving no more than their due weight to legitimate factors.

41. In a case like the present one, the applicant carries the initial burden of establishing a *prima facie* case of racial discrimination. If the applicant meets this burden, the Bank then must provide a non-discriminatory business rationale for its decision. The applicant may then challenge the Bank's stated rationale and provide evidence to show that the Bank's stated reason was a pretext for a racially discriminatory decision.

42. The first question then is whether the Applicant has established a *prima facie* case of racial discrimination. There is no magic test; the proof needed to establish a *prima facie* case will vary from case to case, depending on the facts and circumstances of each case. But as indicated by the Tribunal in *Bertrand*, the Applicant must at least provide "detailed allegations and factual support" for his claim of racial discrimination. Applicants make *prima facie* cases of racial discrimination if they adduce evidence from which the Tribunal can reasonably infer such discrimination.

43. Here the record contains no evidence of racial discrimination. The Applicant suggests that an inference of discrimination can be made from a statement by Mr. X:

After I learned of [Mr. X's] extension [in 2005], [Mr. X] told me that he believed [the Director of DECDG] thought she could not appoint me Global Manager because "OECD and Eurostat are against you. You know Europeans are not used to seeing a black person in a position of power."

44. Yet Mr. X denies making any such statement, and no one else heard Mr. X saying so. The allegation is unsustainable.

45. The Applicant acknowledged before the Appeals Committee that he “did not possess any direct evidence of discrimination,” and does not now make a contrary claim before the Tribunal. Mostly relying on some studies relating to Bank staff, the Applicant asserts that: “Many studies have confirmed discrimination against Africans over 30 years.” In particular, the Applicant states: “A 1997 independent study commissioned by the Bank and carried out by the law firm Dewey Ballantine, established, among other things, that ... blacks were concentrated in support positions, very seldom got into management, and apparently were sometimes hired at lower salaries than non-black staff with similar qualifications.”

46. The Tribunal’s jurisprudence requires that a staff member must provide evidence of discrimination specific to his or her case. In *Njovens*, Decision No. 294 [2003], para. 17, the Tribunal observed that:

The Applicant brought to the attention of the Tribunal a report prepared in 1997 by the law firm of Dewey Ballantine to substantiate his claim of discrimination based on race. That report does indeed conclude that there has been a measure of systemic discrimination among classes of staff members within the Bank. But it is necessary for an applicant to introduce facts supporting a claim of individualized wrongdoing which amount to a violation of his or her own terms of employment. (*Nunberg*, Decision No. 245 [2001], paras. 43-44.)

47. Every applicant must show that he or she - and not other people - have been the victim of discrimination. The Tribunal cannot accept that because some studies adduced by the Applicant suggest apparent discrimination against Africans in general in the Bank, it should be taken as proven that in this particular case the Applicant was not given the ICP Global Manager title because he was an African. The Tribunal stated before that

“discrimination takes place where staff who are in basically similar situations are treated differently.” (*Crevier*, Decision No. 205 [1999], para. 25.) Mr. X served as the Global Manager at the GG level, the same level as the Applicant, and the new Global Manager, who shares the same race as the Applicant, is also at the GG level. There is nothing in the record that suggests that staff members of a different race in the same situation as the Applicant were promoted but the Applicant was not.

48. Even assuming that the Applicant had made a *prima facie* case of discrimination and the burden shifts to the Bank, the Bank has provided a non-discriminatory business rationale for its decision. The Bank explains that the Applicant was not accorded the ICP Global Manager title for two business reasons: (i) DECDG management and the ICP Executive Board wanted continuity in the management of ICP until the work relating to the 2005 Global Round was completed; and (ii) DECDG management and ICP Executive Board decided that any new Global Manager should be selected through a competitive process, as in the past. In the Bank’s words:

The functional title of Global Manager (or Acting Global Manager) was not conferred on Applicant once [Mr. X] retired because such a conferment would require changes in both the functions of [Mr. X] and the Applicant at a critical stage of the ICP project, and DECDG management did not consider such a change of work program assignments as prudent at that juncture. It consulted the ICP partners regarding the appointment or designation of a Global Manager. Following these consultations, which were concluded in the February 25, 2007 meeting of the ICP Executive Board, the Board members resolved that [Mr. X] should continue as the Global Manager through the end of the 2005 Round, and that the (new) Global Manager position should be filled through a competitive selection process as was the case in 2002.

49. The Bank’s explanation is supported by the record before the Tribunal. The minutes of the 25 February 2007 meeting of the ICP Executive Board confirms these two business reasons:

The ICP Executive Board in its meeting on February 25, 2007 discussed the latest circumstance regarding management of the Global Office. As the last item on the agenda, in a closed session with principals only, [the Director, DECDG] briefed the Executive Board. She noted that [Mr. X], as the Global Manager since 2002 retired from the World Bank as of November 2006, but has been re-hired as a consultant. She explained that as a consultant [Mr. X] does not have the same level of administrative discretion as he had as a full-time staff member. He can only work part time for up to 150 days per fiscal year, for example, and he cannot sign documents of a legal or financial nature.

[The Director, DECDG] also noted that [the Applicant] who has been functioning as the Deputy Global Manager, has continued to make significant contributions to this round and is carrying out a heavy work load. The Board was informed that as of mid January [the Applicant] has been assigned as the Bank's internal ICP Team Coordinator. [The Director] asked the Board for its advice on the position of the Global Manager. As an alternative to the current arrangement, she suggested that [the Applicant] could assume the role of the Global Manager for the remainder of this round and that [Mr. X] could serve in a senior advisory capacity to the program.

Going around the table, Board members spoke on this matter. Several speakers noted that the current Global Manager was selected by a subcommittee of the Board through a competitive selection process and that the Board should stay with that process. Some expressed the view that the Global Manager doesn't necessarily need to be a full-time regular staff of the World Bank. A number of Board members acknowledged [the Applicant's] contributions and welcomed the decision made for him to take on the position of the internal ICP Team Coordinator, but did not see him ready to take on the Global Manager position. They unanimously and strongly recommended that [Mr. X] remain as the Global Manager of this round of ICP to the end of the round to maintain continuity. Some offered administrative support from their institutions should the World Bank have difficulty with providing a suitable contract for [Mr. X]. A number of Executive Board members also commented that the next Global Manager should be selected through a competitive process.

50. The Applicant questions the accuracy and authenticity of the above minutes of the 25 February 2007 meeting. He alleges that "critical parts of the 'final' minutes of the February 2007 meeting are contrary to what was recorded and documented by the Chairman of the Board within days of the February meeting." The Applicant queries

why the Director of DECDG was involved in drafting the minutes and why he was given a copy of the minutes only in July 2007, five months after the meeting.

51. The Director of DECDG explained before the Appeals Committee:

So, the meeting - the minutes, which is usually written by the Secretary of the Board, it was [Mr. X], and [Mr. X] had left the meeting, so there was nobody taking the minutes but me and the Chair were taking notes. And after that, in February, after that, it took – between [Mr. X] – between the Chair and myself, it took us a while to finish the minutes. And one of them was because I was very much delayed because my mother died during this period, and I was for months delayed because of that. And then we finished it and we passed it on.

And it took us also a few weeks to get everybody to clear – everybody present to clear, but we managed to do that. Between May and June, everybody managed to clear the minutes.

52. The minutes of the 25 February 2007 meeting record that Mr. A served as Chair of the ICP Executive Board. Twelve other ICP Board members were present at the meeting, representing various international entities including the Australian Bureau of Statistics, the International Monetary Fund (“IMF”), the OECD, the UN Statistics Division, Eurostat (European Commission), the United Kingdom Office for National Statistics, the Asian Development Bank, the Uganda Bureau of Statistics, the African Development Bank, the Russia Federal State Statistical Service, and the Interstate Statistical Committee of Commonwealth of Independent States.

53. The record shows that the minutes of the 25 February 2007 meeting are consistent with prior e-mail exchanges between the ICP Executive Board members and DECDG management where some Board members raised concerns about replacing Mr. X with the Applicant. For instance, in an e-mail message dated 18 February 2007 the Chair of the Board wrote to the Director, DECDG, stating:

I have had unsolicited representations from many people about the situation in the global office including people we respect like [representative from IMF], [representative from OECD], [representative from EUROSTAT]. Some think [the Applicant] has become the global manager with that title having been removed from [Mr. X]. (I have advised them that is not the case.) They feel, I also believe, that he doesn't have the judgment and relationship management skills to be a global manager. As you know some regions do not want to work with him – they do not think he listens or tries to understand their perspective. They are concerned that the whole project would be put at risk if he was made the global manager.

54. More importantly, the record before the Tribunal demonstrates that the Board members present at the 25 February 2007 meeting approved and formally ratified the text of the minutes quoted above. On 28 April 2007 the Chair of the Board sent by e-mail the text of the minutes to the Board members who attended the meeting stating:

Dear colleagues

[The Director of DECDG] and I have prepared a summary of the discussion on the Global Project Manager we held at the end of the last Executive Board meeting. It is important that we maintain a record of that discussion. Please let us know if you have comments on this record. It would be great if you provide any comments by 2 May.

55. Each of the Board members responded by e-mail agreeing that the text accurately reflected the discussion they had on 25 February. For example, the representative of the Uganda Bureau of Statistics responded on 29 April stating “I confirm this as accurate”; the representative of the UN Statistics Division responded on 30 April stating “it is OK with me as well”; the representative of the Asian Development Bank responded on 1 May stating “it's ok with me”; and the representative of the African Development Bank responded on 7 May stating “I fully agree with the report. It's a true reflection of the discussions and reached agreement.”

56. The Applicant believes that only the Europeans disliked the prospect of his becoming the ICP Global Manager. But the record is clear that the representatives from Asia, Africa, and the UN as well concluded that Mr. X should continue serving as the Global Manager. In this regard, in response to the Tribunal's request for additional information, the Chair of the ICP Board wrote to the Tribunal confirming that the representatives from Africa agreed that Mr. X should continue serving as the Global Manager. It is evident that the Board did not share the Applicant's view that Mr. X was "incompetent" and "spectacularly dysfunctional." (*See* paragraph 85.)

57. Given the record before it, the Tribunal rejects the Applicant's allegation that the final minutes were "altered substantially" or that the minutes did not accurately reflect the discussion and agreement of the Board members.

58. The Applicant received the minutes from the Chair of the Board on 20 July 2007, and on 22 July requested that the Board declare the minutes to be "null and void." The Chair of the Board, with the agreement of the other Board members, rejected this request. The Applicant has not adduced valid grounds for the Tribunal to overturn the decision of the Board not to void the minutes. The Applicant claims that the Board was not properly constituted for the meeting of 25 February but has not so proved.

59. The Applicant challenges the "continuity" rationale of the Bank as articulated in the minutes of the 25 February meeting. The Bank explains that Mr. X retired in 2006 when the ICP work on the 2005 Global Round was in progress and was in fact at a critical stage. The Board thought it would not be prudent to make any changes in the managerial arrangements of the ICP and thus the Board and DECDG management decided to have Mr. X "continue" to serve as the Global Manager.

60. The Applicant argues that the Board's explanation cannot stand because he was virtually managing the activities of the ICP, and not Mr. X. The Applicant explains as follows:

After [Mr. X] was recruited it was agreed that the two of us would co-manage the program. ... Upon his arrival, [Mr. X] and I divided management tasks equally. ... Soon after he joined, [Mr. X] was overwhelmed by the complexity and the enormity of the program. In some critical areas the Bank program was falling behind and running over budget. In October 2003, [the Manager of DECDG] called a meeting and the meeting agreed on mid-course correction actions. As the minutes of the meeting reflect, I was asked to take over management tasks from [Mr. X]. At the request of management I gradually took over seven management tasks from him between 2003 and 2005. By 2005 I was managing 17 tasks and [Mr. X] was managing three.

Between November 2002 and July 2008, there were 26 consultants (excluding those stationed in the Global Office). Of the 26, I managed 22 and [Mr. X] managed 4. There are six regional coordination responsibilities that the Global Office is charged to oversee. I managed four, including what is called the Ring region consisting of 18 countries from five regions and [Mr. X] managed two. ... Apart from overseeing program implementation, the two most important responsibilities of the Global Management team are fund raising and advocacy. I was responsible for each and every penny that the Global Office raised both before and after [Mr. X] joined the Global Office. I have been leading the advocacy work since 2005. Initially, both fund-raising and advocacy were in [Mr. X's] column of management responsibility.

As [Mr. X's] management responsibility dwindled, mine increased substantially.

Given this context, the Applicant argues that the "continuity" explanation provided by the Bank is unacceptable.

61. The Bank explains as follows:

Applicant has both misstated and overstated his responsibilities vis-à-vis [Mr. X] With respect to Applicant's claim that he co-managed the ICP with [Mr. X] and that they "divided management tasks equally," the accurate situation is that [Mr. X's] function and responsibilities as the Global Manager were different from those of the Applicant. [Mr. X's] position was a GG level coterminous appointment financed through

contributions from ICP partners, as the Global Manager, he was in charge of coordinating the ICP partnership reporting through the Director, DECDG, to the ICP Executive Board. Also, as the ICP Team Leader in DECDG, [Mr. X] was in charge of coordinating the work of the team. In addition to these two main parts of his function, [Mr. X] also took on a number of technical and operational tasks. Thus, while there were differences between the responsibilities of [Mr. X] and the Applicant (who were at the same GG level), similarities existed in some of the technical and operational activities they performed.

For example, all ICP team members, including Applicant, had well defined and delineated work program assignments, and no member had an unreasonably high or low work load. Periodic review and the work program was routinely done by the departmental management team, and readjustment of work load was necessary as priorities shifted and as demand for Global Office support changed. This was the case, for instance, with Latin America region, which did not require as much work or support from the Global Office as the Africa region did by late 2005. These shifts were not unusual and were not done as the Applicant claims because “[Mr. X] was overwhelmed by the complexity and the enormity of the program.” Thus, Applicant’s claim that he was managing more tasks than [Mr. X] is both misleading and inaccurate, as Applicant has chosen to ignore [Mr. X’s] role and responsibilities as the Global Manager and a Team Leader while exaggerating his work program and contribution for which he had been appropriately credited in his OPEs and rewarded in his SRIs. To be sure, Applicant has been asked to help [Mr. X] during spikes in work assignments as a team member and to foster teamwork competency in Applicant. However, such request for assistance was not made because [Mr. X] was inept as Applicant has disparaged him. To the contrary, [Mr. X] was a highly respected professional and excellent performer during his assignment as the ICP Global Manager, and does not deserve Applicant’s campaign of calumny against him.

With his claim that he “was responsible for each and every penny that the Global Office raised ...” Applicant is again overstating his contributions. The biggest financial contributions made to the ICP included a Development Grant Facility (DGF) grant of \$3 million with which Applicant had nothing to do. Applicant also had nothing to do with IMF’s contributions of \$800,000

Considering Applicant’s claim that as “[Mr. X’s] management responsibility dwindled, mine increased substantially,” Respondent reiterates that during 2002 to 2006 applicant had no “management responsibility” in comparison to [Mr. X].

62. The Tribunal notes that it is not in dispute that the ICP commenced the 2005 Global Round project in 2002 and that it was not completed until 2008. It is also not in dispute that, when Mr. X retired in 2006, the project was at a critical stage. The Tribunal does not find anything unusual or unreasonable in the decision of the ICP Executive Board and the Bank that it would be prudent to have Mr. X continue to serve as the Global Manager, and not to make any changes to the managerial arrangements at this critical stage of the program. As requested by the Tribunal, the Bank submitted a “Comparative List of Tasks between the Applicant and Mr. [X]” performed during the 2005, 2006, and 2007 OPE periods. An examination of this information does not lead the Tribunal to conclude that the Applicant was virtually managing the ICP. The Applicant has not showed why it should be deemed inaccurate.

63. Both the Manager and the Director of DECDG provided consistent testimony before the Appeals Committee to the effect that the Applicant was not given the ICP Global Manager title for the two reasons explained by the Bank. Another colleague of the Applicant, Mr. S, also testified that the Applicant was not given the title because the ICP Executive Board wanted continuity of management until the 2005 Round was completed. After hearing the testimony of these individuals and the Applicant, and examining the record before it, the Appeals Committee found that:

In this case, the Panel found that [the Director’s] decision not to assign the [the Applicant] the ICP [Global Manager] function upon [Mr. X’s] October 2006 retirement was based on non-discriminatory business factors. Specifically, although [Mr. X] was required to retire from the Bank due to his age, the Bank was able to retain him as a staff member through an STC appointment. And, the ICP [Executive Board] Chair and two or three key ICP [Executive Board] members wanted to maintain leadership continuity within the ICP through the conclusion of the 2005 round and thus preferred that [Mr. X] remain ICP [Global Manager]. In the Panel’s view, it was for these reasons that [the Director] did not assign

the [Applicant] that ICP [Global Manager] function upon [Mr. X's] October 2006 retirement.

In reaching this conclusion ... the Panel also took into account the testimony of [Mr. S], who had worked closely for years with [the Director], [the Manager], and the [Applicant]. [Mr. S] whom the Panel found to be very credible, testified that he observed no discriminatory treatment toward staff members in DECDG and found it totally improbable that [the Applicant] had been subjected to discrimination.

64. The important point is that even though the Applicant believes he deserved to be the Global Manager and considered Mr. X as “absolutely incompetent,” the ICP Executive Board and DECDG management considered otherwise. They found it prudent to have Mr. X continue as the Global Manager. In this respect one ICP Executive Board member, who represented the UN and participated in the 25 February 2007 meeting, testified before the Tribunal that:

I cannot remember all the reasons and the details of our discussion. But the conclusion was very clear. We are at the tail end of a complex project. It's not good – the Board decided that it's not good at that time to have a change of leadership. So the Board agreed that [Mr. X] should continue in some way to manage this global project within the rules and regulations of the World Bank.

...

Because I think [Mr. X] has adequately presented all the details of the project. He has shown a mastery of the details. There are so many senior managers of international organizations and statistical offices around the table. And nobody has ever doubted that fact [Mr. X] knows his stuff and managing the team well.

The Director of DECDG similarly testified before the Tribunal that:

Well, because I consulted with the Board and continuation with [Mr. X] by partners was very important. I also looked at it myself and it was very important to continue. We were at the tail end of the program, only – and at that point, I thought we only needed a few more months.

And so that was basically a business decision. It was not a decision against [the Applicant]. It was a decision to continue and make the program successful, because continuity was very important. And I have explained that that was not a decision against [the Applicant]. He could

interpret it that way, but my management decision was not to say [the Applicant] is not getting that. The decision I made was that we continue with [Mr. X].

65. In conclusion, the Tribunal, based on the facts presented, the testimony of the relevant parties before the Appeals Committee and the Tribunal, and the record as a whole, has no basis to conclude that the Bank's "continuity" rationale was simply a pretext for discrimination.

66. The Applicant also challenges the Bank's other rationale for not giving him the title of the Global Manager, namely that "the next Global Manager should be selected through a competitive process." According to the Applicant, the Bank did not follow such a process in 2002 when it recruited Mr. X. The Applicant states that "[Mr. X], an external candidate with no prior ICP experience, was recruited as a Global Manager at level GG ... without going through the Bank's normal clearance and recruitment procedures." Similarly, the Applicant argues that, when in 2009 the Bank hired the new Global Manager, it did not follow a proper process. According to the Applicant:

Respondent has appointed [Mr. Y] (an African) [the new] Global Manager of ICP, despite the fact that he is not qualified for the position. ... Respondent knew of [Mr. Y's] track record including serious charges of program mismanagement, financial fraud and wholesale plagiarism. ... [Mr. Y's] appointment can only be explained by either (a) a desperate preemptive action to cover up Respondent's discriminatory actions after the fact, or (b) a sinister ploy to appoint an African knowing full well that he would not pass the Bank's pre-employment screening.

67. The Bank responds that both in 2002 and 2009 it hired the Global Manager through a competitive process.

68. The Tribunal, recalling the provision of the ICP Governance Framework quoted in paragraph 8 above, finds that the ICP Executive Board and the Bank cannot be faulted for deciding to select the new Global Manager through a competitive process and thus not

to automatically give the title of Global Manager to the Applicant upon the retirement of Mr. X. The Bank has submitted documents relating to the 2002 recruitment process to the Tribunal. These documents demonstrate that the Bank followed a competitive process for the 2002 selection of the Global Manager, Mr. X. In any event, if the Applicant wished to challenge the decision taken in 2002, he should have done so within the time limits prescribed in Article II of the Tribunal's Statute. The time allowed for that challenge, however, expired six years before the Applicant filed the present Application.

69. For the new Global Manager selected in 2009 (Mr. Y), the Bank followed a similar competitive process. The position was advertised on 11 September 2008 on the Bank's website, as well as in *The Economist*, with a closing date of 10 October 2008. Some forty-five candidates, including the Applicant, applied. A HR Recruitment Officer, a Senior HR Officer, and DECDG management screened the candidates and prepared a long-list of seven candidates that included the Applicant. Of the seven candidates three were from Africa including the Applicant. The members of the ICP Subcommittee of the Executive Board served as the short-listing committee. The members included representatives from Norway, the UN, Eurostat, the African Development Bank, Brazil, and Australia. This ICP Subcommittee was charged with the responsibilities of providing input to the Bank on the short-listing, interviewing of candidates, reviewing of references, and recommending a list of suitable candidates for the position for final decision by the Bank.

70. After assessing the backgrounds and the suitability of the seven candidates on the long-list, the ICP Subcommittee prepared a short-list of three candidates for interview:

Mr. Y, one from Germany, and the third from United States. In October 2008 the ICP Subcommittee interviewed these three candidates and recommended that the Bank hire as Global Manager either Mr. Y or the German candidate. Ultimately, Mr. Y was hired as the new Global Manager in 2009. The Bank has submitted detailed documents relating to this recruitment process. The Applicant's assertion that Mr. Y would not survive the Bank's "pre-employment screening" did not turn out to be true. Mr. Y was cleared for employment by the Bank and assumed his responsibilities in 2009. The Applicant considers the selection of an African as the new Global Manager to be a "sinister ploy," but that is not supported by the evidence before the Tribunal.

71. Accordingly, the Tribunal finds that the Bank's decision to select the new Global Manager through a competitive process was proper and consistent with both the ICP Governance Framework and the Bank's practice.

72. The Applicant insists that he should have become the new Global Manager because he has a proven record of good performance. He states that he has performed exceptionally well in all areas of the ICP including management areas, but the Bank refused to make him the ICP Global Manager.

73. The Tribunal concludes that it is not in dispute that the Applicant made an important contribution to the ICP. His good performance has been acknowledged by the Bank in his OPEs. But performance alone does not entitle a staff member to a particular title or promotion. In *Riddell*, Decision No. 255 [2001], the Tribunal stated at para. 23 that

no staff member has a right to be selected to a particular position or to be included in a list of candidates for a position. The decision to select an applicant for a particular position, or to include him or her in a list of

candidates, is discretionary and the Tribunal will not overturn such a decision unless it finds that it is tainted by bias or abuse of discretion.

74. Neither can the Tribunal infer discrimination from the totality of the circumstances of the Applicant's case. The Applicant blames the Manager and the Director of DECDG for racial discrimination. The Applicant states in his Application that: "My Appeal will also show that my Director has a track record of discrimination against blacks." Not a single staff member in the Applicant's department, either current or former, has provided any statement supporting the Applicant's position in this respect. The Applicant might have provided such statements for *in camera* review by the Tribunal. He did not. More importantly, the Applicant requested that the Tribunal allow a former staff member of DECDG "to appear before the Tribunal to testify on a number of critical issues including retaliation and discrimination in the department." The Tribunal approved his request, but on the day of the hearing, the Applicant informed the Tribunal that he would not be calling the former staff member as a witness after all.

75. The record, however, shows that both the Manager and the Director have worked with the Applicant for many years and that the Manager and the Director have consistently recognized the Applicant's good performance and have provided high ratings in his OPEs and SRIs. The Director increasingly assigned important tasks to the Applicant during the 2005 Global Round (in fact, this is the basis of the Applicant's claims regarding his qualifications for the Global Manager position) and openly praised the Applicant for his performance. Considering the record, the Tribunal does not see any pattern of prejudice and is not convinced that racial prejudice or discrimination was a motivating factor for the Director in not assigning the Global Manager function to the Applicant.

76. The Applicant is distressed by the fact the he was not chosen as the Global Manager. The Tribunal has stated before that “the fact that a manager’s decision causes distress does not *per se* make it a case of abuse of discretion.” *Sweeney*, Decision No. 239 [2001], para. 54. The Applicant’s heated rhetoric about the injury he perceives simply cannot substitute for material evidence of his serious charges. In addition to his unacceptable comments about Mr. X (by all accounts an accomplished senior specialist who had the well-documented confidence of the ICP Executive Board), the Applicant’s allegations of discrimination (including “bullying” and “intense psychological abuse”) were equally unacceptable to the Director and the Manager, who emphatically rejected his charges and were able to point to written evidence of a supportive and professional attitude vis-à-vis the Applicant. Naturally the Tribunal cannot accept the Applicant’s allegations, unsupported as they are by any evidence save his own assertions, and moreover denied by senior managers who obviously cannot be *presumed* to have acted unprofessionally and in violation of fundamental principles – which is in effect what the Applicant asks the Tribunal to do.

77. In conclusion, the Tribunal has carefully reviewed the unusually large number of documents submitted both by the Applicant, and the Bank (at the Tribunal’s order), has examined the testimony of the witnesses before the Appeals Committee, and has heard directly from the parties including relevant witnesses. The Tribunal does not find that the Applicant’s race played a role in the decision not to assign the ICP Global Manager function to him.

III. RETALIATION

78. The Applicant claims that DECDG management engaged in retaliation against him since December 2006, when he expressed his desire to file an appeal, and more so after the actual filing of his appeal with the Appeals Committee in February 2007.

79. The Bank rules clearly prohibit retaliation. Staff Rule 8.01, paragraph 2.03, provides that:

Retaliation by a staff member against any person who provides information about suspected misconduct, or who uses the Conflict Resolution System, is expressly prohibited and shall subject the staff member to disciplinary action under this Rule.

80. The burden of proof in the case of alleged retaliation is no different from the burden of proof in the case of alleged discrimination. The Tribunal stated in *O*, Decision No. 337 [2005], para. 47, that:

The burden lies with an applicant to establish facts which bring his or her claim within the definition of retaliation under the Staff Rules. An applicant bears the onus of establishing some factual basis to establish a direct link in motive between an alleged staff disclosure and an adverse action. A staff member's subjective feelings of unfair treatment must be matched with sufficient relevant facts to substantiate a claim of retaliation, which in essence is that the allegation of poor performance is a pretext to mask the improper motive.

81. The Applicant claims that his managers retaliated against him in the following manner:

- (i) the Director of DECDG expressed her intent to retaliate against him as evidenced from the Director's e-mail message of 19 December 2007 to INT in which she asked INT for advice on how the "deal" with the Applicant;

- (ii) management refused to give him clear Terms of Reference (“TOR”) since he filed his appeal and Mr. X was allowed to interfere with the Applicant’s management assignments with impunity;
- (iii) management undermined his role, denied him access to data and software, and excluded him from important work;
- (iv) management interfered in the work relating to the Ring Coordination;
- (v) management retaliated by not short-listing him for the Global Manager position in 2008; and
- (vi) management placed him on a Performance Improvement Plan (“PIP”).

82. The Tribunal will now examine the factual support and evidence provided by the by the Applicant for the alleged retaliatory actions, and the Bank’s explanation and adduced evidence, and will determine whether the Bank’s explanations were a “pretext to mask the improper motive.”

E-mail message of 19 December 2006

83. As evidence of the Director’s intent to retaliate, the Applicant relies on an e-mail message from the Director of DECDG to INT dated 19 December 2006. The context of that message is as follows. On 3 December 2006, the Applicant sent an e-mail message to the Director, together with an attached document (a draft appeal), in which he stated that he would file an appeal with the Appeals Committee. He wrote: “The case you may expect is against [the Manager, DECDG] based on racial discrimination.” On 8 December 2006, the Director wrote to the Applicant: “Your e-mail and the document attached appear to raise issues of alleged misconduct. Please clarify to me whether I

should consider your complaint as a report of suspected misconduct, so that I can refer the matter to INT, as I am required to do under Staff Rule 8.01, paragraph 2.02 (b).”

84. On the same day, the Applicant responded to the Director’s message. He informed her that the complaint she had received was incomplete and that he would rather wait to forward the complete document to INT. He added that if the Director felt that she was required to submit the incomplete document to INT she should make a note that the document represented only a part of the formal complaint.

85. On 15 December 2006 the Director sent an e-mail message to the Applicant: “I take your response to mean that you are standing by your allegations of misconduct. Consequently, I am required by the staff rules to report your allegations to INT. If my understanding is wrong, please let me know.” On 17 December 2006 the Applicant responded to the Director by e-mail stating:

I stand by each and every line I wrote in the document that I have sent you and then more! I am not sure what you were referring to when you said “misconduct.” For me what [the Manager, DECDG] did is more than mere misconduct. It is a malicious act of racial discrimination! Is it not ironic that racial discrimination is still an issue in the twenty-first century in the World’s leading development institution that is housed in an ultra modern glass and steel building that sits regally on Pennsylvania Avenue – supposedly America’s premier ceremonial boulevard?

... How can the Bank justify keeping a person [Mr. X] as a Global Manager, when he has amply demonstrated year after year that he cannot even draft a simple report on his own without somebody else redrafting it for him? Have you seen the comments [one of the Board members] wrote warning [the Manager, DECDG] that submitting [Mr. X’s] draft will seriously undermine the Bank’s standing in front of the international community? Sorry for the digression!, but we just cannot continue to pretend that race is not a factor both in keeping an absolutely incompetent, spectacularly dysfunctional and shamelessly wasteful white man and pushing a black man, who has delivered the best and most complex program in your Department, behind the scene. It is so yester-century, to use my daughter’s expression.

Coming back to your message, as you may have noted, the draft I sent you was a cut and paste job and contains a number of typos and missing lines. I prefer that a complete document is submitted to INT. But if you are required to forward the draft I sent you, please do so by all means. The only thing I would like to ask you is to make it clear that it is not complete and that I will submit a complete document to [the Vice President] on 20 December 2006.

You may have thought I was talking out of anger and emotion when I said I am prepared to leave the Bank Let me repeat it in writing, I am prepared to leave the Bank, but not without a fight. I do not want any person to go through what I am going through. This is a battle for the heart and soul of the Bank. Win or lose the battle or the war, I am prepared to fight. I would not allow anyone to suffocate me personally or professionally. I would not accept a second-class status that DECDG has so generously accorded me.

86. After consulting HR and the Bank's Legal Department on how to handle the Applicant's complaint, the Director referred the complaint, i.e., the draft appeal, to INT by e-mail. The Director wrote:

I am forwarding you a complaint from a staff member in my department ... alleging that he is racially discriminated against. The complaint came to me on 12/03/2006 and I am copying the [e-mail] and the attached document for you review. A few days later I went back to [the Applicant] to get clarification that he is indeed reporting a suspected misconduct, as I was rather shocked by these allegations. And noted that if it is so, then I am obliged to refer the matter to INT, as required that managers do under Staff Rule 8.01, paragraph 2.02(b). [The Applicant] reconfirmed his allegations of misconduct (that [e-mail] is also attached). So I am now referring this case to INT and for your review.

Meanwhile, I would appreciate any advice you can give me in dealing with the staff member. The International Comparison Program (ICP) that [the Applicant] is working on is at a very critical final stage when after many years of work, the Bank is to finalize collection of prices data from over 140 countries. Many sensitive issues are expected to be handled every day from dealing with country members, regional partners, donors and senior managers who are the members of the external executive board that manages the program.

I hope this is the right way of sending you this case. If there is a different procedure that I need to follow, please let me know.

87. The Applicant mostly focused on the fact that in that message the Director wrote to INT for advice on how to “deal” with “the staff member” and this shows, in the Applicant’s view, intent to retaliate on the Director’s part. But the message must be read in the proper context and in view of the subsequent conduct of the Director. Before the Appeals Committee, the Director explained that she had been in a management position in the Bank for many years and this was the first time a staff member raised a racial discrimination complaint. The Director stated that she sought clarification from the Applicant twice and he confirmed that the complaint was based on racial discrimination. She added that she took it seriously and sought advice from HR and the Legal Department and they told her that racial discrimination could amount to misconduct and advised her to refer the matter to INT. With respect to seeking advice from INT on how the “deal with” the staff member, the Director explained before the Appeals Committee:

I was seeking clarifications and any information from INT to tell me whether, you know is there any protocol, is there any information that they could provide me on how to manage a situation where a staff member who has called for, you know, racial discrimination complaint and is in the middle of a critical program, if there is any, you know, special protocols that I need to be aware of.

88. Given the context of the e-mail message and its actual contents, and the Director’s explanations, it cannot be concluded that the Director sent it with the desire to retaliate against the Applicant. Moreover, even though the Director knew in December 2006 when she sent the message that the Applicant was considering an appeal, she went on to assign the Applicant the ICP Team Leader responsibilities in January 2007, which the Applicant accepted. In the Applicant’s own view this appointment was significant. He stated in his Application: “On January 19, 2007 I was appointed ICP Team Leader to take overall responsibility of the coordination of the program, including providing overall

leadership to staff working on the ICP.” In fact, this assignment also made the Applicant part of DECDG’s management. Furthermore, even though on 18 February 2007, the Director knew for certain that the Applicant was going to file an appeal soon (he did so on 21 February 2007), the Director proceeded to propose the Applicant’s name at the 25 February 2007 meeting of the ICP Executive Board for consideration for the ICP Global Manager function. These actions of the Director, the Tribunal finds, are inconsistent with those of a manager bent on retaliation.

89. In conclusion, the Tribunal does not find that the Director’s e-mail message of 19 December 2006 to INT was an act of retaliation or evidence of any intent to retaliate.

TOR

90. The Applicant states that although Mr. X and he had previously worked with a clear division of labor and did not interfere with each other’s work program, Mr. X was allowed to interfere with the Applicant’s management assignments with impunity once the Applicant had filed his appeal in February 2007. The Applicant claims that:

Despite meetings with the Ombudsman and both [the Director, DECDG] and [the Manager, DECDG] to discuss the need for a TOR for me and clear lines of responsibility for [Mr. X], my managers made a mockery of my efforts. Instead of producing a meaningful document which could have laid out clearly what was expected for me and [Mr. X], [the Director] circulated only a “generic” TOR for all DECDG team leaders. ... This did nothing to clarify our roles; if anything it made the situation more confused than ever. ... After I filed my Appeal – they ... tried to strengthen [Mr. X’s] role while diminishing mine.

91. The Bank explains as follows:

Management has spent an inordinate amount of time and effort to clarify to Applicant his roles and responsibilities, well beyond the common practice in the Bank. The provenance of Applicant’s clamor for a TOR is his disaffection with [Mr. X]. Shortly after Applicant was assigned the Team Leader function he started asking for a TOR. All DECDG teams undertake an annual exercise to delineate their work program and Results

Agreements. This exercise is in conformity with the Bank policy for “regular” staff who participate in the OPE process; conversely, TORs are given to STTs and STCs. It is not the Bank’s policy for regular staff to be given a TOR in the middle of a work program year, as Applicant was demanding. Nevertheless, management engaged Applicant when he asked for a TOR and inquired what he wanted to clarify in the TOR that he was requesting. It then became evident to Applicant’s managers that the impetus for Applicant’s request was his resentment of [Mr. X] or as Applicant put it “to restrain [Mr. X].”

When Applicant persisted in asking for a TOR, [the Manager, DECDG] discussed the matter several times with Applicant and suggested to Applicant that he would call a team meeting and collectively review and agree on team procedures and work processes. Applicant did not follow the suggestion and persisted in demanding a TOR. [The Director, DECDG] yielded to Applicant’s persistence, and provided Applicant with a generic TOR for all Team Leaders in the department. She also suggested to Applicant that he should contact her for any questions or areas not covered in the generic TOR. Applicant’s response to the overtures of his managers was to ridicule the TOR. Contrary to Applicant’s claim, he was provided with a meaningful work program and TOR, but he declared them unacceptable because of his professional disappointment at not being appointed Global Manager and the animus that he had developed against [Mr. X]. Applicant had launched a “turf warfare” against [Mr. X], and was still prickly about the retention of Mr. [Mr. X] as the Global Manager.

92. The Tribunal does not find the above explanation from the Bank to be a pretext for retaliation. Even though the Applicant was made the ICP Team Leader in January 2007, Mr. X continued to serve as the Global Manager. The Director had a meeting with the Applicant before appointing him the ICP Team Leader and explained to the Applicant that there would not be any major changes in terms of work program nor “any major changes of who is who within the team.” Thus the Director urged the Applicant to “coordinate the day-to-day work with the Global Manager.” According to the Director, the Applicant understood this arrangement and told her “that there is no need for shifting or changing the work program. I can do it.” The Director found, however, that the

Applicant “was very frustrated with” the fact Mr. X remained the Global Manager and that the Applicant wanted to have more control.

93. In any event, DECDG management did not ignore the Applicant’s frustration over the alleged lack of clarity in his work assignments. On 20 March 2007 the Applicant sent an e-mail message to the Manager of DECDG requesting clarification of his role and responsibilities as ICP Team Leader, noting that it would be helpful if management provided him with TOR for the job. The Manager replied on the same day advising that generally in DECDG each team chooses its own *modus operandi*, based on what works best for the team. The Manager suggested that the Applicant hold a team meeting to agree on a set of operating procedures and offered to attend the meeting if the Applicant thought it would be helpful. It appears that the Applicant did not hold any such meeting and insisted on written TOR.

94. The Applicant then asked for a meeting with the Manager and the Director of DECDG with the presence of the Ombudsman. The managers agreed and a meeting was held in April 2007. Following the meeting, in May 2007, the Director sent the following e-mail message to all DECDG Team Leaders with the subject heading “Generic Terms of Reference for DECDG Team Leaders”:

Colleagues,

Team leaders are an important part of the department’s management team. I have been thinking about how to define and explain their role to the rest of the department, managers in DEC, and other interested to know. Because team leaders perform many different functions, there is no single job description that applies to all of them. Therefore, I thought it would be useful to produce a generic terms of reference. Attached is a draft that tried to do two things: describe the overall structure of DECDG as it is presently constituted (for the benefit of readers outside DECDG) and define the general duties and responsibilities of DG team leaders. I hope you find this useful.

Please read it carefully and suggest any changes or clarifications you think are needed.

Regarding the ICP, the draft described as follows:

International Comparison Program (ICP) Team – Supports the Global Office of the ICP and executes the World Bank’s work program as part of the current round of ICP data collection and analysis. The Global Office works closely with five regional offices and the OECD program; it reports to the ICP Executive Board through the Global Manager who is also a member of the ICP team. The ICP team leader coordinates the work of the team in collaboration with the Global Manager.

95. The Applicant considers this message from the Director to be a “mockery.” The Director testified before the Appeals Committee that it was not feasible to provide the Applicant with more specific TOR. She noted that the Applicant’s work program had remained essentially the same, that the generic TOR explained what was expected of the Applicant vis-à-vis his relationship with the Global Manager, Mr. X. The Director explained that precise TOR were not possible because the nature of the problems that the Global Office was facing every day was very different. She added that “of course, there were a number of announcements to the regional coordinators and others outside the Bank saying ‘[the Applicant] is in charge of this,’ ‘[the Applicant] is in charge of that,’ to make sure that there’s no confusion from the other side. Whenever something was going out of the department, we would check with [the Applicant].” The Manager of DECDG likewise testified that he did not think it was possible to create specific TOR for the Applicant given that the Team Leader position involves “juggling ... to make the program go.” He noted that it is for this reason that every Team Leader in DECDG has generic TOR.

96. In view of the above, the Tribunal cannot find that management's failure to give him precise TOR was retaliatory. No such precise TOR was given to the Applicant before he filed his appeal with the Appeals Committee. So it is not the case that management had previously given him a precise written TOR but stopped doing so once he had filed his appeal. It is also not the case that management gave a precise TOR to other Team Leaders but not to the Applicant. He received no different treatment in this respect. It appears that the core of the problem is not retaliation but lack of coordination between the Applicant and Mr. X, the Global Manager. The Applicant wanted to "restrain" Mr. X from getting involved in the work the Applicant was doing. The Applicant was discontent with the fact that Mr. X continued to serve as the Global Manager. It is questionable whether a precise TOR would have resolved the tension that existed between the Applicant and Mr. X. The Tribunal sees no evidence of retaliation here.

*Undermining the Applicant's role as Team Leader
and denying him access to data and software, and excluding him from important work*

97. The Applicant claims that DECDG management undermined his role as a Team Leader, as a form of retaliation. According to the Applicant, "[the Manager of DECDG] has taken to contradicting me on every possible occasion, including in front of other ICP members, when I am clearly right." The Applicant argues that the manner in which DECDG management undermined his role is evident from the following:

- (i) he raised concerns at an ICP meeting that one of the team members, Mr. R, was using Mr. R's own software to process data and was passing his software on to regions rather than using the "ICP Tool Pack," which had been developed for ICP. In the past, the Manager

emphasized that only the ICP Tool Pack should be used. But the Applicant asserts that now the Manager “contradicted me at the meeting and said he saw no problem with anyone developing their own software nor in passing it on”;

- (ii) since filing the appeal, the Manager “talked frequently to [Mr. R] (who is from the same country) behind closed doors. On one occasion they spoke in [their native language] in my presence when we were discussing a work related issue, particularly [Mr. R’s] lack of cooperation on Tool Pack Development”;
- (iii) Mr. R developed his own software and denied the Applicant access, and Mr. R “did not bother to copy me on his e-mails or respond to my e-mails to him”; and
- (iv) since filing his appeal, the Manager encouraged Mr. R and Mr. X to bypass the Applicant, and allowed team members to go directly to the Manager for mission approval without first clearing their TOR with the Applicant who was their Team Leader.

98. Mr. R explained before the Appeals Committee that his job was to provide technical support to the different regions and Regional Development Banks. He stated that he did not develop any additional software to undermine anyone or the ICP Tool Pack. He testified:

The software that I have developed goes beyond what Tool Pack is. And I don’t want to diminish tool pack, because I’m the architect of Tool Pack originally, as well. So, this is something that I’m not going to try to diminish

But the software that the Regions [and] I use it goes beyond what Tool Pack is doing. And we primarily had a limitation of time. When actually we needed to produce on time and schedule, and it was needed to be fast, and the features were not available in the Tool Pack. So, we needed to move ahead.

99. Mr. R also explained that he worked mostly with the regions, and they would sometime give him highly confidential data which he was under an obligation not to share with anyone, including the Applicant. The Applicant was only denied access to confidential data. He added that, if the Applicant wanted them, he could have simply asked the regions to share these with him. As for the e-mail messages, Mr. R explained that sometimes he did not respond to the Applicant's e-mail messages because he was on mission in the regions working under tight schedules, and sometimes he did not respond because some e-mail messages were "not very polite."

100. The Manager explained that in DECDG, management maintained a fairly open department and did not observe a strict line of command. He stated that staff members would quite often take matters directly to him, or to the Director. He noted that such was the case when Mr. X was the Team Leader, as well as after the Applicant became the Team Leader.

101. The Tribunal finds the explanations provided by Mr. R and the Manager of DECDG reasonable. DECDG management made the Applicant ICP Team leader in January 2007 knowing very well that he had decided to file an appeal with the Appeals Committee. Also in January, the Director announced the appointment of the Applicant as the ICP Team leader to the staff members and urged them to support and help the Applicant. The Tribunal is not convinced that management made him the ICP Team

Leader in January 2007 so that they could undermine him later as part of their design to retaliate against him.

102. The Applicant also claims that the managers excluded him from important work, such as coordinating with the new high level committee, the Friends of the Chair of the UN Statistical Commission. The Applicant complains that the Director nominated Mr. X to be the focal point. This is a discretionary decision of the Director and the Tribunal does not see any retaliatory motive for this decision.

The Ring Coordination

103. The Applicant claims that Mr. X repeatedly interfered with the Ring Coordination project so as to “sabotage” it, and that DECDG management did nothing to resolve the problem. The Applicant describes the Ring Coordination project as follows: “ICP is coordinated by regions. Regional comparison is done first and the regional results are linked using the co-called ‘Ring approach’ to produce globally consistent data.”

104. The Tribunal finds that Mr. X disagreed with the Applicant regarding the best approach for resolving the data problems that had emerged in relation to the Ring Comparison. The Applicant suggested an approach known as “market visit” in several different Ring countries; Mr. X suggested otherwise. The record, however, shows that the Manager and the Director intervened to resolve the problem, and ultimately Mr. X agreed to the approach suggested by the Applicant. For example, Mr. X raised the issue of funding for the “market visit,” stating that the ICP Trust Fund had no budget for that purpose. The Director then offered to cover the costs of the “market visit” from her Department budget, and, after discussion, it was agreed that the visits should proceed.

When some ICP Board members raised concerns about the “market visit,” the Director intervened and convinced them of the value of the “market visit” approach.

105. The Ring Comparison project was completed, but it was delayed. The Applicant claims that this was due to “systematic sabotage” by Mr. X with the approval of the Director. The Tribunal is not convinced. The Applicant himself views the Ring Comparison project as the most critical part of the ICP and if the Ring project failed so would the 2005 Global Round. The Tribunal does not see any reason why Mr. X, the Manager, and the Director would sabotage such an important project. The reputation of Mr. X and DECDG management depended on the successful completion of the Ring project. By sabotaging the Ring project, Mr. X and the DECDG management would have sabotaged the 2005 Global Round. The professional standing of the Applicant, Mr. X, the Manager, and the Director would have been equally affected by the alleged sabotage. The Tribunal finds no evidence of ill-motive in this connection.

Short-listing in 2008

106. The Applicant claims that DECDG management retaliated against him by not short-listing him for the Global Manager position in 2008. He claims that the Director herself hand-picked the members of the 2008 short-listing committee and that his non-inclusion on the short-list cannot be justified in view of his consistent good performance.

107. As discussed before, for the Global Manager position advertised in September 2008, some forty-five candidates applied, including the Applicant. HR and DECDG management screened the candidates and prepared a long-list of seven candidates that included the Applicant. The members of the ICP Subcommittee of the Executive Board served as the short-listing committee. The members included representatives from

Norway, the UN, Eurostat, the African Development Bank, Brazil, and Australia. After assessing the backgrounds and the suitability of the seven candidates on the long-list, the ICP Subcommittee prepared a short-list of three candidates for interview. The Applicant was not among the three who made it to the short-list. The Applicant submitted numerous reference letters in support of his candidacy. In the end, the ICP Subcommittee concluded that the Applicant's "leadership and communication skills were found wanting. He was not regarded as a team player nor able to work cooperatively with others. He also lacks credibility with the other partners in the international statistical system." The Tribunal notes that while it is true that the Applicant previously had a good performance record, he failed to maintain it after 2006. The Bank has submitted documents detailing the process the Subcommittee followed in making its decision. The Tribunal is not convinced that the ICP Subcommittee followed a retaliatory process in collaboration with DECDG management.

PIP

108. On 15 December 2008 the Bank informed the Applicant by a written memorandum that he would be placed on a PIP starting from 17 December 2008 through 31 March 2009. The memorandum stated that the PIP was necessary because the Applicant disregarded the feedback that had been "provided to [him] over the years, particularly, the behavioral aspect of [his] performance, and the need to improve [his] performance." The memorandum mentioned the Applicant's problems with respect to his work program delivery and workplace behavior.

109. Staff Rule 5.03, paragraph 3.02, states that: "If a staff member's performance is not satisfactory, the Manager or Designated Supervisor shall provide the staff member a

period to improve performance in the staff member's position." Under this Rule management can place a staff member on a PIP if it sees a continuous problem with a staff member's performance. The imposition of a PIP is a discretionary decision of management; as such, the Tribunal will interfere with or invalidate such an exercise of discretion if it can be shown that the decision was "arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure." *Sebastian (No. 2)*, Decision No. 57 [1988], para. 22.

110. The Bank states that the Applicant's performance started to suffer in 2006 when he allowed his disappointment at not being appointed as the Global Manager to consume him. He became increasingly preoccupied with his grievances and lost focus on his work and deliverables. His performance problems manifested themselves partly in the technical and substantive aspects of his work, but principally in the behavioral aspects of his work.

111. The Applicant contends that the Bank's claims with respect to his performance are "fabricated" and "retaliatory."

112. To examine whether there was a proper basis for the imposition of a PIP in December 2008, the Applicant's 2007 and 2008 OPEs are most relevant because the PIP was imposed after the end of the 2007 and 2008 OPE cycles. The 2007 OPE cycle covers the period from April 2006 to March 2007. The record relating to the Applicant's 2007 OPE, however, is not before the Tribunal. The Bank explains that "in 2007 he was so occupied with his grievance, and had become even somewhat unmanageable, that he refused to go through the OPE process, exempting himself on the excuse that his appeals

[before the Appeals Committee] were pending. Consequently Applicant had no OPE for 2007.”

113. The record of the 2008 OPE, covering the period from April 2007 to March 2008, is before the Tribunal. The Applicant participated in the 2008 OPE and his Manager (the Manager, DECDG) did discuss his performance with him. The Applicant, however, decided not to list any feedback providers in his 2008 OPE. Thus, his Manager collected feedback from the Applicant’s team members and his other co-workers on the Applicant’s performance.

114. The Applicant’s performance during the 2008 OPE cycle is documented in the 2008 OPE. With respect to his 2008 work programs, the Manager rated him on five key work programs: (i) methodological work – partially successful; (ii) program implementation – unsuccessful; (iii) ICP tools – fully successful; (iv) fund raising – fully successful; and (v) ICP Bulletin – fully successful.

115. Regarding the Applicant’s performance in “methodological work,” the Manager, DECDG, commented in the OPE that:

The most important work program in this area for the ICP team during the review period was to apply and adapt as needed the methodological procedures approved earlier by the ICP Technical Advisory Group to the data reported by the ICP regions in order to produce global results. ...

[The Applicant’s] work in this area was largely directed at the coordination of the team’s work. Unfortunately, his coordination efforts were not always seen as helpful; nor were they well received by the team and the final results were achieved mostly through individual efforts of team members.

For example, while [the Applicant] raised some pertinent questions concerning data quality and documentation in the Africa region, he did so in such a manner that easily resolvable issues resulted in extensive additional time and effort from the team to resolve. One of the more complex technical components of this round of the ICP was that data on

government compensation were adjusted for productivity in three regions. Asia was the first region to adopt the use of the productivity adjustments. The analysis was done by the World Bank, reviewed and accepted by two members of the Technical Advisory Group, and finally approved by the Regional Advisory Board. [The Applicant] was present during the TAG and regional review and approval process. However, after the Asian region published its results, [the Applicant] started questioning the data and raised issues that took valuable time away from the publication of the global report. None of the issues he raised had merit, and the data as published by Asia were used for the Global report.

116. Regarding the Applicant's performance in "program implementation," the Manager commented that:

The most significant and priority activity under this item during the review period was to produce the global results, which was the culminating task of the entire project and which required a concerted effort by the entire team. This included the release of the preliminary results in December 2007 and the final results in February 2008. [The Applicant] took on only a limited number of activities during this intense period when the team was producing the final data and reports. He contributed, only by reviewing the publication one time and added some material about the uses of the data. He did not comment about the publication for the remaining stages of the review. In general, he withdrew from this work, providing little or no support to the team or untimely or non-constructive inputs, which has been noted by the team members as a considerable impediment to their success and to the overall working environment. For example, a number of e-mails were sent out from [the Applicant] to the team and wider audience accusing team members of fabricating data, which was very demoralizing for the team and disruptive to the heavy and critical work plan the team was trying to follow.

117. As for overall feedback, the Manager commented that:

This has been an intense and critical period for the ICP Team as they brought the price data collection of the 2005 Round of ICP to closure and produced the final results. Extensive internal coordination and external partnership and consensus building were required by all members of the team. The sheer volume of work and products to deliver was heavier than in any other period. Unfortunately, [the Applicant] was not successful in delivering the key areas of work described above nor did he contribute his share in producing the ICP results. During this period, several meetings took place with the team and individually with [the Applicant] to clarify the work and the workplace behavior expectations from the team as a whole and from specific individuals on the team. [The Applicant] was

informed on November 28, 2007 and January 8, 2008 and again March 10, 2008 of the performance areas that he needed to improve, including his work program outputs and workplace behaviors and communications with colleagues within the team and the Bank, and with partners outside the team. Unfortunately, [the Applicant] chose not to accept this feedback indicating that he considered it retaliatory in nature. Therefore little progress was made during the performance period in these areas. As [the Director] and I have noted to [the Applicant] on many occasions, effective working relations are critical and he has to improve on this front. At [the Applicant's] request and in the interest of reaching an effective outcome, we used the services of a facilitator on several occasions over the past months. We have also tried to reassure [the Applicant] that he would have our support in his effort to achieve a successful outcome and suggestions included individual coaching or mentoring were given to him.

118. The Director, DECDG, commented in the 2008 OPE that:

I concur with [the Manager's] assessment. I have personally engaged with [the Applicant] to help him bring his performance back to a satisfactory level. [The Manager] and I will continue our efforts for [the Applicant] to improve his performance, as well as provide him with our support. We remain hopeful that [the Applicant] will once again become a fully contributing member of the DECDG team. In any event, while monitoring his progress, if it turns out that his performance does not return to a satisfactory level, we may have to proceed with a formal performance improvement plan (PIP) process in accordance with the staff rules.

119. The performance issues with respect to the Applicant's behavior are well recorded. It cannot be denied that the Applicant's criticism of Mr. X was less than professional – indeed arguably *per se* grounds for dismissal. For example, in an e-mail message sent to the Director in December 2006, as noted before, he questioned how the Bank could justify keeping “an absolutely incompetent, spectacularly dysfunctional and shamelessly wasteful white man” as the Global Manager.

120. Mr. R, a colleague of the Applicant, testified that he found the Applicant's communication with him to be “not very polite,” “unpleasant” and a “distraction” to his work. Another senior manager in DECDG, Mr. S, also testified to the effect that the Applicant was not professional in his exchanges with his colleagues. He testified that:

And so what seemed like a fairly small managerial interaction would suddenly turn into a volume of e-mail, with many of these same accusations repeated in it that, “I’ve never been given credit. You know that I was always the one who did ... this, and this and this. [Mr. X] has never done anything to help this program along.” And that just didn’t seem useful.

121. On 10 October 2007 while the Applicant’s appeal was pending before the Appeals Committee, he sent the following e-mail message to one of the ICP Board members (copying the Chair and two other members of the Board):

I hope that you would manage to participate in the US court in Maryland where I am taking the ICP Board and its members to court. As you know membership to the Board is strictly based on personal capacity. ... Given that and the fact that the NY [Board] meeting was held in a hotel (not in the UN or WB buildings) and that all Board members were in the US for more than 24 hours in February provide me a venue to take the case to the US court, which is under preparation.

122. In an e-mail message to the Director of DECDG, the Chair of the Board stated that he found the Applicant’s message “offensive and threatening.”

123. On 19 November 2007 while his appeal was still pending, the Applicant sent an e-mail message to a large group of people outside the Bank, more than forty individuals who are mostly officials of various governments, threatening “to take the Board to a US court.” He stated in the message that:

[T]he Board’s flagrant abuse of its authority represents a travesty of justice that should not be allowed to stand unquestioned. Mine is a question to be judged by the merits of my contribution. Nothing more! And most definitely, nothing less! This is a basic human right. Anyone who violates this would not remain standing to tell the tale. Let that go on the record!

124. According to Mr. X, the e-mail message was “extremely bizarre behavior” because it was sent to the “United Nations Working Group commissioned to do an evaluation of the ICP.” The Chair of the ICP Board sent an e-mail message to the

Director of DECDG stating that the Applicant's e-mail message worried him deeply and it caused him "a few sleepless nights." He also informed the Director that the other Board members were also very concerned.

125. The Applicant rejects all the performance problems identified by DECDG management. He considers them all to be "fabricated" and "retaliatory." But he fails to provide any convincing evidence for the Tribunal to conclude that the PIP was retaliatory. Management brought to his attention numerous times the problems with his performance and warned him that if he did not improve, management would consider a PIP as an option. Management participated in the intervention by the offices of the Ombudsman and Mediation to resolve his issues but nothing was resolved. According to Mr. S, the Applicant's colleague of more than ten years, the Applicant "felt very strongly that ... mediation wasn't possible, that he felt that he needed to be vindicated in his claims, and he wanted to take it to a sort of higher authority in order to get that kind of vindication, rather than to negotiate it out." In the Applicant's own words, his case is "a battle for the heart and soul of the Bank. Win or lose the battle or the war, I am prepared to fight," and he is "prepared to leave the Bank, but not without a fight." The record suggests that DECDG management explored the possibility of reassigning the Applicant elsewhere, but according to the Bank, the Applicant "scorned the attempt to reassign him when it was broached to him."

126. When management sees continuous problems with a staff member's performance, a PIP is a reasonable course to take. The Applicant is not immune from being placed on a PIP simply because he filed an appeal with the Appeals Committee. The Tribunal stated in *O*, Decision No. 337 [2005], para. 49:

Although staff members are entitled to protection against reprisal and retaliation, managers must nevertheless have the authority to manage their staff and to take decisions that the affected staff member may find unpalatable or adverse to his or her best wishes. The “Tribunal accepts that it is not always easy for an applicant to produce evidence to support a claim of retaliation” (*Harou*, Decision No. 273 [2002], para. 68). Nevertheless, the Staff Rule on the Management of Unsatisfactory Performance is a legitimate rule and the fact that a staff member has made a good faith complaint about alleged irregularities does not confer any immunity upon that person from managerial authority. An allegation of retaliation is an allegation of very serious impropriety on the part of the alleged perpetrator and the Tribunal should not lightly find retaliation when a manager has made a difficult decision in relation to a staff member, simply because some time before, that staff member had had a troubled relationship with another manager.

127. This is not a case where the Applicant filed an appeal and management put him on a PIP on the next day. He told management in December 2006 that he would file an appeal and did so in February 2007. The PIP was only imposed in December 2008. During the intervening 22 months, the record does not show that management sought to retaliate against the Applicant. On the contrary, management made him the ICP Team Leader and in February 2007 proposed his candidacy as a Global Manager to the ICP Executive Board. The record shows that the Applicant had performance problems and management brought his weaknesses to his attention on numerous occasions, but the Applicant saw everything through the prism of retaliation and was apparently unwilling to accept any criticism. Given these circumstances, and the record before it, the Tribunal is not convinced that the PIP was retaliatory.

128. The Tribunal notes that it is precluded from reviewing the Bank’s conduct during the PIP period as well as its subsequent decisions regarding the Applicant. The Bank offered the Applicant the possibility of joining complaints about the PIP process and subsequent decisions to the present case, but he declined; he wrote to the Tribunal stating

that he intended to challenge the subsequent decisions separately, either before this Tribunal or before a US court. Accordingly the Tribunal has limited its review of the PIP to the question of whether its imposition was retaliatory.

DECISION

For the reasons given above, the Tribunal dismisses the Applicant's claims.

/S/ Jan Paulsson
Jan Paulsson
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 23 March 2010