

Decision No. 271

Manuel Conthe,
Applicant

v.

International Bank for Reconstruction and Development,
Respondent

1. The World Bank Administrative Tribunal has been seized of an application, received on October 9, 2001, by Manuel Conthe against the International Bank for Reconstruction and Development. The case has been decided in plenary session with the following members of the Tribunal participating: Francisco Orrego Vicuña, President; Thio Su Mien and Bola A. Ajibola, Vice Presidents; and A. Kamal Abul-Magd, Robert A. Gorman and Jan Paulsson, Judges. The case was listed on September 13, 2002.

2. The written materials produced in support of the application are exceptionally voluminous. The dispute is also unusual in terms of the hierarchical level at which it has arisen; the Applicant was a Vice President and reported directly to a Managing Director. Moreover, his allegations are grave: in his own summary phrase, they constitute “a knowing violation of the Bank’s Rules by the Bank’s Senior Management.” He goes so far as to state that Bank officials in their actions in relation to him exhibited a degree of dereliction of duty which in some countries would expose them to criminal sanctions. At any rate, the object of the application is quite precise; it challenges decisions taken on June 12, 2001, to the effect that the Applicant was:

- terminated as Financial Sector Vice President;
- reassigned as Special Advisor to the Bank’s Chief Financial Officer; and
- not confirmed as Regular staff.

The Applicant also complains that he was denied just compensation from 1999 to 2001, and that he was given “disparate treatment.”

3. Given the length of this Judgment, it is organized under headings as follows:

Factual summary: paragraphs 4-38

Procedure: paragraphs 39-44

Legal bases of the grievance: paragraphs 45-55

Fairness in “managing” the Applicant’s performance: paragraphs 56-107

Alleged harassment, misconduct and retaliation: paragraphs 108-131

Alleged lack of support: paragraphs 132-133

Alleged illicit investigation by the President of the Bank: paragraphs 134-139

Reassignment: paragraphs 140-163

Alleged salary discrimination: paragraphs 164-165

Propriety of the March 2000 Update: paragraphs 166-185

Factual summary

4. After having been a senior civil servant in Spain, where he served *inter alia* for seven years as the Director General of the Treasury, the Applicant was recruited by the Bank and took up his position as Vice President for

Financial Operations – as the first incumbent of that newly created post – on April 1, 1999. (The position was soon to be renamed Financial Sector Vice President (FSVP); its remit, as described by the Applicant, was “financial sector reform.”) Barely two years later, his relationship with the Bank came to an unhappy end. No one can disagree that this was an unfortunate experience for both the Applicant and the Bank. The controversy is whether the Applicant was treated in violation of the Staff Rules. Broadly, the Applicant contends that he was ultimately the victim of ill-will and retaliation on account of his zeal in pursuing the stated objectives of the Bank; the Bank considers that the Applicant failed to exhibit requisite managerial skills and therefore proved himself unsuitable for his post.

5. The Applicant was hired pursuant to an Open-Ended appointment subject to confirmation. The probationary period was to last up to two years, i.e. up to April 1, 2001. The language used in the letter offering him the appointment, dated March 19, 1999, was as follows:

In accordance with World Bank Group policy, your appointment will be subject to a probationary period of up to two years.

6. Early in the autumn of 1999, after the arrival of a new Managing Director of the Bank, Jeffrey Goldstein, to whom the Applicant reported directly, the Applicant was informed by the then Vice President of Human Resources (HR), Richard Stern, that the Human Resources Department would conduct a 360 Degree Feedback Report on him. The Applicant provided to Aulikki Kuusela, an HR Manager, a list of suggested persons to be interviewed. Eight of the Applicant’s “peers and managers” were interviewed, as well as five subordinates. The four-page, single-spaced Report of this exercise recorded a number of positive comments, such as “[e]xcellent technical skills,” “brilliant intelligence,” and “fresh views,” but also some criticisms, such as:

- Management style characterized as open, but appears hierarchic and somewhat control-oriented to some subordinates and peers;
- Perceived by several colleagues and subordinates as not listening, which in turn is interpreted as not wanting advice or tolerating criticism;
- Need to engage openly in discussions to listen and learn where people are coming from before forming or expressing a strong view; and
- There is uneasiness and a lack of clarity in the Vice Presidency about what will happen to the organization in the future (job insecurity).

7. The Applicant has no complaints about this Feedback Report, which was dated “November 1999” and which he says he was given “late in November.” He states that he “took the recommendations to heart and made his best effort to put them in[to] practice.”

8. According to the Applicant, Mr. Stern called him in late January or early February 2000 to say that a new 360 degree feedback exercise would be initiated with respect to him. There was no written confirmation of this announcement. The Applicant affirms that he was surprised at the message because of the closeness in time to the previous Report, but did not “pay much attention” to it. Mr. Stern, who has since retired from the Bank, has provided a written declaration in which he states that the idea of Ms. Kuusela “go[ing] back to some of the people she had interviewed a few months earlier” for an update was “suggested” by him to the Applicant, who “responded favorably.” There is no way to determine with certainty which version is more accurate.

9. The upshot of this initiative is an important element of the Applicant’s complaint and will be referred to below as the “March 2000 Update.” Ms. Kuusela describes it as follows in her written declaration submitted by the Bank:

In early March 2000, Mr. Stern contacted me to update the 360 Degree Feedback Report that I completed in November 1999. I was asked to go back to as many of the original feedback providers as possible and inquire how Mr. Conthe performed in the last few months. This was an informal process

and I was not asked to follow any specific procedures. Mr. Stern indicated that the views of staff would be used as input to the assessment of Mr. Conthe's performance. I was to deliver the feedback to Mr. Goldstein, who would share it with Mr. Conthe in the [Overall Performance Evaluation] discussion they would have shortly thereafter.

Due to heavy operational travel schedules of the original feedback providers during the 2nd week of March 2000, I was able to contact and meet with about half of the group, still representative of each category of providers – peers, direct reports, and designates outside the FSVPU. At this juncture, the feedback was much more negative than in November 1999. Some staff felt that the situation had not improved. Others thought that things were getting worse. The patience, optimism and encouraging tone that I observed a few months before was gone. A number of people expressed doubt that Mr. Conthe would be able to absorb the feedback that he was given. The staff within the FSVPU felt that their unit was increasingly fragmented, with little direction and virtually no cohesion. Mr. Conthe was not able to manage in an inclusive manner and had trouble building effective collaboration within the VPU. A few noted concerns about confidentiality of their comments. They feared that even if their names were not used, he would be able to determine who made certain observations and hold the comments against them. I assured them that HR would make every effort to ensure their confidentiality.

10. On April 4, 2000, the Applicant says that he was asked to go to Mr. Goldstein's office, where Mr. Goldstein expressed an apparent concern as to the Applicant's satisfaction with his job as well as a suggestion that he might fit in better elsewhere in the Bank. He alleges that Mr. Goldstein referred to "preliminary results from your second 360 Degree Report" indicating "significant problems of behavior." The Applicant states that he "expressed disbelief," asked for further details about feedback of which he had not been apprised, and noted that he had not been involved in the organization of the exercise "as was required." He describes the meeting as "heated" and as ending on a "conflictual note." Mr. Goldstein's version does not *per se* contradict the Applicant's; he states that the Applicant "indicated that he was being evaluated too frequently and that the Bank was obsessed with feedback," and that Mr. Goldstein told the Applicant "that he clearly needed to change certain behaviors to become a more effective manager."

11. At their next weekly meeting, on April 11, the Applicant says he told Mr. Goldstein that he would refuse to have a discussion about partial findings of a 360 Degree Report which he had not seen and "even more gallingly, had been leaked." Mr. Goldstein confirms this refusal on the part of the Applicant.

12. The same evening, the Applicant e-mailed Mr. Stern to raise some questions with respect to "My 360" which he had understood from Mr. Goldstein was "already finished." He asked for a copy:

so that I am in a position to present to him quickly a plan to address the weaknesses identified by the Report (apparently there are quite a few).

He went on to write that the most "worrisome" finding was that "my performance as Chairman of the FS Board is not good and members feel disenfranchised and not listened to (my rendition of Jeffrey's words)." He concluded that:

I would like to show them that "I have understood the message," that I am on the mend (I hope!), and that creating a cohesive and friendly FS Board team will be my top priority.

13. He reiterated his request for a copy two days later, and was informed by e-mail that the Report was being checked to ensure the preservation of the anonymity of the contributors; Mr. Stern added that "I hope that we can give it to you tomorrow."

14. "Extremely concerned" about the "leak" of an apparently unfinished Report, the Applicant informed Mr. Goldstein the next morning that he felt there had been an apparent breach of the Code of Ethics by the HR Vice Presidency, and requested an inquiry. He sent a copy of his request to the Managing Director in charge of the HR Vice Presidency, Shengman Zhang, as well as to the General Counsel and the Auditor General.

15. On April 15, the Applicant wrote an e-mail to the President of the Bank, James D. Wolfensohn, under the

heading “Request for a private meeting,” stating that he wished to explain why he had requested a confidential investigation of a “potential breach of the Code of Ethics by the HR Department.” He referred to it as an “HR plot I have denounced.” He asked Mr. Wolfensohn to withhold judgment on this initiative until they met. He also indicated that he wanted to “talk about the future,” and a “challenging work program” which I “can and will deliver.”

16. The meeting with Mr. Wolfensohn took place on Monday, April 24. Three days later, the Applicant wrote a detailed e-mail to Mr. Wolfensohn, with a copy to Mr. Goldstein, purporting to summarize his conclusions from the meeting, preceded by the words: “I am determined to follow your advice and change my behaviour.” This e-mail, containing what the Applicant himself referred to as his “Easter Resolutions,” is quoted verbatim below (see paragraph 71 *infra*).

17. The Applicant decided to comply with the President’s wish (as he says he understood it) to withdraw his request for an investigation. He did so by an e-mail dated April 30, 2000, and worded as follows:

This is to confirm that I withdraw the request I made to you on April 14 for an investigation into the conduct of the HR Department. Furthermore, I do not have the slightest objection to be the subject, in two or three months, starting from scratch, of a new, second 360 report.

I fully agree that this brings to a close the unfortunate misunderstanding around the updating of my first, November 360 report.

18. He now says that he acted in the belief that “the withdrawal of his personal request for an investigation would not detract from the Bank’s interest in pursuing the case,” and criticizes the Bank for not having continued the inquiry at its own initiative. At any rate, the March 360 Report was put to the side, and “a new, second 360 report ... starting from scratch” – to use the Applicant’s words – was indeed conducted, although it was not concluded until February 2001. (As to the timing, see paragraph 29 *infra*.)

19. The Applicant considers that his relations with Mr. Goldstein deteriorated from May 2000 onward. Be that as it may, in the context of the Applicant’s Overall Performance Evaluation (OPE), Mr. Goldstein did assess the Applicant as “fully successful” with respect to “results.” Mr. Goldstein’s assessment of “behavior,” on the other hand, included two “partially successful” notations with respect to “people management.” (The five possible ratings are: unsuccessful; partially successful; fully successful; superior; and outstanding/best practice.)

20. Two comments by the Applicant in his own OPE merit quotation. The first one, which the Applicant states “probably well captured” his “own assessment of his performance,” is the following:

I find that my performance has been remarkable.

The second is this:

[T]he Bank [is] an institution which I consider poorly organized, not well managed and inimical to good performance.

21. Mr. Goldstein signed the Applicant’s OPE on June 19, 2000; the Applicant did so the next day.

22. In the course of a further meeting with the President – the purpose of which was, in the Applicant’s words, “to discuss performance” – on June 21, 2000, the Applicant alleges that the President expressed acute criticism of the Applicant’s comments in his OPE with respect to the organization and management of the Bank.

23. As the months went by, the Applicant says his weekly meetings with Mr. Goldstein took on a repetitive and negative cast, with Mr. Goldstein questioning the Applicant’s ability to generate good staff morale and the Applicant explaining that his staff’s “malaise” was the consequence of “deeper, more structural causes, which were only under Senior Management’s control.”

24. The Applicant and Mr. Goldstein also had fundamental policy disagreements about the budget process. The Applicant says he was taken to task by Mr. Goldstein for “functional insubordination.”

25. In the summer or early fall of 2000, as a result of a suggestion from Mr. Goldstein which was, the Applicant says, “gladly accepted” by him, Mr. Lorne Blackman, a management consultant, was chosen to act as the Applicant’s “personal coach.” As part of his task, Mr. Blackman met with all regional members of the Financial Sector Board, as well as the directors and senior advisor who comprised the Applicant’s “front office.” On October 16, 2000, Mr. Blackman sent the Applicant the text of his “summary of the key issues emerging from my interviews” (hereinafter referred to as the “Blackman Summary”). Mr. Blackman indicated, by way of introduction, that the purpose of the interviews had been:

to get their perspectives on how things are working in the function and in your role as leader of the financial sector.

26. The Blackman Summary is too lengthy to be reproduced or even paraphrased here. Suffice it to say that while it recognized the Applicant’s abilities and expressed a constructive view (“you have a foundation to build from”), the Summary contained serious criticisms, e.g.:

- “none of the regional FSB directors take their relationship with [the Applicant] seriously.”
- “very low morale of staff in the anchor units.”
- “he does not develop the relationships needed to make things happen in the World Bank.”
- “[the Applicant] does not hear us. He comes in with a strong position on issues and says that he is willing to listen, but there is no change in his position.”

27. Ten days after receiving this Summary, the Applicant forwarded it to the Financial Sector Board and to Mr. Goldstein with the following brief comment:

Many thanks for your help. Although I tend to share Paul Siegelbaum’s famous skepticism about the “perfectibility of human nature,” I will do my best to meet your expectations and change for the better.

28. In December 2000, the Applicant proposed a structural modification of the Financial Sector Vice Presidency which would have had the effect that he no longer reported to Mr. Goldstein. This proposal was articulated, in the Applicant’s expression, on a “business rationale,” but was “dismissed summarily” by Mr. Goldstein.

29. What became the Applicant’s 360 Degree Feedback Report for 2001 was in fact initiated in late 2000. The Applicant chose to select the maximum number of “feedback providers” – 15 for each category rather than the usual three. This may explain why the Report was not delivered to the Applicant until February 22, 2001.

30. The Applicant considers that the 2001 Report was overall “very positive” with the exception of Mr. Goldstein’s ratings, which he describes as “consistently the lowest in almost all categories.” Nevertheless, when he met with Mr. Goldstein, he found that the latter interpreted the Report as indicating “clear managerial weaknesses.” Mr. Goldstein disregarded averages, and argued that the mere presence of low scores was significant. The Applicant responded that his selection of the maximum number of feedback providers had been designed precisely to reduce “sampling bias” and to yield “more representative” averages. The Applicant says that he told Mr. Goldstein that the latter’s appearance in the Report as a negative “consistent out-lier” confirmed his “unbalanced attitude” toward the Applicant.

31. The 2001 Report, in addition to a number of comments praising the Applicant’s skills, particularly on an intellectual level, as well as his drive and candor, contains a number of quite critical ones, including the following two from persons designated by the Applicant:

- “He is sometimes stubborn and unwilling to change his positions even in the face of overwhelming disagreement (by his own staff).”
- “Manuel is an intellectual and this colors his approach to communication – it is not always 100 percent clear as to where he is heading when he is engaged in his more speculative or philosophical discourses.”

32. Another feedback provider, identified only as someone who reported directly to the Applicant, was yet more sharply negative:

- "Sees only what he wants to see. Does not learn from feedback or experience. Divides everyone into two groups: supporters or incompetents.

Open to manipulation by others. Believes that leadership is forcing his ideas on others."

33. On March 15, 2001, the Applicant met Mr. Wolfensohn to discuss his 360 Degree Report. According to the Applicant, the President not only sided with Mr. Goldstein, but

went even further and argued that, during the recent past, he had conducted "*his own personal and extensive investigation*" about the Applicant's professional career in Spain's Ministry of Finance and talked to various people. He would not disclose his sources, but indicated that they were at a rather senior level. And his findings were that the Applicant had a history of conflict with other Government officials. (Emphasis in the text.)

34. The Applicant avers that he "challenged" Mr. Wolfensohn to give more specific information, but that the latter "gently declined."

35. In the course of a number of conversations in May 2001, senior managers of the Bank (Messrs. Wolfensohn, Goldstein and Zhang; and the Vice President of Human Resources, Katherine Sierra) made it clear to the Applicant that he would not be confirmed in his position due to his alleged lack of managerial skills, leaving open the possibility that he might stay on as a senior advisor.

36. On June 1, 2001, the Applicant wrote an e-mail to Messrs. Zhang and Goldstein, as well as to Ms. Sierra, stating that the "constant" element of these discussions was his "forcible and unilateral termination as Vice-President" and requesting

in accordance with the Staff Manual and Principles of Employment, that I am *notified in writing* of any decision (and the reason for it), past or future, which, directly or indirectly, entails my termination as Financial Sector Vice-President. (Emphasis in the text.)

37. On June 12, 2001, Mr. Goldstein wrote to the Applicant as follows (*in extenso*):

As you have requested, this will serve to confirm the recent conversations I have had with you regarding your performance.

For more than a year, we have had conversations in which I have indicated my concerns about some aspects of your performance. You have been provided with various forms of feedback over this period, all of which have been part of a constructive effort to enable you to understand the nature of the concerns and to make necessary improvements. These concerns, which center on the need to improve your managerial practices and approaches, are of critical importance for someone in the senior managerial position you occupy.

I very much regret that you have been unable to demonstrate sustained improvement in your performance in this regard. While I recognize you have made some efforts toward improving your management, it is my judgment that these have been insufficient. Your keen intellect and broad knowledge are widely recognized, but they are not matched by your managerial competencies. I have, therefore, asked the Vice President, Human Resources, Katherine Sierra, to exercise the authority granted under Staff Rule 5.01, "Reassignment," para. 2.03, and to reassign you to a non-managerial position by July 1. We would also be willing to consider providing support for a position outside of the Bank for up to a year, but you must act promptly in identifying such a position.

In taking this action, I am confident that it is in the interests of the Bank that this reassignment occur. Please do not hesitate to contact me if you wish to discuss this matter further. You should expect to hear from Ms. Sierra shortly.

38. The same day, Ms. Sierra wrote to the Applicant as follows (*in extenso*):

Based on the request of your manager, Jeffrey Goldstein, and in accordance with the provisions of Staff Rule 5.01, "Reassignment," this is to advise you of my decision to reassign you to the position of Special Advisor reporting to the Senior Vice President and Chief Financial Officer, Mr. Gary Perlin, effective July 1, 2001.

This position will focus on the financial structure of the Bank Group support for development in light of broader MDB and financial market experiences. More detailed terms of reference will be provided by Mr. Perlin.

The President and senior management of the Bank believe this is a position of critical importance in which your experience and intellectual leadership can be utilized to best advantage. Please be aware you have not been confirmed in your current assignment, and that the issue of confirmation will be reviewed again in one year.

Procedure

39. On the evening of the same day (i.e. June 12, 2001), the Applicant sent an e-mail to the Board of Executive Directors requesting the Board to open an investigation into the conduct of Messrs. Wolfensohn, Goldstein and Zhang with respect to "potential violations of the World Bank's Code of Professional Ethics." By a joint letter to the Applicant dated June 14, 2001, the then Dean of the Board, Mr. Andrei Bugrov, and the then Chairman of the Personnel Committee, Mr. Moisés Pineda, informed the Applicant, on behalf of the Board, that "it would not be proper for the Board to conduct ... an investigation in an individual personnel dispute or claim" and that the proper forum for such a dispute would be the Bank's Conflict Resolution System.

40. On July 10, 2001, as envisioned in Article II, paragraph 2(i), of the Tribunal's Statute, the Bank agreed to the Applicant's request that he be permitted to submit an application directly to this Tribunal without exhausting prior remedies available within the Bank Group. As mentioned in paragraph 1 *supra*, the application was submitted on October 9, 2001. In the meantime, on July 12, 2001, the Applicant requested the Department of Institutional Integrity (INT) to conduct a separate investigation into allegations that he had raised in his e-mail of June 12, 2001 to the Board of Executive Directors. On August 3, 2001, the Director of INT, Mr. Maarten De Jong, informed the Applicant of his decision not to proceed with such an investigation on the basis that the Applicant's allegations were "inextricably intertwined with the personnel grievance that you have said you intend to file with the Administrative Tribunal."

41. The usual exchange of written pleadings took place before the Tribunal. Pursuant to various orders of the Tribunal, each party produced certain documents requested by the other party. An additional written statement submitted by the Applicant at his own initiative was added to the record by the Tribunal. Moreover, pursuant to Rule 23 of the Rules of the Tribunal and with the Tribunal's permission, the World Bank Group Staff Association submitted a brief as *amicus curiae*, dated March 4, 2002, and amended on March 11, 2002. Both parties were given the opportunity to provide written comments on the Staff Association's brief, and both did so.

42. The Applicant requested in his pleadings that the Tribunal order Ms. Katherine Sierra, Mr. Gary L. Perlin, Mr. Maarten De Jong and Ms. Aulikki H. Kuusela "to appear for depositions." The Respondent argued in turn that "oral testimony from these staff members [was] unnecessary." The Tribunal decided "to deny the Applicant's request for depositions, but instead to appoint, pursuant to Rule 17 of the Rules of the Tribunal, a fact-finding investigator for the purpose of investigating certain disputed questions of fact." The Tribunal did so by an Order dated April 26, 2002, which reads *in extenso*:

Appointment of investigator

The Tribunal appoints Sir Robert Yewdall Jennings, former President of the International Court of Justice and former Whewell Professor of International Law at the University of Cambridge, as the fact-finding investigator in the case submitted by Manuel Conthe against the International Bank for

Reconstruction and Development. Mr. Nassib G. Ziadé, Executive Secretary of the Tribunal, will serve as Special Assistant to the Investigator.

Scope of investigation

The investigation will be strictly limited to the following three issues:

- (i) when and to what extent the Applicant was informed of any deficiencies in his managerial abilities;
- (ii) whether the use of the 360 Degree Feedback processes was normal and whether such processes were put in place to serve legitimate objectives; and
- (iii) whether the President of the Bank conducted an investigation regarding the Applicant without the Applicant being informed, and whether the information obtained from any such investigation was used as a justification to reassign the Applicant.

Selection of persons to be interviewed

The investigator will select the persons to be interviewed and will communicate their names to the parties.

Confidentiality of interviews

All interviews will be conducted in private and the interviewees will be given assurances of confidentiality.

Transcripts of interviews

The interviews will be transcribed for the sole purpose of assisting the investigator in preparing his report. The Tribunal may examine the transcripts *in camera* if the President of the Tribunal determines that such examination is absolutely necessary.

Report

The investigator will prepare a written report presenting his findings and conclusions. The report will be submitted to the Tribunal. A copy of the report will be communicated to each party for its comments thereon.

43. Having reviewed the written pleadings, Sir Robert selected twelve present or former staff members to interview. These persons were, in alphabetical order:

1. Ms. Benedicte M. Boullet
2. Mr. Manuel Conthe
3. Mr. Jeffrey Goldstein
4. Ms. Aulikki H. Kuusela
5. Mr. John Denis Lavelle
6. Mr. Alphonsus J. Marcelis
7. Ms. Ann E. Rennie
8. Mr. Sven Sandström
9. Ms. Katherine Sierra
10. Mr. Richard Stern
11. Mr. James D. Wolfensohn
12. Mr. Shengman Zhang

44. All the interviews took place on the premises of the Tribunal Secretariat in Washington, DC during the period of June 7-12, 2002. Counsel for the Applicant and the Respondent presented themselves at the

Tribunal's Secretariat on August 20, 2002, and were each given, simultaneously and by hand, a copy of the investigator's report (hereinafter the "Jennings Report"). Each party was at that time also given the opportunity to make written comments on the Jennings Report. Both parties availed themselves of that opportunity and the proceedings were thereafter closed.

Legal bases of the grievance

45. The Applicant invokes first of all the terms of his appointment; see paragraph 5 *supra*. Secondly, he invokes Principle 2.1 of Staff Employment (which is quite understandably and properly stressed by the Staff Association in its *amicus* brief):

The Organizations shall at all times act with fairness and impartiality and shall follow a proper process in their relations with staff members.

46. Next, the Applicant refers to a number of sources of norms which he contends were violated with respect to specific elements of his grievance:

- Staff Rule 4.02 relating to probation;
- Staff Rule 5.01 relating to reassignment;
- Staff Rule 5.03 relating to performance management procedures;
- the Code of Professional Ethics; and
- the Standards and Procedures for Inquiries and Investigations.

47. He also invokes a number of texts which clarify these norms, such as internal documents interpreting the Staff Principles and Rules, e.g. a "checklist" for managing staff on probation, a study of issues pertaining to non-confirmation, and a memorandum on the use of 360 Degree Reports.

48. The Tribunal's purpose in examining allegations of wrongdoing by the Bank is not to conduct inquiries of general interest, but to determine whether they support the Applicant's specific requests for relief. There is clearly one dominant issue in this case: did the Bank's treatment of the Applicant violate his rights in such a manner as to vitiate his reassignment to a post other than the one he had accepted? The principal factual controversies in this case are wholly focused on this question, and naturally revolve around the propriety of the Bank's determination that the Applicant's performance did not warrant confirmation in 2001.

49. Staff Rule 4.02 ("Probation") provides as follows in paragraph 2.02:

During the probationary period, the designated supervisor shall:

...

(b) at the end of each six months of the probationary period, or earlier, share with the staff member a written assessment of the staff member's suitability and progress based on achievement of the work program, technical qualifications and professional behaviors; and

(c) at the end of the probationary period complete a performance review in accordance with provisions of Rule 5.03, "Performance Management."

50. Paragraph 3.02 of Staff Rule 4.02 establishes that:

The manager shall determine the staff member's suitability or non-suitability for confirmation based on an assessment of the staff member's achievement of the work program, technical qualifications and professional behaviors.

51. The relevant provisions of Staff Rule 5.03 ("Performance Management Process") are paragraph 2.02, which

defines the annual review procedures as follows:

- (a) At least once in a twelve month period, the designated supervisor and the staff member shall meet and discuss the staff member's performance, achievements, strengths, areas for improvement, and future development needs. In exceptional circumstances, the Vice President, Human Resources, may require that performance evaluations be completed by designated supervisors more or less frequently.
- (b) The designated supervisor shall provide the staff member with a written summary assessment of the staff member's performance during the review period.
- (c) The designated supervisor, in consultation with the staff member, shall establish in writing the development priorities for and the results to be achieved by the staff member during the upcoming review period.

and paragraph 3.02 ("Procedure for Management of Unsatisfactory Performance"):

- (a) If a staff member's performance is not satisfactory, the designated supervisor shall provide the staff member a period to improve performance in the staff member's position.

52. The Applicant notes that the Bank's *Checklist for Managing Staff on Probation* states that feedback to a staff member who is not meeting expectations should be "detailed, acknowledging the areas of strength and highlighting areas in need of improvement."

53. He also invokes an internal Bank document which concludes that non-confirmation must be:

- supported by relevant facts;
- consistent with applicable procedures; and
- consistent with notions of due process.

54. According to the Applicant, the Bank failed to respect these norms in its dealings with him.

55. In the interest of clarity, it is important to distinguish the two main strands in the Applicant's presentation. The Tribunal first examines whether the Bank failed to fulfill its duty to "manage" (i.e. monitor and evaluate) the Applicant's performance in a proper fashion. Only then will it examine the Applicant's claims of harassment, misconduct and retaliation. A number of incidental grievances will be examined at the end of this Judgment.

Fairness in "managing" the Applicant's performance

56. Staff Rule 4.02, paragraph 1.02, establishes that: "The intent of the probationary period is to assess the suitability of the Bank Group and the staff member to each other."

57. The Tribunal had the occasion to give further content to this provision as long ago as in *Buranavanichkit*, Decision No. 7 [1982], where it said, at paragraph 26:

Probation has as its purpose the determination whether the employee concerned satisfies the conditions required for confirmation. These conditions may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members. The merits of the Bank's decision in this regard will not be reviewed by this Tribunal except for the purposes of satisfying itself that there has been no abuse of discretion.

58. The Tribunal added, in paragraph 27, that the expression "unsatisfactory performance" in the context of non-confirmation of probationary employment may have a broader meaning than what would be understood outside the Bank, and that relevant criteria include:

a person's ability to get along with others, temperament generally and even ability to derive satisfaction from his work in such a way as to ensure that he remains a contented and efficient member of the staff.

59. On the other hand, as stated in *McNeill*, Decision No. 157 [1997], at paragraph 44:

While the probationer has no right to be confirmed, he has the right to be given fair opportunity to prove his ability, and the Tribunal will review whether this right has been respected and whether the legal requirements in this regard have been met.

60. The Staff Association has correctly recalled those “legal requirements” in its *amicus* brief. It has emphasized its appropriate concern that non-confirmation decisions be preceded by a proper performance evaluation; that reasons be adequately reflected in the evaluations as well as meaningful in their context; and that the process provide an opportunity to respond. The Tribunal confirms these principles, and needs to be satisfied that each of these requirements is observed.

61. The Applicant contends that the decisions of June 12, 2001 were:

based on alleged unsatisfactory performance that was never substantiated through a “performance evaluation.” Nothing on the Applicant’s record justifies the decisions taken.

62. As he also puts it:

Aside from Applicant’s fully satisfactory performance evaluation for the year 2000, there is no other written evaluation on which Management could base a decision to refuse confirmation to Applicant. Alleged conversations in a general business context do not constitute the required performance evaluation.

63. He adds that if faced with a proper evaluation, he could have defended his record and explained his achievements, and “it would be difficult not to be swayed by his arguments.” In sum, he “was never given any interim assessment or final performance review, as envisaged in the Staff Rules 4.02 and 5.03.”

64. Staff Rule 4.02 contemplates a number of formalized steps intended to protect persons hired on a probationary basis. One can well understand that persons holding mid-level or lower-level appointments would insist on the Bank’s adherence to a systematic approach, e.g. to avoid arbitrariness. But at the highest levels of the hierarchy, where a Vice President on probation is unlikely to find himself susceptible to evaluation as part of a category of staff members, and it would therefore be odd to speak of a “systematic” method, it may seem highly artificial to insist on a formalistic rather than a substantive application of Staff Rules 4.02 and 5.03 given the subjective qualities required at that level. As the Tribunal stated in *McNeill*, at paragraph 51, “the rules on the periodic evaluations have to be applied with some flexibility depending on the circumstances.” The Applicant seems to hold views that go well beyond *McNeill* in this respect; he writes in his reply that he

felt that the Bank’s standard procedures, by requiring OPEs for everybody all the time, led to a yearly hypocritical exercise, in which staff was supposed to extol their own performance and, out of fear of being outperformed by others, indulged in an orgy of self-praise. ... Applicant was not shy in expressing his skeptical views about the value of general OPEs, as practiced by the Bank

65. The salient relevant “circumstances” – in the sense of *McNeill* – are the following.

66. Although the Applicant describes his first 360 Degree Report (from November 1999) as “on balance, very positive,” the fact is that it contained a number of criticisms which might have alarmed someone aspiring to high managerial duties. (See paragraph 6 *supra*.) In her written declaration, Ms. Kuusela, one of the few Bank officials whose professionalism is (if only partially) acknowledged by the Applicant, refers to the comments as “quite mixed,” and describes her meeting with him to discuss the results as follows:

... I am not sure that he internalized the messages I was trying to convey to him. When we discussed unfavorable comments, he questioned some of the feedback and appeared a bit uncomfortable.

67. Ms. Kuusela adds that she invited him to contact her after he had had a chance to absorb the feedback “if he wanted to work on possible solutions,” but that her offer was not taken up.

68. On April 4, 2000, according to the Applicant, Mr. Goldstein told him:

you have significant problems of behavior, especially in your relations with the Regions.

69. While it is notoriously difficult for any judicial body to have confidence in recollections of unrecorded one-to-one conversations, the words just quoted are those used by the Applicant himself. They are not inconsistent with Mr. Goldstein's version, which is that he told the Applicant "that he clearly needed to change certain behaviors to become a more effective manager."

70. On April 24, the Applicant met with Mr. Wolfensohn. Given the great importance attached by the Applicant to this meeting – he had asked the President to "withhold judgment" until he could explain his position; see paragraph 15 *supra* – it is more than surprising that the lengthy application to this Tribunal (296 paragraphs) says so little about what was said and agreed. The entirety of his account is to be found in paragraph 165, which reads as follows:

After the Spring Meetings were over, the Applicant had with Mr. Wolfensohn the meeting he had requested. During the meeting, somewhat disappointingly for the Applicant, Mr. Wolfensohn did not express the slightest interest in the potential improprieties the Applicant had denounced, and *Mr. Wolfensohn took it for granted that the request for an investigation would be withdrawn*. Mr. Wolfensohn then unveiled a long list of complaints about the Applicant's arrogance and behavior, that he had been watching closely, particularly during Corporate Days. The Applicant was taken aback by Mr. Wolfensohn's reaction but, after reflecting for a day, decided to comply with his request and withdrew the request for an investigation. In so doing he took comfort in the belief – wrong, as it turned out – that the investigation of potential misconduct and a breach of the Code of Professional Ethics was a procedure in the Bank's public interest, akin to a disciplinary or criminal investigation in national jurisdictions, so that the withdrawal of his personal request for an investigation would not detract from the Bank's interest in pursuing the case. (Emphasis in the text.)

71. This description of the meeting gives the impression that the focus of the discussion was the Applicant's complaint about the 360 Degree Report Update. A dramatically different light is cast on this meeting by the Applicant's own e-mail to Mr. Wolfensohn dated April 27 (three days after the meeting), which merits quotation *in extenso*:

I want to thank you for our meeting last Monday. While not particularly pleasant, it was extremely useful for me, especially because of your candour and clarity.

I am determined to follow your advice and change my behaviour. Key objectives will include:

To cultivate more *personal, friendly relations* with colleagues, most particularly Regional VPs.

While maintaining an inquisitive and open-minded spirit with respect to the Bank's practices, to *cast in a positive, constructive light* any ideas or suggestions on how to improve them.

Not to miss any opportunity to *praise* and applaud high-quality work or good ideas of colleagues or staff.

To be *more aware of the risks of misperception of what I say and how I behave* (including body language!), what others perceive being often very different from what I really meant (that was, by the way, the case with my remarks during Corporate Day on the discrimination of Subsaharan nationals!).

To avoid the *image* of "haughty Castillian/self-conscious European senior finance official" which apparently I have created for myself.

To participate in the *EDP* at Harvard University, as an opportunity for networking and for getting to know better other people's perspectives.

I will send to Jeffrey [Goldstein] an e-mail withdrawing my request for an investigation on the process followed by HR in my "non-nato" second 360, and declaring myself quite interested in HR preparing from scratch, in two or three months, a second 360 report (the two-three month delay will allow the new report to reflect changes in behaviour).

New Year resolutions are notorious for being forgotten pretty soon. But I was lucky that our

conversation took place in April, on Easter Monday. Mine are, therefore, “Easter resolutions.” If only because of that, I am optimistic they will not go unfulfilled. (Emphasis in the text.)

72. It is difficult to imagine a more relevant contemporaneous document concerning the management of the Applicant’s performance, at the conclusion of a singular and candid meeting with the highest official of the Bank, which occurred at the mid-way point of the originally contemplated two-year probation period. The Applicant identified six “key objectives” having arisen from an “extremely useful” though “not particularly pleasant” meeting, as a result of which the Applicant expressed his determination “to follow your advice and change my behaviour.”

73. Yet the application contained not a word about this message to the President of the Bank, nor was a copy of it included among the Applicant’s numerous exhibits. Instead, it was subsequently disclosed to the Tribunal by the Bank.

74. Needless to say, the Jennings Report paid considerable attention to these “Easter Resolutions.”

75. Reacting to the relevant passages of the Report, the Applicant, in his personal comments dated September 4, 2002, presents what must be said is an extraordinary explanation to the ultimate effect that “[t]he Resolutions reflect exclusively Mr. Wolfensohn’s subjective perception of Applicant, and are totally unrelated to Applicant’s relations with his own staff.” Further, so the Applicant explains, they were written in reaction to the President’s “rather insulting” words, and constituted an exercise in “humility” applying a “traditional technique” of “Social Cognition.” The Resolutions were thus nothing but “a list of the criticisms that the President had made” and an ostensible promise “to follow-up on his advice” used as a psychological “technique.”

76. In other words, it appears that the Applicant is now saying that:

(a) his so-called resolutions were “totally unrelated” to his performance as a manager vis-à-vis his own staff;

(b) he did not actually agree with them but merely listed “criticisms” flowing from Mr. Wolfensohn’s “subjective perception”; and

(c) the whole exercise was a type of psychological ploy designed to alter the President’s perception of him (“to break ... confirmatory biases”) and not a sincere commitment to address shortcomings accepted as such.

77. For the Applicant to put such a gloss on a message to the President which begins with a promise to “change my behaviour” is profoundly troubling. In the first place, the Applicant appears to have intentionally undermined Mr. Wolfensohn’s attempt at a constructive dialogue by undertaking an action plan in which he did not believe, having designed it as a form of manipulation. Secondly, the Applicant, no doubt inadvertently, confirms the repeated comments of senior-staff colleagues – whose testimony he says should be dismissed on the basis that they are merely complying with a party line – to the effect that he was unwilling to assimilate suggestions for improvement.

78. As against the Applicant’s egregious explanation of his “Easter Resolutions,” Mr. Goldstein’s reaction stands in stark contrast. Upon having been sent a copy of the Applicant’s e-mail to Mr. Wolfensohn on April 27, Mr. Goldstein responded: “Many thanks for the attached. I think we have reached constructive grounds.” What took place during the one-on-one sessions between the Applicant and Mr. Goldstein is a matter of controversy. Those discussions cannot be reconstituted. The objective fact remains that the Applicant thus had a weekly occasion to defend his record and to try to persuade the most important person in the process that he was suitable for confirmation at the end of his probationary period. Many staff members on probation would be more than satisfied with access at such a level and with such frequency. What the Applicant sought to do, instead, was first to curtail the weekly meetings (see paragraph 119 *infra*) and then to propose a fundamental change of the Bank’s hierarchy so that he would no longer report to Mr. Goldstein (see paragraph 28 *supra*). Such conduct on the part of an employee on probation seems, it must be said, rather unusual. As the Jennings

Report puts it:

... Mr. Conthe later complained about these weekly meetings (each about an hour long) as being a form of harassment. But if so, he can hardly at the same time also complain that he was not apprised of his alleged failings.

79. It is not for the Tribunal to decide whether Mr. Wolfensohn's or Mr. Goldstein's perceptions of the Applicant's shortcomings were accurate:

While it is the duty of the Tribunal to draw the appropriate conclusions from any non-observance of the conditions of employment of a staff member under probation, the Tribunal will not substitute its own judgment for that of the Respondent on the staff member's suitability for permanent employment. ... [T]he merits of the Bank's decision will not be reviewed by this Tribunal except for the purpose of satisfying itself that there has been no abuse of discretion and that the appropriate standards of justice have been met. (*Salle*, Decision No. 10 [1982], para. 30.)

80. The Applicant in this case had occasions to discuss these perceptions at the very highest levels of the Bank. His own written evidence, in his Easter Resolutions, is that of an ostensible commitment to "change my behaviour" in consequence. His final explanation to the effect that this commitment was insincere is not to his credit. More importantly, it constitutes decisive proof that he had no intention of complying with his managers' "subjective perceptions." Under these circumstances, the Applicant's complaint that there was something amiss with his removal from a key managerial position is unpersuasive.

81. To say that the Applicant's reaction to the Jennings Report damages his case is an understatement. The Applicant's own explanation puts in doubt his good faith. It confirms not only the Jennings Report, but also the written declarations of the Bank's witnesses.

82. The Jennings Report was commissioned with the intent of giving the Applicant every chance to prove his allegations. The Applicant's case requires that the factual premises of what he considers his demotion should be investigated critically, without necessarily accepting at face value various elements of the file which the Applicant contends were used, in effect, to perpetrate a cover-up, and without giving undue credence to written declarations prepared after the fact, often by persons who retain an indirect reporting line, as the Applicant puts it in his reply, to Mr. Goldstein and "Senior Management." Upon being apprised on January 14, 2002, of the Tribunal's decision to appoint a fact-finding investigator, the Applicant informed the Tribunal, by a letter dated January 22, 2002, that he "welcome[d] the appointment of an investigator."

83. Sir Robert was selected because of his eminence, his reputation for integrity, and for his independence from the Bank. He interviewed 12 persons, selected by him in light of his perusal of the pleadings and his assessment of relevant potential contributions, between June 7 and 12, 2002, including the Applicant, whom he interviewed twice: on the very first day and on the very last, after having concluded all other interviews.

84. The Tribunal thus gave the Applicant an unusual opportunity, which it felt appropriate in the circumstances and given the high level at which the Applicant's accusations were directed, to have his contentions examined by someone unlikely to be inhibited by the hierarchical position of the persons whose conduct is in question.

85. The Jennings Report concludes, by reference to a time well before spring 2001, that:

... Mr. Conthe could hardly help but become aware of the existence of serious apprehensions concerning his perceived managerial deficiencies. There were indeed apprehensions and worries about his management methods from the very beginning.

86. More particularly, the Jennings Report notes that the November 1999 Feedback Report (which Sir Robert found "mixed but on the whole quite favourable") revealed

significant doubt still about his management techniques, but he was given frank comments and advice on how to improve them.

It also concludes that the Applicant's "Easter Resolutions" in April 2000

constitute a crucial statement in writing by Mr. Conthe that he had by this time been made fully aware, and in some detail, of the perceived managerial deficiencies. ...

[I]t is difficult to see how, at least after [the end of April 2000] the Applicant can credibly maintain that he was never made aware of the perceptions of his managerial deficiencies or of their nature and extent.

87. The Jennings Report also refers to “another significant development” in March 2001, which it describes as follows:

The President of the Bank, Mr. Wolfensohn, during the year 2001, had made a practice of himself visiting a great number of departments in informal meetings. These informal meetings were intended to give him some idea of the state of affairs in each department. He met Mr. Conthe’s VPU on 21 March, 2001. The meeting had been welcomed by Mr. Conthe and he had arranged for a number of staff to attend. But Mr. Conthe himself, unusually for a head of a department, was not present at the meeting. He had been invited to be there. But he had arranged to travel, on Bank business, to Mexico, and judged this visit to be more important than the meeting.

The President told me what happened at the meeting. It appears that, after his own brief introductory speech, he was “greeted with an avalanche”. The discussion was opened by someone “sitting on the right-hand side” of the room who asked the President whether he knew “that everybody in the department is looking for jobs?” The President told me that the situation that faced him at this meeting was unique because, he said, the Bank is “not a place where you get revolutions publicly” and such a public confrontation by staff was quite unusual. It was, the President told me, quite clear that the management situation in Mr. Conthe’s department was simply “chaos”. The President did not keep his anxiety about this situation to himself. He told Mr. Conthe about it and discussed it with him at some length.

88. In his “Review” of the Jennings Report, the Applicant’s counsel flatly says that “Mr. Wolfensohn lied to Sir Robert when he told him that he had discussed with Applicant the results of the March 21 meeting.” Given this unresolved contradiction, the Tribunal will disregard this controverted element of the Applicant’s dialogue with his superiors.

89. As a result of his investigation of “details and numerous incidents and encounters,” Sir Robert took the view that:

There was hardly any time when the HR staff were not endeavouring to apprise Mr. Conthe of serious and damaging management deficiencies and this with a view to genuinely trying very hard to help him to get on top of the trouble. This was not only because they liked him and respected him and also respected what were constantly referred to as his intellectual powers Their endeavours to help the Applicant were also because they regarded this helping people over difficulties as very much an important part of their job in the Bank. Their own professional pride required them to help. There might also, it must be said, have been some tendency, perhaps subconsciously, to delay the time when someone was going to have to make a final decision about Mr. Conthe one way or the other. ...

The fact of the matter is that there was an enormous and constant but growing amount of serious complaints which various people attempted to convey to him and to try to persuade him to appreciate and understand. The HR staff who thus strove to assist Mr. Conthe naturally regard the allegation that he was not informed about his managerial deficiencies as “slightly ironic”.

Ultimately,

the conclusion has to be that the allegation that he was in some way left in ignorance of the complaints that, whether justified or not, were quite certainly a constant and growing feature of his entire tenure, is fanciful and impossible to reconcile with the history of the matter.

90. In reaction to the Jennings Report, the Applicant filed a 35-page “Review” signed by his counsel, and 22 pages of his own “Comments.”

91. The “Review” makes a number of forensic points which are readily dismissed. It begins by complaining about the fact that the interviewees were limited “almost exclusively to a set of witnesses who represent the interests of the Organization.” Whatever might be said about the word “represent” in this context, and disregarding the gratuitous implication that the interviewees were willing to misrepresent facts in order to be of assistance to the Bank, the facts remain that:

(i) the list was made known in advance and elicited no complaint from the Applicant until the Jennings Report was issued; indeed a number of the Bank personnel had been identified by the Applicant as persons who should be questioned (see paragraph 42 *supra*); and

(ii) it is difficult to imagine who else should have been interviewed; it would have been preposterous ostensibly to “balance” the list with admirers of the Applicant if they had no knowledge of the relevant events.

92. The Review also questions the choice of Sir Robert on the footing that he “has no known prior involvement with the World Bank” and therefore did not understand the HR Department’s “checkered history” which may find its best analogy in “the former Communist Party Central Committee and the System of Political Commissars.” Once again, this criticism was not made *before* the Report was issued; Sir Robert was selected precisely because of his independence from the Bank. As for the rhetorical “analogy,” it makes no impression on the Tribunal.

93. Most unfortunately, the Review resorts to *ad hominem* attacks on persons whose statements are unfavorable to the Applicant. Thus, Sir Robert is said to have “blindly accepted Ms. Kuusela’s word, but has not perhaps looked behind the appearances to question whether she was influenced by Ms. Pertunnen, also Finnish” and who is described as apparently “hostile” to the Applicant. Furthermore, the Review notes that Sir Robert “never remarks on the ties that bind Messrs. Wolfensohn, Goldstein and Stern,” and argues: “Their particular backgrounds should have given him pause to consider how their interests coincided.” Ms. Benedicte M. Boulet, who in 1999 was the Senior Officer responsible for HR matters related to the Financial Sector, is described as someone with “meddling inclinations”; Mr. Blackman, the consultant chosen as the Applicant’s coach without demur from the latter, as someone with “his own checkered background” and a possible “Trojan Horse.” Not only was Sir Robert quite right in not entertaining such snide aspersions, for which there was no foundation whatsoever; it would have been shocking if he had done so. The Tribunal deplores such comments, bereft of any apparent basis but prejudice and innuendo.

94. The Applicant himself has apparently conceived the notion that Sir Robert had a prejudice in favor of the Bank; in his personal “Comments” on the Report, he refers to its author as “always eager to exculpate Management.” The Tribunal regrets that the Applicant has found himself reduced to such disparagement; the Applicant clearly disapproves of most of the conclusions of the Report, but does not even allege any circumstances which might suggest why Sir Robert, a lifelong academic and jurist of worldwide reputation who has no hesitation in using the word “incompetence” when referring to the way in which the Applicant’s March 2000 Update was dealt with by the Respondent, would be inclined to protect officials of the World Bank.

95. For its part, the Tribunal considers that the record as it stood before the Jennings Report failed by a wide margin to support the Applicant’s grievance. Hence the investigation favored the Applicant in the sense that it opened the door to proof of things that may have been hidden between the lines. But in the event, the Jennings Report confirms the written record. The Tribunal unhesitatingly adopts its findings insofar as they relate to the existence of a legitimate basis for non-confirmation.

96. The present case may be compared to *Matta*, Decision No. 12 [1982], which involved a *confirmed* staff member of eight years’ standing whose employment was terminated for unsatisfactory performance. The staff member was a secretary who was found to be unable to follow instructions, to have poor interpersonal skills, and to be excessively sensitive to criticism. The Tribunal noted that the Applicant’s “technical skills were not the primary source of complaint” and stated (in paragraph 47) that

evaluation of an employee's performance may refer not only to the technical competence of the employee but also to his or her character, personality and conduct generally, insofar as they bear on ability to work harmoniously and to good effect with supervisors and other staff members.

97. If this is true of a secretary in confirmed employment, *a fortiori* it is the case with respect to a Vice President on probation, whose ability to cooperate and to inspire performance involves far more multifaceted and subjective skills than those required of a clerical worker. Subjective evaluations which may seem unacceptably nebulous with respect to lower-level employees may be unavoidable with respect to persons near the summit of a corporate hierarchy. The subjective evaluation of a Vice President's attainment of standards commensurate with high responsibility must ultimately reside in his or her few superiors. A President is not required to maintain a Vice President, no matter how able or diligent, whom he feels is pulling in the wrong direction or is not managing his staff in such a way as to generate loyalty to the institution or confidence in its operations and purposes.

98. In short, at this level of a corporate hierarchy, a staff member on probation simply must gain and retain the confidence of the highest leadership of the institution. Absent clear proof of arbitrariness or ill-will, of unwillingness to articulate the grounds of any dissatisfaction, or of refusal to give any opportunity to demonstrate improvement, such a staff member is in no position to claim an entitlement to be confirmed in a position which by its nature demands the fullest subjective confidence.

99. Given the standards by which he should have expected that a Vice President would be judged, the Applicant's failure to understand – or even to notice – the criticisms made of him are quite astonishing. For example, he refers to the Blackman Summary as "extremely positive" for him, whereas no one could reasonably so conclude unless they were reading that document with blinkers. (See paragraph 26 *supra*.) It is characteristic of the Applicant's approach that he dismisses critical views, both in the Blackman Summary and in the 2001 Feedback Report (which he perplexingly asserts as having been "overwhelmingly positive," see paragraphs 30-32 *supra*) as the product of "difficult relations" with individuals who took a different view of policy issues (such as the FY02 budget).

100. The Applicant properly does not insist that the "written assessment" referred to in Staff Rule 4.02, paragraph 2.02(b), need take a particular form. He confirms to Sir Robert his view that 360 Degree Feedback Reports may serve this purpose. He must accept that the Blackman Summary, which he took the initiative to circulate to a number of persons (including Mr. Goldstein) as an indicator of areas in which he needed to improve his performance, also served this purpose – as did, *a fortiori*, his Easter Resolutions. The problem is thus that the Applicant reads these assessments in an impossibly selective manner. Nor is it necessary to determine whether there were relevant assessments within each six-month segment of the probationary period. As the Tribunal did 20 years ago in *Salle*, Decision No. 10 [1982], at paragraph 46, it has determined that the timing of the performance evaluations does not matter if the Applicant does not substantively suffer injury as a result of the delay. As in *Salle*, the Applicant here appears to have contributed, *inter alia*, to the length of time it took to conclude his second 360 Degree Report (by insisting on a large sample of respondents). At any rate, the Tribunal is satisfied that neither the frequency nor the timing of the Applicant's several assessments affected the outcome.

101. At the same time, rather inconsistently with the position described in the beginning of paragraph 100, and in sharp contrast to his "skeptical views about the value of ... OPEs" as referred to in paragraph 64 *supra*, the Applicant occasionally seems to argue that the fact that his 2001 Overall Performance Evaluation was not initiated until June 26, 2001 proves that there was no adequate basis under Staff Rule 4.02, paragraph 2.02(b), for the decision not to confirm him as Vice President. To test this argument, it is instructive to consider the kind of formal flaw which the Tribunal has found unacceptable in the past.

102. *Singh*, Decision No. 188 [1998], involved a staff member of 22 years standing who was terminated for unsatisfactory performance, "essentially" due to "difficulties in her interpersonal relationships." Her final annual Performance Review Record was not finalized until after her dismissal had been decided and her notice of termination issued. The Bank argued that despite the absence of a final warning, "the procedures followed

were nonetheless adequate and reasonable, and satisfied the requirement of due process.” The Tribunal disagreed, noting at paragraph 15 that if a staff member is not formally placed on the “monitored performance plan” required as a prerequisite to termination under Staff Rule 7.01, Section 11 (“Unsatisfactory Performance”), “there can be no basis on which such staff member could know clearly where the process is leading.” Later in its judgment, the Tribunal noted:

Staff rules are not written for the sake of formality but precisely to secure an orderly process that will be fair and ensure that the staff member affected can feel that his or her case has been properly considered. Even if the Respondent is in substance right about the decision that it took with respect to the Applicant, its departure from the relevant rules amounts to an abuse of its discretion.

103. In the present case, there is no question about notice; the Applicant was on probation. Indeed, he was on quite specific notice that his tenure was in doubt: witness his Easter Resolutions. The degree of attention paid to the Applicant’s case, and the number of occasions he was given to address (or disprove) perceived shortcomings, were abundantly sufficient to satisfy the requirements of due process. The fact that the 2001 OPE was not concluded until the Applicant was removed from his post is no evidence of an abuse of discretion on the part of the Bank. That OPE was not necessary to justify the challenged decisions; but it was ultimately required as part of the Applicant’s ongoing work with the Bank, in a new position which he accepted.

104. In sum: the Applicant obviously understood from the beginning that he was on probation and that it was necessary for him that his “suitability” be demonstrated. Ultimately, in his e-mail to Messrs. Wolfensohn and Goldstein on June 6, 2001, when he realized that his Vice Presidency would not be maintained, he referred to Mr. Wolfensohn’s view that he was a “lousy manager” – a “view with which I disagree” – as “*legitimate*.” (Emphasis added.) That last word is identical to the Tribunal’s own conclusion. It does not matter if the Applicant is right in believing that he was suitable for his position.

105. In his counsel’s “Review,” the Applicant’s final words with respect to the issue of due process in relation to non-confirmation are as follows:

Bureaucracies function on the basis of records and there are three records only that are valid – the first 360, the 2000 OPE and the electronic 360 of 2001. They give a favorable picture of Applicant, are reliable, and constitute the true record. The rest involves gossip, ex post statements, animosities of a personal nature, and internal politics.

106. This passage serves well to illustrate the untenable nature of the Applicant’s case. First, even if the records he invokes are the only “true record,” they easily contain sufficient criticism of the Applicant to have permitted the Bank to conclude that the Applicant was unsuitable for the executive tasks of a Vice President without being subject to criticism that it abused its discretion. Secondly, these are not the only records; the Applicant’s own Easter Resolutions and the Blackman Summary – distributed by the Applicant himself with the intent that it be understood as reflecting matters with respect to which he needed to improve – constitute salient and reliable evidence which makes it unnecessary for the Tribunal to involve itself in controversies as to the substance of one-on-one meetings.

107. So although the Tribunal confirms the principles recalled by the Staff Association (see paragraph 60 *supra*), it does not agree with its statement that, in this particular case, “[t]he decision not to confirm was taken without any semblance of a performance evaluation, or even any performance discussion in which Applicant could defend himself.” The record, and notably the Applicant’s own written communications, particularly in connection with (a) his Easter Resolutions, (b) the Blackman Summary, and (c) the decision not to confirm, amply demonstrate the contrary. The Staff Association’s conclusion builds on the assertion that the “key event affecting confirmation appears to have been” Mr. Wolfensohn’s meeting with the Applicant’s staff in March 2001. That view is not tenable in light of the evidence before the Tribunal. (The Tribunal is conscious of the fact that the Staff Association’s brief was authored before the final submissions of the parties, and without perusal of the Jennings Report.)

Alleged harassment, misconduct and retaliation

108. The Applicant complains of a “consistent pattern of unfair treatment of the Applicant by the Bank’s Management, which entailed professional harassment and misconduct by Mr. Jeffrey Goldstein and other senior Bank officials” and of “retaliation” on account of his expression of unpopular opinions as well as his request for an Ethics investigation in April 2000.

109. The latter element of this complaint may be readily dismissed. The Applicant complained about the circumstances surrounding the March 2000 Update. As will be discussed below, he was right to complain. But any suggestion that the circumstances involved an ethical breach remains unproven. The Applicant initially requested an inquiry, but withdrew the request after discussions with Messrs. Wolfensohn and Goldstein relating to the substance of his performance rather than to the process of the March 2000 Update. The Update itself was ultimately withdrawn by the Bank, and it is not given any weight in this Judgment. The Applicant’s current statement to the effect that he had expected that the Bank would pursue the inquiry on its own motion seems doubtful (particularly in light of the fact that his e-mail of April 30, 2000, entitled “Withdrawal of my April 14 request,” ended with the words “I fully agree that this brings to a close the unfortunate misunderstanding around the updating of my first, November 360 report”). The essential point is that he has adduced no evidence to support his contention – entirely inferential – that his withdrawn request for an investigation had so offended senior managers in the Bank that they decided to take retaliatory measures. There is certainly no basis for *presuming* that the Applicant’s real or imagined opponents, e.g. Mr. Goldstein or Mr. Stern, acted *mala fides*.

110. That leaves the more general accusations of harassment, misconduct and retaliation. They are more difficult to deal with precisely because they are expressed in general terms; the Applicant invites the Tribunal to draw stark conclusions from the totality of the circumstances, presumably on the balance of probabilities.

111. This again must necessarily be a matter of inference, as there is no proof of ill-will toward the Applicant. To the contrary, he was recruited with the personal involvement of the President, who, one expects, must have started out with a high opinion of the new Vice President. The Applicant argues that there is an “inbred hostility to senior staff ‘parachuted’ into the Bank.” This may or may not be so, but then presumably Mr. Goldstein himself, who joined the Bank after the Applicant, should have been the object of the same difficulties. It is just as plausible to speculate that top executives, such as Mr. Goldstein and such as the Applicant, when recruited by the President, will find many persons in their path who are desirous of creating alliances with them, and confirming the wisdom of the President’s choice. In short, independently of the fact that it simply is not within the province of the Tribunal, such speculation is inconclusive.

112. What the record shows is that the Applicant rather quickly generated considerable conflict.

113. Ms. Boullet, the Senior Officer who was responsible for HR matters related to the Financial Sector in the Bank when the Applicant took up his post, has declared that the Applicant “required me to compromise my professional standards and personal ethics all too frequently,” and that although she tried to work with him only for about half a year she “can only describe my experience as the most frustrating and difficult period of my 25-year professional career both in and outside the Bank.”

114. Mr. Gerard Caprio, a member of the Financial Sector Board who began to work with the Applicant in April 1999, has declared that the Applicant was rash, capricious and uninformed, with “open contempt” for human resources issues, and “incapable of building enthusiasm and team cohesion”; Mr. Caprio assessed him as:

the worst manager (of the 13 for whom I have worked) that I ever had, based on his lack of expertise in finance, his lack of strategic vision, and his inability to make (and not continuously re-visit) decisions. ... Since his departure, the morale and the functioning of the Vice Presidency have improved significantly.

115. The Applicant criticizes these declarations, as well as many others, as the product of loyalty or subservience to higher management. This criticism is undercut by the fact that a number of declarations provided by the Bank are neutral or indeed complimentary to the Applicant. Nevertheless, in light of this criticism it is natural to give greater weight to the Applicant’s own comments about his strained relations with his colleagues, including his admission that he quickly entered into “open disagreements” with the Regional Vice Presidents for East Asia and Europe and Central Asia. There were “serious” tensions in his relations with three

Anchor Directors in the autumn of 2000 about budgetary issues. He uses words like “hostility” and “animosity” to describe the attitude of colleagues who disagreed with him, or who “hid their real intent.” This type of conflict is illustrated by an exchange of e-mails between the Applicant and Mr. Jemal-ud-din Kassum, the Vice President of the East Asia Region. On November 6, 2000, the Applicant criticized the latter’s planned reorganization of his sector as being “the epitome of *worst practice* in a matrix organization.” The next day, Mr. Kassum responded: “My compliments on finding the time for yet another frantic, condescending e-mail. Calm down and perhaps we can talk when I am back from East Asia.”

116. Countless pages in the Applicant’s lengthy submissions are devoted to these controversies, and to a myriad lesser ones. The thrust of the Applicant’s demonstration is that he was invariably correct in his understanding of the Bank’s best interests and values. Indeed, the fact that Managing Directors such as Mr. Goldstein and Mr. Sven Sandström did not intervene to take his side in some of these disputes is viewed by the Applicant as yet further evidence of their failure to support him, indeed that they undermined his efforts.

117. Of course the Applicant may have had the better side of these many arguments. These are not questions within the purview of the Tribunal. What he appears not to see is that being right in some absolute sense is not the same thing as being a good manager. The Applicant’s superiors may have considered that it was for him, as Vice President, to find solutions that would achieve consensus and teamwork rather than friction and disruption. More seriously yet, they may have been alarmed when observing a manager on a probationary contract immediately and sharply disagreeing with other senior staff members as to proper procedures and policies for the Bank.

118. To criticize someone for fractiousness is not the same as criticizing him for speaking his mind; to decide that a manager cannot build consensus and mobilize a team into effective action is no evidence of ill-will toward him.

119. This brings us to the question of the Applicant’s most important relations: those with Messrs. Wolfensohn and Goldstein. The Applicant had numerous meetings with both the President and the Managing Director to discuss either his performance or that of his Vice Presidency – which, at this level of responsibility, comes to the same thing. He authored lengthy reports defending his record. His complaint cannot be that his views were disregarded, but only that they proved unpersuasive. Moreover, the Applicant surprisingly took the initiative to try to *reduce* his opportunities for feedback. Whereas Mr. Goldstein, as Managing Director, had a policy of weekly meetings with his Vice Presidents, the Applicant decided that he preferred meetings with more persons present, in the interest, he says today, of “openness and transparency.” He was of course entitled to his opinion and his preference, but equally it was for his supervisor, Mr. Goldstein, to decide on his own working methods, and to give each of his Vice Presidents access to him on an equal and confidential one-on-one basis. The Applicant now describes Mr. Goldstein’s failure to go along with the Applicant as his having been “adamant” and “unreasonable” as though the presumption must be that the Applicant could dictate conditions to the Managing Director.

120. This confusion as to his prerogatives appears to have been perpetuated when, upon learning in May 2001 that he would not be confirmed, the Applicant told Mr. Zhang and Ms. Sierra – as the Applicant describes the conversation today – that he

would be willing to leave voluntarily his position of Vice President provided Mr. Goldstein abandoned his as Managing Director, “*as schoolboys are typically asked to do when they fight at school.*” (Emphasis in the text.)

121. The Applicant’s personal antagonism to Mr. Goldstein may have been at work when he made a written proposal in December 2000 to the effect that the Bank’s structure should be reorganized in such a way that he no longer reported to Mr. Goldstein (see paragraph 28 *supra*). He describes the “first indirect response” to this proposal as having been implicit in introductory comments made by Mr. Wolfensohn in a staff meeting on January 10, 2001, when he, according to the Applicant, said that “Jeffrey Goldstein is a superb professional. It is a privilege for the Financial Sector to have him as Managing Director.” The Applicant quotes this purported comment as though its relevance speaks for itself. It does not. The only conclusion one can draw is that the

Applicant must have realized that Mr. Wolfensohn did not share his own views of Mr. Goldstein, which, as the Applicant has submitted to the Tribunal, are that he has:

“difficulty in grasping the budgeting system”;

“scant knowledge about the history of the Bank’s Financial Sector”; and a

“remarkable lack of substantive views on the Bank’s priorities.”

122. The Tribunal has neither the ability nor the mandate to evaluate such comments. The Applicant directs harsh accusations, e.g. of “dishonest” and “reprehensible” conduct, against many of his colleagues at all echelons of the hierarchy, including junior officials who do not find favor in his eyes. When such opprobrious language is used, it is important to ask whether the animosity is reciprocal. There is in fact no evidence that Messrs. Wolfensohn, Goldstein or Stern, or indeed anyone else, mistreated the Applicant due to some personal ill-will. The Applicant’s ire is impressive, but it is, on the evidence, unilateral.

123. In response to the Applicant’s proposal to reorganize the Bank’s hierarchy so that he would no longer report to Mr. Goldstein, the latter declares that it made no “strategic or managerial sense.” That was his prerogative, but the Applicant clearly cannot accept it as such. He submits that Mr. Goldstein’s “outright rejection” of the proposal supports his claim of professional harassment. The suggestion is unconvincing and rather confirms the Bank’s thesis that the Applicant was intolerant of disagreement.

124. It may well be that the Applicant resented the fact, as he put it, that Mr. Goldstein “systematically neglected and overlooked the abundant series of proposals which the Applicant made on strategy and budgetary policy.” There is no doubt that the Applicant made “abundant proposals” on a wide variety of subjects. It may well be that these proposals did not receive the attention the Applicant felt they deserved. But then again, the Applicant was not the chief executive, and Mr. Goldstein may simply have preferred that the Applicant concentrated on consensus-building and effective administration within his Vice Presidency. In this connection, it may be recalled that Mr. Goldstein was not the Applicant’s first supervising Managing Director; that was Mr. Sandström, whose written declaration indicates that although the Applicant “was new to the Bank and had much to learn about the institution, he appeared unable or unwilling to adjust his opinions to take into account valid perspectives of experienced Bank staff, including Regional Vice Presidents, and generally had difficulty listening to and working with others.”

125. The Staff Association, in its *amicus* brief, states that the Applicant was among the few senior managers who “consistently expressed his support ... for the interventions of the Staff Association on issues affecting the sound management of the Bank.” He expressed views “which at once mirrored the concerns of Bank staff expressed by the Staff Association, and placed him in a minority among his peers.” The Staff Association goes on to draw the conclusion that the Applicant suffered a demotion, and then infers that it:

appears as retaliation for his willingness to speak out candidly on issues of management, including in support of the Staff Association. Mr. Conthe’s demotion is a warning to other senior staff.

126. This discussion appears in the *amicus* brief under the heading “Reprisals Made Against Applicant for Rendering Favorable Consideration to the Views of the Staff Association.”

127. These contentions are not persuasive, for they are based on a series of speculative hypotheses which are acceptable only if one ascribes bad faith to the Bank’s management on an *a priori* basis. The first proposition (that the Applicant conducted himself in a way approved by the Staff Association) must be taken as true given the author of the assertion. But this proposition does not lead to the next: that senior management thinks it wrong to support the Staff Association. And it certainly gives no warrant for the *non sequitur* inference that senior management punishes those who do. Such inferences, lacking any proof in the particular case at hand, would be grossly unfair to the individuals putatively responsible for the alleged retaliation.

128. The Applicant stresses again and again that he was the object of harassment and retaliation because of his outspoken views. Not only is there no proof of this proposition; to the contrary, the record is replete with

expressions of admiration for the Applicant's refreshing candor.

129. The Applicant's many complaints are ultimately either nebulous or trivial. It suffices to note the first three of a long list which appears in his Application:

- in their weekly one-on-one meetings Mr. Goldstein voiced "negative criticisms without regard to positive factors";
- Mr. Goldstein's low assessments of the Applicant's performance were unfair in failing to illustrate low ratings with reference to specific cases;
- there was a "striking absence of congratulatory comments" from Mr. Wolfensohn and Mr. Goldstein with regard to the Applicant's professional achievements.

130. It is clear that the Applicant was disappointed in the Bank's ultimate conclusions as to his unsuitability for a senior management position. He may think them "unfair" in the sense that the judgments of those who evaluated him were wrong. But it is not for the Tribunal to decide whether the Applicant was suitable or not. The Tribunal is concerned only with determining whether he has proved unfair treatment or harassment.

131. The Applicant's reply implicitly admits the absence of direct proof of retaliation when it advances the proposition that "only a retaliatory motive can explain so many irregularities and their surprising timing." This invitation to infer a retaliatory motive fails by its own terms since the premise itself is rejected. There was no multiplicity; there was one sole irregularity. Nor is there any weight in the notion of "surprising timing." The only matter which gives rise to legitimate criticism is that of the improper March 2000 Update (see below); this impropriety does not come close to supporting a finding of unfairness, harassment or retaliation.

Alleged lack of support

132. The Applicant's complaints about an alleged lack of support in performing his managerial functions are unfounded. They reflect nothing more than his own disagreements with his superiors – the President or his Managing Directors – as to issues of policy or organization, mostly on the basis that the Applicant felt he should have had a more central role. Numerous instances are invoked by the Applicant; one characteristic example will suffice. He argues that he should have been supported in his attempts to be

more closely associated, from an institutional point of view, to the Bank's high-level dialogue with the IMF, an institution whose projects in the financial sector were a permanent source of anxieties for the Bank's staff.

133. In this respect, as in all others under this heading of complaints, the Applicant's criticism relates to management prerogatives which the Tribunal does not review.

Alleged illicit investigation by the President of the Bank

134. The record of the events leading to the Applicant's reassignment and non-confirmation is quite sufficient to sustain the Bank's contention that there was no abuse of discretion. There was, and remains, no need for the Bank to rely on "feedback" from non-World Bank personnel (who at any rate could hardly have much to say about the Applicant's suitability in the specific context of the Bank). The idea that Mr. Wolfensohn conducted an "investigation" comes from the Applicant's own rendition of what was said in the course of a one-on-one discussion. His account is denied by Mr. Wolfensohn, who, as recorded in the Jennings Report, states that the meetings with two Spanish political figures he had mentioned to the Applicant had not been arranged for the purpose of discussing the latter. Sir Robert concludes that the words used by the Applicant, i.e. that Mr. Wolfensohn had said he had conducted an investigation, altogether misrepresent what occurred.

135. According to Mr. Wolfensohn, his two Spanish interlocutors who made comments on the Applicant "seemingly cancelled each other out": one very complimentary, the other not so at all.

136. As for his conversation with Mr. Horst Köhler, the Managing Director of the IMF, Mr. Wolfensohn told Sir Robert that Mr. Köhler's opinion could be "described as neutral."

137. The issue raised by the Applicant is whether the President conducted a secret investigation of the Applicant, and if so whether the information obtained was used as justification not to confirm the Applicant in his post. The answer to each of these questions is, to the Tribunal's satisfaction, negative.

138. In his final pleadings, the Applicant has shifted from focusing on his complaint of an illicit investigation to the entirely different question of whether Mr. Wolfensohn made derogatory remarks about him to outsiders. These accusations are irrelevant to the issues raised by the application.

139. Nor is it important to "investigate" whether Mr. Wolfensohn did or did not explore, in his discussions with Mr. Köhler (and without clearing it with the Applicant), the possibility of finding a job for the Applicant at the IMF. That too is a matter irrelevant to the grievance raised by the application.

Reassignment

140. In announcing the Applicant's reassignment to him, Ms. Sierra wrote that the position of Special Advisor to the Senior Vice President of Finance and Chief Financial Officer was one of:

critical importance in which your experience and intellectual leadership can be utilized to best advantage. (Emphasis added.)

141. The Applicant argues that Mr. Goldstein's simultaneous offer to the Applicant of support for a position *outside* the Bank proves that the reassignment was not a genuine reflection of the Bank's intent, nor in pursuit of its genuine interest. If it was critical for the Bank that the Applicant fill a role as Special Advisor, the Bank could not reasonably have proposed his departure from the Bank as a neutral option. The Applicant argues that this was a cover for "removing a senior officer from his position without due process."

142. The Tribunal disagrees. Ms. Sierra wrote that the position of Special Advisor was a critical one, not that it was critical for the Applicant in particular to fulfill that role. The implication is that the position is an important one, and that whoever carried it out was exercising a key function. If there was any hypocrisy here, it was in the nature of offering the Applicant some diplomatic comfort in the proposition that the divestment of the Applicant's managerial role did not mean that he was viewed as lacking stature and ability.

143. Equally, there is evidence that the position proposed to the Applicant, and accepted by him, was *not* a diplomatic sinecure. For one thing, a widely circulated e-mail dated June 11, 2001, from Mr. Gary Perlin, the Bank's Senior Vice President and Chief Financial Officer, identified a number of specific projects which would be suitable in light of the Applicant's experience as a senior European finance ministry official. For another, the Jennings Report reveals that some of Sir Robert's interviewees believed that the Applicant was unsuitable for an executive position but nevertheless had a significant contribution to make to the Bank as a very talented specialist.

144. Nor is it appropriate for the Applicant to complain about a *demotion*. A demotion it may have been, certainly in his eyes and perhaps in others', but whatever protections the Applicant may have had against a demotion were conditioned upon his entitlement to a confirmed position in the first place. (At any rate, under the principle acknowledged in *Sengamalay*, Decision No. 254 [2001], para. 29, the Tribunal would not reverse a decision to remove even a *confirmed* staff member from a managerial position based upon "a reasonably founded belief that the staff member's technical abilities were strong and his managerial skills were less impressive.")

145. The true question is thus whether the Applicant's non-confirmation was in violation of the terms of his employment. The fact that Ms. Sierra sought to soften the blow is neither here nor there; nor is it relevant that the Applicant was offered a position which he views as inferior to the one in which he aspired to be maintained.

146. The same goes for the fact that the Special Advisor position had not existed previously. The Applicant argues that it was “hastily devised to accommodate the reassignment” and that this demonstrates that the Bank’s actions were “capricious.” The first part of this sentence may be correct without leading to such a conclusion. If the Bank was entitled not to confirm the Applicant, it did not lose that entitlement by virtue of the fact that it engineered a face-saving “accommodation.” If, on the contrary, the Bank was wrong in failing to confirm, it did not help its position by creating this post.

147. Apart from his contention that the reassignment was a cover-up, the Applicant has a technical argument to the effect that both the words and the timing of Ms. Sierra’s letter of June 12, 2001 disqualify the Bank’s attempt to put an end to his employment. As seen in paragraph 38 above, she wrote that (i) the Applicant had been reassigned, (ii) he had not been confirmed in his current assignment, and (iii) the issue of confirmation would be “reviewed again in one year.”

148. The Applicant considers that this letter violated Staff Rule 4.02 (“Probation”), which gives no warrant for confirmation of *assignments* as opposed to *appointments*, and is “linked to overall suitability for Bank employment.”

149. The Applicant states that it should have been “apparent” to Ms. Sierra that “any extension of the probationary period of the Applicant beyond two years (i.e. beyond April 1, 2001) ran directly counter to the Staff rules and to the Applicant’s contract.” The Applicant refers to a “strict two year limit, with no possibility of extensions.”

150. He also argues, rather vaguely, for the application of the “principle of estoppel” or the recognition of “vested rights,” leading to “an appropriate equitable remedy.” These contentions add nothing to the debate. There can be no estoppel absent an attempt to demonstrate actual detrimental reliance.

151. Thus the Applicant’s contentions with respect to Ms. Sierra’s letter fall to be examined with reference to the existence or not of the supposedly “strict two year limit.”

152. Paragraph 2.01 of Staff Rule 4.02 reads as follows:

The length of probation shall normally be two years for Open-Ended appointments and one year for all other appointment types. The probationary period may be shortened or lengthened up to a maximum period of 2 years by the staff member’s manager in consultation with the appropriate Sector Board or Staffing Group.

153. This text is not an example of artful drafting. The first sentence provides that the length of probation for an Open-Ended appointment such as the Applicant’s shall *normally* be two years. That leaves the possibility that the period could be *more* than two years. Of course the letter by which the Bank offered an appointment to the Applicant spoke of two years, so that resolves the issue *in his case*; his probationary period was the normal two years. That leads to the second sentence, which leaves the door opened to lengthening the period “up to a maximum of 2 years.”

154. The Applicant wishes to read this sentence as a qualification of the first sentence, with the result that there could in no case be an extension beyond an aggregate period of two years. There are two problems with this argument. First, the reference is to “a maximum,” not *the* maximum as a drafter would naturally put it if the intent was to convey that the first sentence contained a “strict” overall maximum. Secondly, in the event of an initial two-year period – such as was contractually the case with the Applicant – the consequence would be that there would be *no possibility of any extension at all*; this contradicts the general initial words of the second sentence.

155. Nor does the Applicant’s argument succeed when he suggests that it would be absurd to read the second sentence to subject all persons on probation to an indefinite number of two-year extensions. That is not what the Bank contends; the Tribunal is satisfied that the second sentence refers to a “period” with a definitive singular implication, not the prospect of plural extensions, which would have required an expression like “one

or more periods.”

156. The Applicant has a more convincing argument when he suggests that the text of paragraph 2.01 was revised precisely in order to create an unavoidable cut-off date. Indeed, support for this proposition is found in the Jennings Report, which records that an unnamed interviewee sent Sir Robert a memorandum outlining the history of this provision and stating that it was meant to reflect “the policy intent ... to force a decision on employment suitability no later than the two year point.” This may very well be so, but the Tribunal has no direct proof of this proposition, and it finds that the text promulgated in fact does not clearly achieve the putatively intended result.

157. True enough, as the Applicant points out, a clearer indication of the meaning for which the Bank argues would have been achieved if the words “up to” had been preceded with “by.” But the fact that clearer language could have been used does not prove that a contradictory meaning was intended; as seen above, there are logical counterarguments. In sum, paragraph 2.01 of Staff Rule 4.02 is unclear.

158. It may be said that the “strict” two-year limit favors staff members in that it is a good thing to force the Bank to take a stand. But it may equally be said that the opposite reading favors staff members who would rather have an opportunity to continue than to be cut off. Hence, even if one considers the text as being ambiguous, there is no confident way to resolve the ambiguity in a manner that will tend to favor staff members. The Tribunal notes that the Staff Association’s *amicus* brief does not take a position in this regard.

159. In the present case, the obvious lengthening of the Applicant’s probationary period allowed him to stay on with the Bank. He has indeed stayed on, and continues to receive his salary. He certainly did not insist on a cutoff date; to the contrary, on May 15, 2001, the Applicant stated, in a meeting with Mr. Goldstein, that he needed only one more year to complete the reforms he had initiated; and on June 9, he proposed to Mr. Wolfensohn that he continue as Vice President “at least until June 30, 2002” with a post-dated resignation letter to serve as a “call option” exercisable in a year if the Applicant’s performance was not satisfactory. Both of these instances, as described by the Applicant himself, denote, in effect, a positive willingness to extend a probationary arrangement. It is impossible to see how the Bank could be criticized on this account. The record of the Applicant’s conduct is thus contradictory to his contention that he was *tacitly* confirmed when the date of April 1, 2001 came and went without a negative decision. At any rate, the Applicant has not proved the existence under the Staff Rules of a mechanism as unlikely as a tacit confirmation.

160. To conclude: the Applicant was not confirmed, in the terms of Ms. Sierra’s letter of June 12, 2001, *in the occupancy of his initial post*; he was reassigned; and he was told that the issue of his confirmation would be reviewed in a year. The Tribunal finds no fault in the Bank’s handling of this transition.

161. The Applicant finally seeks to argue that paragraph 2.01 of Staff Rule 4.02 should be understood in light of an internal Bank document entitled *Checklist for Managing Staff on Probation*, which contains the following passage:

The normal probationary period for Term staff is one year, but an extension of an additional year is possible. The normal probationary period for Open-Ended staff is two years, but no extensions are possible.

162. The author or authors of this “checklist” seem to have interpreted Staff Rule 4.02, paragraph 2.01, in the way now proposed by the Applicant. But such a document cannot possibly *amend* the Staff Rules.

163. Of course the Bank may be liable for the dissemination of information such as the “checklist,” even if it misstates the Rules, in the event that complainants rely on such information to their detriment. But the Applicant has not attempted such a demonstration. At the most, he has shown that the Bank sought to soften the blow of his discontinuance as a Vice President by allowing him to stay on in another capacity – while extending his period of probation. He willingly availed himself of this opportunity. It would be perverse to infer that the Bank caused him prejudice by failing to dismiss him summarily. The Applicant may have succeeded in demonstrating that the Bank’s position with respect to maximum periods of probation has not been articulated

with precision. But this does not advance his case; he was not the *victim* of any abuse of discretion, but, if anything, the *beneficiary* of a possibly unintended degree of flexibility.

Alleged salary discrimination

164. In his reply, the Applicant accepts that the Bank “has demonstrated that Applicant’s salary was not technically in breach of the Bank’s rules on minimum remuneration.” That effectively eliminates this grievance.

165. The Applicant nevertheless insists that his salary gradually declined from a “market reference point,” and that this is “further evidence” of unfairness and discrimination. Since there is no other proof of unfairness or discrimination, this contention too falls away. (It is conceivable that a staff member could articulate a *prima facie* case of discrimination within the specific context of a challenge to salary levels, but that has never been the Applicant’s case.)

Propriety of the March 2000 Update

166. The Tribunal is persuaded by the Applicant’s reasoning to the effect that it follows from Mr. Goldstein’s own description of his meetings with the Applicant on April 4 and 11, 2000, that (i) Mr. Goldstein had the 360 Report Update, (ii) he did not give a copy to the Applicant, and (iii) he must have comprehended that the Applicant was anxious to read it, as the Applicant understandably refused to pursue a dialogue about criticisms he had not been able to see.

167. The Bank answers that Mr. Goldstein was not in a position to give the Applicant the report until HR staff had ensured that it did not expose commentators to breaches of anonymity, a matter which Ms. Kuusela states was of specific concern to persons to whom she had spoken about the Applicant (see paragraph 9 *supra*). But this vetting should, in the Tribunal’s view, have taken place *before* the Report was put into the hands of Mr. Goldstein.

168. The Applicant states that the fact that the Update was given by Ms. Kuusela to Messrs. Stern and Goldstein, but never to the Applicant, was in breach of Bank rules; he invokes the *Guidelines of the 360 Feedback for Managers Program* which were widely circulated on January 23, 2001.

169. In his “Review” of the Jennings Report, the Applicant’s counsel makes the further point that a 360 Report should, as a matter of due process, not be made available to a supervisor without the staff member also having it, because any appraisal of performance based on such a report “runs into the danger that it is used maliciously by persons who can hide behind anonymity.”

170. So far the Tribunal agrees with the Applicant. The issue here is not whether a 360 Report prepared in 2000 could have been used as a part of the appraisal of a Vice President (the Applicant himself told Sir Robert that if properly carried out it could be valuable for this purpose), but whether it is acceptable to use it without providing it to the concerned staff member.

171. This does not mean that the Applicant has made good on his serious charges of “duplicity” on the part of Mr. Stern, nor his charge of professional and indeed actionable “reprehensibility” on the part of Ms. Kuusela. These accusations are based on speculations about the true date of the Update, as well as its having been withheld from the Applicant. The evocative words used by the Applicant are “cooked” and “secret.”

172. There is no evidence for either accusation. The explanation to the effect that the Report was temporarily withheld from the Applicant to ensure anonymity is plausible, and not overcome by any contrary evidence – as to which the accuser has the burden of proof.

173. Mr. Goldstein’s statement to the effect that the March 2000 Update was in effect set aside in light of the Applicant’s critical reaction to the circumstances in which it was prepared, and that instead another feedback exercise would be carried out in a few months, is consistent with the evidentiary record, including:

- the Applicant's statement when withdrawing his request for an inquiry (see paragraph 17 *supra*);
- the Applicant's own statement to the effect that he welcomed a new feedback exercise (see the penultimate paragraph of the Applicant's "Easter Resolutions," quoted in paragraph 71 *supra*); and
- the objective fact that such an exercise was indeed conducted.

174. Indeed, there is a real question whether the Applicant's complaint about the March 2000 Update is sustainable as an autonomous grievance in light of his own e-mail of April 30, 2000: "I fully agree that this brings to a close the unfortunate misunderstanding around the updating"

175. The Bank has, however, not made any objection on this ground, and perhaps fortunately so in the interest of a full examination of this case.

176. There is certainly no excuse for having treated the March 2000 Update in a looser manner than the initial Report. The responsibility for this incident must begin with Mr. Stern, who now explains that the impetus for the Update was that there were continued complaints relating to the Applicant's performance, and that the Update's purpose was "[t]o get a better sense of why things were not improving." As for the Officer asked to implement this task, Ms. Kuusela, she now says that she was told that

the views of staff would be used as input to the assessment of Mr. Conthe's performance. I was to deliver the feedback to Mr. Goldstein, who would share it with Mr. Conthe in the OPE discussion they would have shortly thereafter.

177. These accounts are not satisfactory. When Mr. Stern writes that Mr. Conthe "responded favorably" to the proposed Update, one can only surmise that Mr. Stern had omitted to mention its impetus and purpose as described in his own words in the previous paragraph. If he had revealed them, the Tribunal has not the slightest doubt that the Applicant would have given his very fullest attention to what Ms. Kuusela was doing. He would have understood that the Update, far from being an innocuous adjunct to the initial exercise, was a matter of far greater portent. He would have insisted on obtaining it at the same time as Mr. Goldstein did, or perhaps even before. He would probably have asked questions about Ms. Kuusela's methodology which she would have been bound to answer. (To take an important example noted in the Jennings Report, the Applicant may well have questioned the fact that the Update involved just over half of the respondents who contributed to the November 1999 Report. The missing respondents were not necessarily those most favorable to the Applicant; Sir Robert specifically and credibly found to the contrary – it was a matter of availability in the given time period. Yet, to use the words of the Jennings Report, this "must clearly have affected the relevance and usefulness" of the Update. And whether the Applicant might have agreed to the exercise anyway is not the question – the fact that he was left in ignorance exposed the exercise to an obvious risk of controversy.) In short, he would not have come unprepared into Mr. Goldstein's office on April 4, 2000.

178. Senior HR officers must be aware of the intense unhappiness that is likely to result whenever potentially career-affecting evaluations are conducted improperly. Such errors create misunderstandings, resentment, and indeed a deep sense of grievance which may lead to protracted and disruptive strife. The Tribunal is unwilling to excuse such errors. (It is inclined to be less severe with respect to Mr. Goldstein, whose experience at the Bank was limited. He could reasonably have relied on the procedures put in place by the HR staff. The consistent accounts of both Mr. Stern and Mr. Goldstein is that the Update was suggested by the former to the latter. Finally, Mr. Goldstein in due course reacted properly to the Applicant's complaints about the Update by disregarding it.)

179. The jurisprudence of this Tribunal does not excuse failures to respect staff members' procedural rights on the basis that they were innocent mistakes. The Staff Association *amicus* brief insists that the Bank has a duty to ensure respect for due process in managing the careers of its staff; its insistence in this regard is both proper and well-founded. An aggrieved staff member does not have to prove intentional mistreatment; nor can the Bank escape by arguing that the complainant's file inadvertently fell through the cracks. It is perhaps important to emphasize this point with respect to lower-ranking staff members who otherwise might be in a particular

danger of not getting the requisite degree of managerial attention, but the rule is for all: the procedural safeguards aptly recalled by the Staff Association (see paragraph 60 *supra*) simply *must* be respected; as persons familiar with the Tribunal's body of judgments will know, negligence in this respect will lead to liability, not exculpation.

180. As Sir Robert noted, it is difficult to evaluate the procedural legitimacy of the Bank's use of 360 Reports given that the rules relating to their use are "so flexible and so variable and when there simply is no binding rule book." Although he was satisfied that the Applicant had not been mistreated in the present case, he raised the following question ("for future cases"):

Whether the existing practices need looking at again, and especially perhaps the evident possibilities of manipulating the practice of protecting the anonymity of the providers of feedback by disguising and in effect somewhat altering what they have said

The Tribunal does more than concur; it urges the Bank to study the issue as a matter of some priority. If 360 Reports were clearly understood as being exclusively for the benefit of the concerned staff member, according to his or her perception of their usefulness, there would perhaps be no problem. But that is not their only use; it is clear that the Bank in certain cases uses them for purposes of evaluation. If that is so, the rights of staff members are clearly at issue, and the constraints of due process come to bear. It is not satisfactory to respond that the Bank may ultimately disregard a particular report, because that suggests that there may be an arbitrary decision *not* to disregard it. Matters of due process are not discretionary. This is an area which calls for clarification to ensure that the Bank's practices do not give rise to justified grievances.

181. The comments in paragraph 180 *supra* are obviously *obiter dictum*. To revert to the present case, the Tribunal is unconvinced by the Applicant's attempt to elevate the incident of the March 2000 Update to an egregious wrong. The way he colors it today stands in sharp contrast to the message he sent on April 30, 2000 (see paragraph 17 *supra*). That the March 2000 Update was initially mishandled is clear, but the Tribunal is satisfied that it was not in any sense determinative of the Applicant's fate at the Bank. The issue was resolved by the abandonment of the Update; the Applicant himself accepted it as a "misunderstanding" which was "[brought] to a close" in the aftermath of the far more important event of his meeting with Mr. Wolfensohn on April 24, 2000. It is impossible to conclude that the incident of the Update, which took place more than a year before the Applicant's non-confirmation in his post as Vice President, was a cause of his non-confirmation. Its *contents* may be consistent with the ultimate causes, but those causes have an ample and autonomous foundation, evidenced in antecedent and subsequent records. And the Applicant had numerous occasions, over the course of more than a year until he was replaced as Vice President, to convince the highest levels of the Bank's management that the criticisms reflected in the Update were wrong.

182. In other words, no tangible prejudice was caused to the Applicant. Nevertheless, the Bank's conduct in regard to the Update was improper, and it may certainly be said that the Update contributed to the Applicant's malaise; that it put him in a more litigious frame of mind; and that it exacerbated his sense of grievance.

183. A difficulty arises at this point due to the fact that the March 2000 Update neither embodies nor builds upon a decision challenged by this application. In and of itself, the March 2000 Update has become a nullity: the Bank put it to the side; the Applicant himself agreed in April 2000 that it was a closed chapter; and the Tribunal has not relied on it in reaching its decisions on the merits of the application. It may seem illogical to sanction the Bank for an incident which has become of no moment, and which in and of itself is not an object of the application.

184. With this in mind, the Tribunal considers that the appropriate sanction of the Bank's improper actions in respect of the March 2000 Update should be in connection with the Applicant's costs, because, as said above, this was conduct likely to lead to frustration and litigation.

185. Counsel for the Applicant has accounted for costs in the amount of US\$61,747.35. Since the application has been broadly unsuccessful, there can be no question of recovering the totality of these costs. The Tribunal finds it appropriate to order the Bank to make a contribution to the Applicant's costs which the Tribunal

recognizes as little more than symbolic, but nevertheless considers to be important as such.

Decision

For the above reasons, the Tribunal decides that:

- (i) the Respondent shall pay the Applicant a contribution of US\$20,000 to his costs; and
- (ii) all other pleas are dismissed.

/S/ Francisco Orrego Vicuña
Francisco Orrego Vicuña
President

/S/ Nassib G. Ziadé
Nassib G. Ziadé
Executive Secretary

At Washington, D.C., September 30, 2002