



World Bank Administrative Tribunal

2016

Decision No. 550

**DR & DS,
Applicants**

v.

**International Finance Corporation,
Respondent**

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

**DR & DS,
Applicants**

v.

**International Finance Corporation,
Respondent**

1. This judgment is rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

2. The Applications were received on 17 September 2015. The Applicants were represented by Ryan E. Griffin and Marie Chopra of James & Hoffman P.C. The International Finance Corporation (IFC) was represented by David R. Rivero, Director (Institutional Administration), Legal Vice Presidency and Natalia Robalino, Senior Counsel. The Applicants' request for consolidation of their respective Applications was granted on 17 November 2015 pursuant to Rule 27(1) of the Rules of the World Bank Administrative Tribunal. The Applicants' requests for anonymity were granted on 2 November 2016. Oral proceedings were held on 2 November 2016. The parties have provided the Tribunal with English translations of relevant documents and newspaper articles which were originally written in Spanish. These documents have been translated by translators of the World Bank Group.

3. The Applicants challenge the 20 May 2015 decision of the Vice President, Human Resources (HRVP) imposing disciplinary sanctions for disclosing to the Argentine press non-confidential but non-public information about former World Bank Group Executive Director Guido Forcieri's travel plans obtained from the World Bank Group's travel management system. The Applicants claim protection under the World Bank's Whistleblower Policy and contend, in the alternative, that the sanctions were disproportionate. The Applicants seek full rescission of the HRVP's decision imposing disciplinary measures and compensation in the form of "full back pay for the five percent reduction in their salaries effective 22 May 2015, including recalculation of any annual salary increases or other benefits based on salary level, and additional compensation for the serious, needless, and ongoing danger of external retaliation" due to the Bank's actions.

The Applicants request legal fees and costs in the amount of \$39,762.75 for the first Applicant and \$41,463.53 for the second Applicant.

FACTUAL BACKGROUND

4. The first Applicant joined the IFC in 2007 while the second Applicant joined the IFC in 2003.

5. On 12 June 2014, Mr. Guido Forcieri, the World Bank Executive Director for Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay, was summoned by Argentine Judge Ariel Lijo of the Fourth Federal Court for Criminal and Correctional Matters as a potential suspect in corruption investigations (the Ciccone investigation). Prior to his position as an Executive Director, Mr. Forcieri was the Chief of Staff of the Argentine Minister of the Economy, then Amado Boudou, who subsequently became the Vice-President of Argentina. The prosecutor in the case alleged that Mr. Forcieri was involved in a corruption scheme stemming from the bankruptcy of the Argentinian company Ciccone Calcográfica in 2010 and the subsequent purchase of the company by Amado Boudou. Ciccone Calcográfica was the only private company authorized to print paper money in Argentina.

6. On 13 June 2014, an anonymous email was sent to the Ethics Committee of the World Bank Board of Directors notifying the Committee of the Ciccone investigation and expressing concern about Mr. Forcieri's alleged involvement in the matters under investigation. The anonymous email stated:

As World Bank staff we are very concern[ed] about the reputation and credibility of this institution in the corruption scandal involving Argentina's Executive Director Mr. Guido Forcieri.

The formal accusations go back to 2012, before he took his ED position. Now the scandal has hit the main pages of all national newspapers regarding alleged misconduct and corruption in the Ciccone case and others. The judge has requested that he present himself in Buenos Aires to testify next week.

Is the institution investigating this case?

7. On 18 June 2014, the day he was scheduled to appear before Judge Lijo, Mr. Forcieri, through his lawyer, requested that the date for his appearance be postponed until 11 August 2014 due to his work obligations as an Executive Director of the World Bank Group.

8. On or around 19 June 2014, the first Applicant accessed Mr. Forcieri's travel profile in the Bank's internal travel management system. According to the Applicant, he viewed Mr. Forcieri's travel plans, which were accessible to all WBG staff, and saw that Mr. Forcieri was in fact scheduled to visit Buenos Aires, Argentina from 22 to 26 June 2014, and was also planning to take two days of personal leave in New York before returning to Washington, D.C. on 30 June 2014.

9. The first Applicant provided this information to an employee of the Argentine newspaper, *La Nación*. This travel information was forwarded the same day by that employee to an investigative journalist covering the Ciccone investigation for *La Nación*. The investigative journalist did not report on the information that was given to him at that time.

10. On 19 June 2014, Judge Lijo considered Mr. Forcieri's request. The IFC provided the Tribunal with an English translation of his order which is originally in Spanish. The translated order noted that:

[T]he reason cited for the accused's request is that as an Executive Director of the World Bank Group he is working in the city of Washington, D.C., in the United States, and that this work requires his presence at several engagements that cannot be postponed and require his daily attention; as a result, he could not leave his job responsibilities until August 11.

Since the accused requested postponement on the same day on which the hearing was scheduled to be held, and his request was not accompanied by a note from the organization where he works stating the reasons preventing his appearance, the accused is hereby ordered to appear in Court on Thursday, June 26, 2014, at 11 a.m., to make the unsworn declaration pursuant to Articles 282 and 289 of the Code of Criminal Procedure of Argentina.

11. Mr. Forcieri's delayed appearance before the Argentine court was widely reported in the Argentine press which published allegations of ongoing efforts by the executive branch and the suspects in the Ciccone investigation to "buy time," postpone the possible indictment of the suspects, and remove Judge Lijo from the case.

12. On 22 June 2014, Mr. Forcieri travelled from Washington Dulles Airport to Dallas-Fort Worth Airport en route to Buenos Aires as scheduled. According to the IFC, Mr. Forcieri's flight from Washington, D.C., was delayed and he missed his connecting flight to Buenos Aires. Mr. Forcieri purchased a one-way ticket and returned to Washington D.C.

13. On 25 June 2014, Mr. Forcieri, through his lawyer, requested that the court postpone his appearance due to his obligations as an Executive Director. The IFC provided the Tribunal with an English translation of this request which was originally in Spanish. According to the translation, the request stated:

I emphasize to Your Honor that it is impossible for my client to appear physically in Court tomorrow.

Because of his work as an Executive Director of the World Bank Group, Mr. Cesar Guido Forcieri is working in the city of Washington, DC, in the United States, as the representative of the Argentine Republic; he also represents Bolivia, Chile, Paraguay, Peru, and Uruguay. That work requires his presence at various engagements that cannot be postponed at this time of the year.

With respect to matters on the agenda in the city of Washington pertaining to Argentina, which have a direct impact on his regular duties, of note are the agreement reached with the Paris Club, the situation with the bondholders who did not accept Argentina's debt swap in 2005 and 2010, and the process underway at the International Monetary Fund for preparing the national statistics report for that organization.

[...]

Therefore, in order to comply with his fiduciary duty to the institution, and that of representative of the abovementioned countries that have elected him to the position, my client must attend various work-related events and meetings, commitments that include the consideration and approval of the institution's general budget for fiscal year 2015, which begins on July 1 of this year.

14. On 25 June 2014, the following headline was reported on *Perfil* online: "Forcieri tries Lijo's patience: requests another postponement." The newspaper reported "Boudou's former chief advisor at the Ministry of Economy will once again miss the investigative hearing tomorrow. The judge has asked Interpol to bring him to the country by force." *La Nación*, on the same day, also reported "Forcieri will not testify tomorrow and an order compelling his return may be issued."

According to the news article “if [Forcieri] misses the hearing, Judge Ariel Lijo may initiate proceedings to order that he be returned by the police, and given that he is abroad, to issue an international warrant for his capture through Interpol.” The report further noted that “as late as last night, Forcieri’s camp insisted that the official did not have a ticket to fly to Buenos Aires today for a court appearance tomorrow.”

15. On the same day, following news of Mr. Forcieri’s renewed request to postpone his appearance before the court in Argentina, the Applicants discussed his apparent failure to travel to Buenos Aires as scheduled. The second Applicant accessed Mr. Forcieri’s travel records and saw that he had aborted his trip. The Applicants concluded that Mr. Forcieri was lying to the court and that information of the aborted flight to Buenos Aires was critical and time-sensitive with respect to the Ciccone investigation proceedings. The first Applicant provided the second Applicant with the investigative journalist’s contact information. The second Applicant, using an anonymous email address, sent details of Mr. Forcieri’s aborted trip to the investigative journalist at *La Nación*. The second Applicant also printed the travel itinerary and delivered a copy to the investigative journalist.

16. On the same day, a congresswoman in Argentina sent an email message to the helpline email address of the Bank’s Office of Ethics and Business Conduct (EBC). She stated:

I am writing to draw your attention to a possible case of misconduct involving the executive director Cesar Guido FORCIERI (Argentina). The aforementioned official has been summoned by an Argentinean criminal court (Juzgado Nacional en lo Criminal y Correccional Federal No. 4) to render testimony as defendant in a judiciary proceeding involving the Vice President of Argentina Republic.

It is noteworthy that [it] is the second time in which the director Forcieri has been subpoenaed by the court and has refused to appear before the Judge alleging his duties as executive director of the World Bank.

In that order I would like to inquire if the director Cesar Guido Forcieri has notified the Ethics Committee, in accordance with the last paragraph of the point 3 of section A of the Code of Conduct for Board Officials, which state[s] that a ‘Board Official shall notify the Ethics Committee if he or she is arrested, charged or convicted of any criminal offences, other than minor violations’, that he has been charged by a federal judge in a decision adopted on June 12 of 2014 of a criminal offence punishable by Argentinean criminal code.

In addition I would like to ask the Ethics Committee, whether the refusal of the representative of Argentina to appear before the court for examination after his indictment constitutes a violation of the Code of Conduct for Board Officials.

17. The Applicants made an anonymous call to the EBC helpline later the same day. According to the records, the report of the message notes that the anonymous callers were based in Argentina. The summarized written record of their call reads as follows:

Jyido [sic] has tried to avoid returning to Argentina to face corruption charges claiming his World Bank duties prevent it.

[...]

Jyido Forcieri is being investigated for corruption in Argentina. Jyido was called to testify in Argentina. Jyido claimed that he could not go to Argentina due to his World Bank duties. The press in Argentina is reporting the situation.

18. In their oral testimony before the Tribunal, the Applicants maintained that, in their effort to complete their call to the EBC helpline, they were met with the request that they state their names and which Vice-Presidency of the Bank their concern related. In their testimony, the Applicants contend that this experience demonstrates the ineffectiveness of the EBC Helpline where activities of an Executive Director are concerned.

19. On 26 June 2014, Judge Lijo issued a decision suspending the hearing. According to the English translation provided by the IFC, he held that:

The attorney stated that it was impossible for Mr. Forcieri to appear physically before the Court; to substantiate this assertion he indicated, as he already did in the first request for postponement of the hearing, that the accused, in his capacity as an Executive Director of the World Bank Group, is physically working in the city of Washington, D.C. in the United States, as the representative of the Argentine Republic as well as of Bolivia, Chile, Paraguay, Peru, and Uruguay; and that this job requires his presence at several engagements that cannot be postponed.

To substantiate the foregoing on this occasion, the accused provided documentation that could be covered by the provisions relating to the confidentiality of the World Bank Group's archives. Accordingly, in order to protect its confidential, sensitive, and restricted nature, it shall be kept in the Court's safe.

Taking into account the arguments of the accused and the documentation provided, the World Bank is hereby officially notified of the charge against Guido Forcieri

and requested to inform this Court of the dates on which the accused can appear in this Court to make his unsworn declaration. For this purpose, the authorities of the World Bank are hereby informed that the actual proceeding will not require the presence of the accused for more than 24 hours, and he can return to his duties once completed.

In addition, official notification is hereby sent to the Ministry of Economy to inquire whether Guido Forcieri is representing the national government in negotiations for payment to bondholders who did not accept Argentina's debt swap in 2005 and 2010 and, if so, to indicate the nature of his functions.

20. On the same day, the Clerk of the Fourth National Federal Court for Criminal and Correctional Matters, sent an official letter to the World Bank Group formally notifying it of the Ciccone investigation and the allegations against Mr. Forcieri. The Bank was informed that "a hearing was set for June 18 of this year for the unsworn declaration of Guido Forcieri. However, the accused has twice requested its postponement, arguing that his duties with the World Bank preclude him from appearing before the Court." The World Bank was formally requested to "inform this Court of the dates on which Mr. Guido Forcieri can appear before the Court so that the hearing can be held," and was informed that "the actual proceeding will not require the presence of the accused for more than 24 hours; he can return to his duties at its conclusion."

21. On 27 June 2014, *La Nación* published an article titled: "On his way to appear before Argentine authorities, Forcieri decided to return during a layover." In the article, the investigative journalist reconstructed Mr. Forcieri's 22 June 2014 aborted trip to Buenos Aires noting:

Guido Forcieri, former Chief of Staff to Amado Boudou, cut short his flight to Buenos Aires on Sunday after completing the first leg of his trip. He arrived in Dallas, Texas, but opted to return to Washington and, from there, informed the Argentine authorities that it was "impossible" for him to appear in order to explain his role in the Ciccone case.

[...]

[...] Forcieri intended to spend just two days in Buenos Aires. His plan was to appear before federal judge Ariel Lijo, then return yesterday, Thursday, June 26, to New York, where he was planning to remain until Monday, June 30.

The itinerary, which Forcieri booked through American Express, the Travel agency used by the World Bank, does not match the official version put forward by his

defense in the Comodoro Py courts. Forcieri informed Judge Lijo that “there is no way to delegate” the sovereign debt issues, which, he explained, “must be dealt with unofficially.” He therefore concluded by requesting that his investigation be postponed until August 11, seven weeks later.

[...]The record show that Forcieri described his trip to Argentina as an “official” World Bank business trip, without indicating that he was being investigated by the Argentine authorities for his alleged criminal liability in the Ciccone case.

Rafael Resnick Brenner, former chief advisor to the head of the income tax office [...] testified before the Court that Forcieri summoned him to his office in 2010 to explain to him the importance to the Government of a comeback by the former Ciccone company. Resnick Brenner [...] also testified that Forcieri introduced him to Nuñez Carmona, a business partner of Boudou’s then the Minister of Economy, as if he were an official from the treasury office responsible for resolving the matter.

[...]

Through a public statement circulated by the office of the Vice President mere hours after Resnick Brenner’s testimony, Forcieri denied the accusations and retaliated with barbs leveled at the AFIP official. However, he cut short his trip to Buenos Aires, where he had been on his way to defend himself before judge Lijo.

22. Other news agencies also reported on Mr. Forcieri’s aborted trip to Argentina in both print and online media.

23. On the same day, an Information Officer in the World Bank Group Information Technology Services (ITS) sent an email message to another Information Officer informing the latter that she had received a request from the office of Mr. Forcieri to “investigate who accessed [his] travel records in SAP.” She requested that the investigation be kept confidential. The request was sent to another staff member to commence the investigation. On the same day, the Chief Information Security Officer enquired whether there was authorization for this investigation, stating: “[t]here is a process to follow if we need to access anything beyond logs. The policy requires VP’s approval to access staff’s record if that’s required to be conclusive. Please do not proceed further until my request is answered.”

24. On the same day, the aforementioned Argentine congresswoman sent a letter addressed to the President of the World Bank Group through the World Bank Country Office in Argentina. In

her letter she drew the President's attention to the allegations of misconduct against Mr. Forcieri stating "[i]t is my understanding that this situation has not been brought to your attention by Executive Director Forcieri, having failed to notify, as mandatory, to the Ethics committee that he has been charged with a criminal offense punishable by the Argentinean criminal code." She called for "suitable measures to be taken to suspend immediately Cesar Guido Forcieri from office and to initiate the process for his removal, since it is unacceptable that anyone suspected and accused of criminal offences within an extremely serious corruption judicial process, a process that affects one of the top Argentinean constitutional authorities who may stand in for the President when he is absent or otherwise unavailable, continues performing his duties." She concluded by stating that Mr. Forcieri's "refusal to appear before a Court of law and the criminal charges he faces are incompatible with his current function as Executive Director, bringing into disrepute the World Bank organization."

25. On 28 June 2014, the Senior Information Officer contributed to the email discussion between the ITS staff stating: "Please route this request through EBC since it is an investigation on breach of sensitive official Bank information. Ethics office will be able to advise on appropriate steps to go through to proceed further with the investigation, especially due to the fact that the request is originating from an ED's office." The staff members involved agreed not to proceed further until the ITS Information Officer communicated with Mr. Forcieri's Senior Executive Assistant.

26. On the same day, *La Nación* reported that Judge Lijo issued indictments the previous night against Vice President Boudou and other co-defendants. *La Nación* claimed that Judge Lijo "had planned to issue a decision in 15 days, but the accuseds sought to delay the proceedings with their petitions for postponement."

27. On 30 June 2014, the ITS Information Officer contacted the ITS team stating "[t]he ED would like to proceed. Let me know if I need to contact SECMM or if Mr. Forcieri can be the one authorizing this."

28. On the same day, Mr. Forcieri sent an email to members of the Ethics Committee of the Board of Directors. Also addressed were the then Chief Counsel of the World Bank Legal Department, the Ethics Committee Secretary, Corporate Secretary and Special Envoy of the World Bank President, and Corporate Secretariat Adviser and Deputy Secretary of the Ethics Committee. In the message, Mr. Forcieri gave a “disclosure notice” stating in part:

[O]n June 12 this year, I have been formally accused of somehow participating in the maneuvers under investigation, and called to attend to Court on June 16; I have been included in speculations on account of the fact I served as Chief of Staff for the Minister of Economy during part of 2010 and 2011. As you can easily notice, the time between I have been notified and the date I was supposed to attend to Court was extremely short, not allowing me to even hire a lawyer, get to read the accusation and less to assess all the elements filed. Let me say, this is not normal at all in an ordinary process.

Based on this and on the task I must perform daily related to my ordinary duties at the Board, I asked the Judge to postpone the date for my attendance until the Board recess in August, while stressing my full collaboration with the process, while putting all my efforts in seeking to put forward that date, if possible. Yesterday, June 27, and after a series of presentations, the Judge decided to suspend my attendance and to ask the Bank to verify the Board calendar in order to determine a possible date for attendance.

29. Mr. Forcieri added:

Having said the above, I wish to clearly express the following to the Committee: First, urge to say that I have never participated on any administrative procedure nor directly or indirectly related to the facts under investigation, while I was at the Ministry. I trust in the judicial system and I’m confident that my innocence will soon be determined.

Second, I’m fully open to make myself available to the Committee so as to give all the explanations, details and any type of information that this body considers necessary.

Third and last, I would like to bring to the Committee that the legal process, to its extent it relates to myself, will not interfere at all in my duties as a member of the Board.

Moreover, the process has no relation with the Bank Group in any form whatsoever.

30. On 1 July 2014, an EBC Senior Investigator contacted the Deputy Secretary of the Board Ethics Committee. The Senior Investigator informed her that EBC received information that Mr. Forcieri was summoned by an Argentine court but failed to appear citing his duties as a World Bank Executive Director. The Senior Investigator added:

As the remit of EBC only covers staff subject to Staff Rule 3.00, and excludes individuals employed as Executive Directors, I am referring this matter to [you] in your capacity as Deputy Secretary of the Ethics Committee for appropriate disposition.

31. On 2 July 2014, the World Bank Group responded to the letter from the Argentine court in which the Bank was requested to inform the Court of dates Mr. Forcieri would be available to appear before Judge Lijo. The letter was sent by Ms. Anne-Marie Leroy, Senior Vice President and Group General Counsel. The Bank stated:

Mr. Cesar Guido Forcieri is an Executive Director of the World Bank. Mr. Forcieri was elected to this position by six (6) of the World Bank's member states, including Argentina, which he represents on the World Bank Board of Executive Directors. Mr. Forcieri is not a staff member of the World Bank, and is accountable in the performance of his responsibilities to the member states that have elected him. Accordingly, Mr. Forcieri's availability to attend to matters outside Washington DC, should be determined between Mr. Forcieri and the member states he represents on the Board.

32. On the same day, the World Bank Group responded to the letter from the Argentine congresswoman stating that:

As you will know, the World Bank is a public international organization owned by its 188 member states. Mr. Cesar Guido Forcieri is an Executive Director of the World Bank. Mr. Forcieri was elected to this position by six (6) of the World Bank's member states, including Argentina, which he represents on the World Bank Board of Executive Directors.

In sum, Mr. Forcieri is not a staff member of the World Bank, and he is accountable in the performance of his responsibilities to the six (6) member states that have elected him.

33. On the same day, it was reported on *Parlamentario.com*, a website dedicated to news about the Argentine Congress, that the National Deputy asked the Ethics Committee of the World Bank's

Board of Directors to review whether Mr. Forcieri had violated the standards of ethical conduct contained in the Bank's Code of Conduct for Board Officials. According to the translation, the report noted that:

In its June 27 edition, the newspaper *La Nación* reported that Forcieri embarked on a trip to Argentina but on a layover decided to return to Washington. As the article reported, the trip to Argentina was recorded as official travel and charged to the World Bank [...].

The deputies reported these facts so the World Bank's Ethics Committee could determine whether Forcieri abused his immunities by attributing his refusal to appear in Argentine court to supposed responsibilities at the World Bank and falsifying information on his trip in order to charge the expenses to the World Bank, by claiming that his trip to Argentina was an "official" Bank trip.

34. On 3 July 2014, the Argentine congresswoman sent her complaint, by email, to the Deputy Secretary of the Board Ethics Committee. She stated that she was available to provide any additional information needed and would appreciate being kept updated on "the World Bank's follow up regarding the complaint about Mr. Forcieri."

35. On 7 July 2014, the World Bank Group ITS informed EBC that a newspaper in Argentina, *La Nación*, published a story that contained details of Mr. Forcieri's travel records, which led his office to believe that his World Bank Group travel records had been leaked.

36. On 17 July 2014, the Chair of the Ethics Committee sent an email message to Mr. Forcieri entitled "Confidential Ethics committee July 15" stating:

On behalf of the Board's Ethics Committee, I wish to inform you that the Committee met on July 15, 2014. The Committee acknowledged receipt of your Disclosure note dated June 27, 2014. The Committee also took note of your reference, in the Disclosure Note, to travel to Argentina to cooperate with the investigation during the Board recess.

Finally, I want to mention that a Committee member expressed discomfort with the whole issue, which was duly noted and recorded.

37. On 21 July 2014, EBC secured authorization from the Vice President and WBG Chief Information Officer to perform network searches to identify Bank staff members who viewed Mr.

Forcieri's travel records the week prior to the *La Nación* article, and to conduct a network-wide email search to identify any Bank email accounts that communicated with the *La Nación* email domain during this period. Approval was also obtained from the Senior Vice President and Group General Counsel, and a Managing Director.

38. Extensions to this authorization were granted on 5 and 21 August 2014. Based on these searches, EBC found that eight staff members, including the Applicants, had accessed Mr. Forcieri's travel records in the World Bank Group's travel management system. EBC also found evidence that the Applicants were involved in communicating Mr. Forcieri's travel plans to *La Nacion*.

39. On 5 September 2014, Mr. Forcieri was formally indicted after appearing in Buenos Aires for questioning.

40. On the same day, the Institutional Integrity Vice Presidency (INT), which investigates allegations of fraud and corruption, received an allegation of suspected misconduct through its online communication form. The form stated:

The Argentine court has processed [sic] with several charges involving corruption acts, Mr. Guido Forcieri, currently a representative of Argentina, Chile, Peru, Uruguay and Paraguay to the World Bank. It is a discredit to the World Bank organization to have among its Directors persons who have court process and are being investigated for corruption cases and even being indicted.

It should be a logical and ethical action from the World Bank organization to request the removal of the individual involved, in this case Mr. Forcieri.

41. On 6 September 2014, INT received another report concerning Mr. Forcieri's indictment on corruption charges.

42. On 23 September 2014, the INT Vice President referred the complaints received to the Chair of the Board Ethics Committee. In his memorandum on the matter he stated:

I understand that you are already aware of the matters presented in these complaints as Executive Director Forcieri has previously brought them to your attention.

As you are aware, INT does not have jurisdiction over matters relating to Executive Directors as such jurisdiction lies with the Ethics Committee. Therefore, as these allegations fall outside of INT's jurisdiction, we are forwarding them to you for action as you deem appropriate.

43. On 8 October 2014, EBC issued Notices of Alleged Misconduct to each Applicant. The first Applicant was informed of the allegation that he "leaked non-public information to the media by accessing the World Bank travel records of Mr. Cesar Guido Forcieri and [gave] those records to a reporter at the newspaper *La Nación*." He was also alleged to have "misused World Bank Group resources by improperly disposing of [his] IFC-issued laptop or placing it [in] an unsecured location where it would likely be stolen." The second Applicant was informed of the allegation that he "provided details of Executive Director Mr. Cesar Guido Forcieri's World Bank travel records to an employee of the newspaper *La Nación*, when a *La Nación* employee or reporter sought to verify specifics of Mr. Forcieri's upcoming travel." He was also alleged to have "facilitated another non-public disclosure by arranging for an IFC colleague to provide records of Mr. Forcieri's World Bank travel to a reporter at the newspaper *La Nación*." The first Applicant was interviewed via videoconference on 12 October 2014, while the second Applicant was interviewed via videoconference on 28 October 2014. Both Applicants confirmed the factual allegations in the Notice of Alleged Misconduct concerning the disclosure of non-public information.

44. On 5 January 2015, EBC transmitted its Final Reports to the Human Resources Vice President (HRVP). In the reports, EBC noted the Applicants' admissions that they viewed and transmitted Mr. Forcieri's World Bank travel records on the World Bank Group intranet and conveyed that information to the investigative journalist. EBC found the Applicants to be "credible and cooperative during the investigative process." The reports noted that their written responses were also found to be credible and the "background information concerning the Ciccone corruption case to be accurate." With respect to the first Applicant, EBC stated that it did not find evidence to substantiate allegations that he improperly disposed of his IFC laptop or placed it in an unsecured location where it would likely be stolen.

45. EBC noted the Applicants' explanations that they feared retaliation if they reported Mr. Forcieri's suspected misconduct internally. EBC invited the HRVP to "consider whether misconduct has occurred and if he so decides, to impose disciplinary measures, as set forth in Staff Rule 3.00, paragraph 10.06." EBC also invited the HRVP "to determine whether Staff Rule 8.02 on whistleblowing applies to this case." Finally, EBC noted the allegation made that Mr. Forcieri may have committed misconduct by abusing World Bank Group travel benefits, and stated that this allegation would be referred to the Board Ethics Committee, which is authorized to review allegations of misconduct against Board Officials.

46. On 20 May 2015, several months after EBC's Final Reports, the HRVP issued disciplinary letters to both Applicants indicating that, after "careful and thorough review of the Final Report[s]," he had determined that there was clear and convincing evidence to support a finding that they engaged in misconduct, as defined under:

- a) Staff Rule 3.00, paragraph 6.01(a) – Misconduct includes a failure to observe obligations relation to ... disclosure of nonpublic information.
- b) Staff Rule 3.00, paragraph 6.01(b) – Misconduct includes a failure to observe generally applicable norms of prudent professional conduct.
- c) Staff Rule 3.00, paragraph 6.01(c) – Misconduct includes acts or omissions in conflict with the general obligation of staff members set forth in Principle 3 of the Principles of Staff Employment including the requirements that staff [...] conduct themselves at all times in a manner befitting their status as employees of an international organization and to avoid any action [...] that would adversely or unfavorably reflect on their status [...] (Principle 3.1(c)).

47. The HRVP noted several mitigating factors namely that: the Applicants have had a record of good performance; their admission to the allegations and cooperation with EBC; their claims that they felt they "had an ethical obligation to release the information to fight corruption and the obstruction of justice with regard to an ongoing corruption trial in Argentina"; and their claims that they had no personal gain from their conduct.

48. The HRVP further noted that the Applicants claimed that they had engaged in whistleblowing, a protected activity under Staff Rule 8.02, Protection and Procedures for Reporting Misconduct (Whistleblowing), paragraph 4, External Reporting. The HRVP held that Whistleblower protection was unavailable as the Whistleblower Rule only "applies to reports of

suspected misconduct that may threaten the operations or governance of the Bank Group.” The HRVP concluded that the “corruption trial in Argentina does not come under the ambit of ‘suspected misconduct that may threaten the operations or governance of the Bank Group.’” According to the HRVP the Applicants should have availed themselves of the internal avenues to raise their concerns, assuming “for the sake of argument that the suspected misconduct came under the purview of the Whistleblower Rule.”

49. The HRVP imposed the following disciplinary measures: a) demotion and ineligibility for a promotion for a period of three years; b) a reduction in salary of 5% of the Applicants’ current salary; and c) that the disciplinary letter would remain on their staff record for a period of three years.

50. On 11 June 2015, EBC issued an announcement to all Bank staff on the World Bank Group’s intranet. The announcement reported that “three staff members have been found to have engaged in the unauthorized public disclosure of confidential World Bank documents and information, in violation of World Bank Group policies.” The announcement did not identify the Applicants by name. However, the announcement noted that one of the “leak[s] involved two staff members and the travel records of a Bank official” and that the responsible staff members “ha[d] been disciplined appropriately and similarly.”

51. On 17 September 2015, the Applicants submitted their individual Applications to the Tribunal. They seek full rescission of the disciplinary sanctions issued on 20 May 2015 by the HRVP. The Applicants further seek compensation in the form of “full back pay for the five percent reduction in their salaries effective 22 May 2015, including recalculation of any annual salary increases or other benefits based on salary level, and additional compensation for the serious, needless, and ongoing danger of external retaliation” due to the Bank’s actions.

52. On 31 December 2015, Poder Ciudadano, the Argentine chapter of Transparency International, filed an amicus curiae brief in support of the Applicants.

53. On 22 March 2016, the World Bank Staff Association filed an amicus curiae brief in support of the Applicants.

SUMMARY OF THE MAIN CONTENTIONS OF THE PARTIES

The Applicants' Contention No. 1

The Applicants' disclosures of Mr. Forcieri's travel information constituted protected whistleblower conduct for which the Bank may not impose disciplinary measures

54. The Applicants assert that their conduct qualifies for whistleblower protection under Staff Rule 8.02 in that they reasonably suspected Mr. Forcieri of committing misconduct which threatened the operations or governance of the Bank Group, and reasonably believed that immediately disclosing Mr. Forcieri's travel plans to *La Nación* was necessary to avoid violations of Argentine law. The Applicants contend that reporting through internal Bank channels presented clear risks of retaliation, and Mr. Forcieri's attempts to discover the source of the disclosure demonstrated the reasonableness of this belief. Finally, the Applicants maintain that external reporting was justifiable under the circumstances because it gave them a better chance of remaining anonymous under Argentine law which protects the confidentiality of journalists' sources of information, and because, in their assessment, there were no countervailing concerns that weighed against external disclosure under the circumstances since the travel records were not confidential.

The IFC's Response

The defense of whistleblowing is not available to the applicants.

55. According to the IFC, the Applicants have failed to show how the operations or governance of the Bank Group were threatened by Mr. Forcieri's alleged intention to thwart the investigation in the Ciccone case. The IFC further argues that the Applicants' reliance on their "alleged reasonable belief that the operations or governance of the Bank Group was threatened" is insufficient, and irrelevant. To the IFC, Staff Rule 8.02 "does not apply if a staff member is wrong, no matter the reasonableness – or, for that matter, sincerity – of his or her belief."

56. The IFC further contends that the Applicants fail to meet two additional requirements related to external reporting, namely that their reporting was: a) necessary to avoid a violation of national or international law; and b) it was not possible to report the suspected misconduct using any of the established internal mechanisms. Regarding the former, the IFC asserts that the standard of proof for reporting externally is “much higher” than the “reasonable belief” standard advocated by the Applicants.

The Applicants’ Contention No. 2

The disciplinary process and sanctions against the Applicants were arbitrary and disproportionate to their conduct

57. The Applicants assert that should the Tribunal find that the Bank Group’s Whistleblower Policy does not protect their conduct, it should nevertheless find that the treatment they received was arbitrary and grossly disproportionate under the circumstances. The Applicants contend that the sanctions imposed on them were motivated by an unrelated disciplinary matter, namely, the Bank Group’s desire to appear evenhanded in its discipline of Fabrice Houdart, the third staff member referenced in the 11 June 2015 EBC intranet announcement. According to the Applicants, the Bank Group nevertheless sought to treat them similarly to Fabrice Houdart, in issuing disciplinary measures, despite the substantial difference in the nature of the information disclosed and the mitigating factors identified in the EBC Final Reports.

The IFC’s Response

The disciplinary sanctions imposed on the Applicants were neither disproportionate nor arbitrary

58. The IFC maintains that the disciplinary sanctions imposed on the Applicants were proportionate to their conduct. With respect to the factors which the Applicants allege should have had a mitigating effect on their sanctions, the IFC contends that the Applicants did not “assist [] the prosecution of high-level public corruption,” nor did their actions result in “substantial reputational benefit” to the IFC. On the contrary, the IFC asserts that the disclosures caused “serious embarrassment [to the IFC] when its own staff leaked sensitive documents to the press

negatively affecting its relationship with its shareholder countries.” The IFC further asserts that it suffered “reputational harm” by the article which reported on Mr. Forcieri’s “aborted trip because it focused on the costs associated with the trip, as well as Mr. Forcieri’s alleged lavish lifestyle in DC.”

THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS

59. The scope of the Tribunal’s review in disciplinary cases is well-established. In *Koudogbo*, Decision No. 246 [2001], para. 18, the Tribunal stated that this review

is not limited to determining whether there has been an abuse of discretion. When the Tribunal reviews disciplinary cases, it “examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.” (*Carew*, Decision No. 142 [1995], para. 32.)

60. Similarly, the Tribunal has held that its review in such cases “encompasses a fuller examination of the issues and the circumstances.” *Cissé*, Decision No. 242 [2001], para. 26, citing *Mustafa*, Decision No. 207 [1999], para. 17, and *Planthara*, Decision No. 143 [1995], para. 24.

61. It is also well-established, as stated in *Dambita*, Decision No. 243 [2001], para. 21, that:

In disciplinary matters, strict adherence to the Staff Rules is imperative and a conclusion of misconduct has to be proven. The burden of proof of misconduct is on the Respondent. The standard of evidence in disciplinary decisions leading [...] to misconduct and disciplinary sanctions must be higher than a mere balance of probabilities.

62. The present case will be reviewed in accordance with these standards.

EXISTENCE OF THE FACTS AND WHETHER THEY LEGALLY AMOUNT TO MISCONDUCT

63. It is not in dispute that, on 19 and 25 June 2014, the Applicants accessed the travel records of the World Bank Executive Director, Mr. Guido Forcieri, contained in the World Bank travel

management system. The Applicants then provided information on Mr. Forcieri's travel itinerary to Buenos Aires to an investigative journalist working with the Argentine newspaper, *La Nación*. This information formed the subject matter of several print and online media articles about Mr. Guido Forcieri's aborted trip to Buenos Aires.

64. The issue at hand is whether the Applicants' conduct legally amounts to misconduct. It is worth noting, at the outset, that the IFC does not assert that the act of accessing Mr. Forcieri's travel records amounts to misconduct. Indeed, the World Bank Group's travel management system is accessible by all staff members of the Bank Group, and the EBC investigation revealed that during the time in question, several staff members accessed and viewed Mr. Forcieri's travel records. The conduct which is under scrutiny is the act of disclosing these travel plans to the journalist at *La Nación*.

65. Principle 3.1(d) of the Bank's Principles of Staff Employment provides that staff members shall

observe the utmost discretion in all matters relating to the Organizations both while they are staff members and after their service with the Organizations has ended. In particular, they shall refrain from the improper disclosure, whether direct or indirect, of information related to the business of The World Bank.

66. According to Staff Rule 3.00, paragraph 6.01(a), misconduct includes the "[f]ailure to observe obligations relating to [...] disclosure of non-public information." Staff Rule 3.01, paragraph 5.01 which specifically addresses the disclosure and use of non-public information further provides that:

Staff members and former staff members in possession of non-public information obtained in the course of Bank Group employment shall not, without written authorization from a senior manager, disclose to any third party for any reason or otherwise use such information in furtherance of a private interest or the private interest of any other person or entity. These obligations continue after separation from Bank Group service. "Non-public information" is defined as information generated by the Bank Group that has not been approved for release outside the Bank Group in accordance with the Bank Group's rules.

67. According to the IFC, under the Bank's 2013 Access to Information Policy, travel records of staff or Executive Directors and Alternates are classified as internal administrative documents. These documents are restricted and are classified, by default, as "Official Use Only." Policy 6.21A of the World Bank Group's Administrative Manual "defines the principles for the classification of information and categorization of the World Bank Group's (WBG) application and infrastructure assets." According to AMS Policy 6.21A, paragraph 4, "[a]ll restricted information must be classified as Strictly Confidential, Confidential or Official Use Only as defined in this policy." Paragraph 5.3 of the AMS Policy provides that "Official Use Only" information

if disclosed may in the judgment of the relevant WBG entity cause harm to well defined interests of the WBG entities or stakeholders. Sharing "Official Use Only" information with the general public or the press is not permitted. This is the default classification level for restricted information.

Access to information classified as Official Use Only must be restricted to WBG Staff of the relevant WBG entity. Official Use Only information may be disclosed to External Parties if the disclosure, on a prudent basis, is in the interest of the WBG entity and the receiving External Party is notified that the information so disclosed may not be further disclosed without the prior consent of the disclosing WBG entity, or is otherwise under an obligation of confidentiality.

68. The Tribunal finds that by disclosing Mr. Forcieri's travel itinerary to the investigative journalist at *La Nación*, the Applicants violated Principle 3.1 of the Principles of Staff Employment and Staff Rule 3.01, paragraph 5.01. The Applicants did not seek the requisite managerial approval prior to the disclosure of non-public information. The Applicants also acted in contravention of the AMS Policy by disclosing information without informing the receiving external party, the journalist at *La Nación*, that the information may not be further disclosed without the prior consent of the disclosing WBG entity, or is otherwise under an obligation of confidentiality. The Tribunal is therefore satisfied that the Applicants' disclosure of Mr. Forcieri's travel plans would constitute sanctionable misconduct unless it is established that the disclosure of Mr. Forcieri's itinerary amounted to protected activity under the Bank's Whistleblower Policy.

WHETHER WHISTLEBLOWER PROTECTION APPLIES TO THE APPLICANTS' CONDUCT

69. In 2008, the World Bank Group established a two-tiered whistleblower policy creating both internal and external channels through which protected disclosures of suspected misconduct may be made. Staff Rule 8.02, Protections and Procedures for Reporting Misconduct (Whistleblowing) sets out the obligation upon staff to report suspected misconduct, and the scope of the Whistleblower Policy. Staff Rule 8.02, paragraph 1.01 explains that the purpose of this rule is to

clarify the rights and responsibilities of staff members with respect to reporting suspected misconduct that may threaten the operations or governance of the Bank Group, so as to encourage staff members to raise concerns and enable the Bank Group to effectively address such cases, manage risks, and uphold standards of good governance.

70. Staff Rule 8.02, paragraph 1.03 states that:

This Rule applies to reports of suspected misconduct that may threaten the operations or governance of the Bank Group. The protections set out in this Rule apply whether the subject of the allegations is a staff member or any other person or entity inside or outside the Bank Group.

71. With respect to internal reporting, Staff Rule 8.02, paragraph 2.02 states that:

Staff members are encouraged to report suspected misconduct, and are required to report to INT suspected fraud or corruption in Bank Group financed projects or in the administration of Bank Group business. [...] Suspected misconduct that falls within the scope of EBC, as described in Staff Rule 3.00, Section 6, is to be reported in accordance with Section 7 of that Rule. Suspected misconduct that falls within the scope of INT, as described in Staff Rule 8.01, Paragraph 1.01, is to be reported in accordance with paragraph 2.02 of that Rule. Where a staff member has grounds to believe that reporting to line management or EBC or INT, as applicable, would subject the staff member to retaliation or create a likelihood that evidence relating to the suspected misconduct will be concealed or destroyed, the staff member may report suspected misconduct directly to the President, a Managing Director, the Senior Vice President and Group General Counsel, or the Vice President, Human Resources, as the staff member may prefer, with a request that an alternative reviewer outside EBC or INT, as applicable, be designated to review the report of suspected misconduct. Reports of suspected misconduct involving Board Officials should be submitted to the Ethics Committee of the Board as provided in the Code of Conduct for Board Officials.

72. Although external reporting channels are not prohibited, Staff Rule 8.02 stipulates a preference for internal reporting, enumerating specific criteria for protected external disclosures:

4.01 Because a primary objective of this Rule is to enable the Bank Group to take institutional measures necessary to remedy misconduct, staff members are generally required to report suspected misconduct under this Rule through the internal mechanisms set forth in Paragraph 2.02 of this Rule.

4.02 Nevertheless, protections against retaliation by Bank Group managers or other staff members shall be extended to a staff member who reports suspected misconduct to an entity or individual outside of the established internal mechanisms where the staff member can show that:

- a. such reporting is necessary so as to avoid:
 - i. a significant threat to public health or safety; or
 - ii. substantive damage to Bank Group operations; or
 - iii. a violation of national or international law; and
- b. the established internal mechanisms are inadequate because:
 - i. the staff member has grounds to believe that it is not possible to report the suspected misconduct pursuant to any of the established internal mechanisms because all such avenues would subject the staff member to retaliation within the institution; or
 - ii. the staff member has grounds to believe that it is not possible to report the suspected misconduct pursuant to any of the established internal mechanisms because all such avenues would create a likelihood that evidence relating to the suspected misconduct will be concealed or destroyed; or
 - iii. the staff member has previously reported the suspected misconduct through the established internal mechanisms (and not on an anonymous basis), and the Bank Group has failed to inform the staff member in writing of the status of the matter within six months of such report; and

- c. the staff member does not accept payment or any other benefit from any party for such report.

4.03 Qualified external reports that are made by staff members in accordance with Paragraph 4.02 above, and consistent with any confidentiality obligations to concerned third parties, shall not be considered as a breach of staff members' obligations with regard to the disclosure and use of non-public information under Staff Rule 3.01, "Standards of Professional Conduct," Paragraph 5.01 on "Disclosure and Use of Non-Public Information."

73. Retaliation or adverse disciplinary measures against staff members engaged in protected activity under Staff Rule 8.02 is expressly prohibited.

74. The Applicants contend that their conduct in disclosing non-public, "Official Use Only," information about Mr. Forcieri's travel plans was protected under the Whistleblower Policy, while the IFC maintains that the Applicants' disclosure does not meet the requirements set in Staff Rule 8.02. Based on the provisions enumerated above, the Tribunal observes that to claim whistleblower protection the Applicants must first demonstrate, as required by Staff Rule 8.02, paragraph 1.03, that they reported "suspected misconduct that may threaten the operations or governance of the Bank Group." Secondly, the Applicants must show that their external reporting to the journalist meets the criteria itemized in Staff Rule 8.02, paragraph 4.02. The Tribunal will now address each separately.

Whether the Applicants reported suspected misconduct that may threaten the operations or governance of the Bank

75. According to the Applicants, they reasonably believed that Mr. Forcieri was abusing his position in order to "thwart a high-level public corruption investigation." This, to the Applicants, was in direct violation of the Code of Conduct for Board Officials and threatened the operations or governance of the Bank. The Applicants contend that the discrepancy between Mr. Forcieri's statements to Judge Lijo that his duties prevented him from travelling to Buenos Aires until 11 August 2014, and his travel records in the WBG travel management system substantiated their suspicion that Mr. Forcieri was misleading a member country's judiciary regarding his Executive Director obligations. According to the Applicants, the reasonableness of their belief is confirmed

by the reactions to their disclosure of Mr. Forcieri's travel arrangements, as the record shows that Judge Lijo promptly issued indictments in the Ciccone case.

76. The IFC on the other hand contends that not every violation of the Code of Conduct for Board Officials would have the potential to threaten the operations or governance of the Bank Group. According to the IFC, the Applicants must have a reasonable belief that misconduct has occurred, something it asserts they could not have had in this case based on the timeline of events. The record shows that the first disclosure of Mr. Forcieri's travel itinerary was made on 19 June 2014 and the IFC argues that there was no legitimate reason for this disclosure. The IFC contends that it was reasonable for Mr. Forcieri to request a postponement of the hearing due to the short notice between the date of his summons and the date on which he was to appear before the Argentine court.

77. The IFC further avers that the Applicants could not have been operating under a reasonable belief that misconduct had occurred when they shared the travel records on 25 June 2014 because there was nothing in the document that the Applicants leaked which "might have reasonably led one to suspect that any form of misconduct was being committed." It is the IFC's contention that postponing travel could not have given the Applicants any cause for doubting Mr. Forcieri's motives, nor could they have formed a reasonable belief at that time, as they now assert, that Mr. Forcieri was postponing his testimony to the Argentine judge as a delaying tactic to enable the removal of the judge.

78. The Tribunal first observes that under Staff Rule 8.02, paragraph 1.03, staff members, as reporting agents, are not required to confirm the existence of the misconduct prior to using either internal or external reporting channels. Rather, the rule governs the suspicion of misconduct. To require otherwise would place an undue burden on the staff member and have a harmful effect on staff confidence in the organization's protection of whistleblowers. It would also detract from the responsibility of the units mandated to investigate allegations of misconduct. This could not have been the intention of the drafters of the Bank Group's Whistleblower Policy.

79. The IFC contends that not every violation of the Code of Conduct for Board Officials could have the potential to threaten the operations or governance of the Bank Group. The HRVP also maintains that the “corruption trial in Argentina does not come under the ambit of ‘suspected misconduct that may threaten the operations or governance of the Bank Group.’”

80. Article V, Section 4(a) of the IBRD Articles of Agreement provides that Executive Directors “shall be responsible for the conduct of the general operations of the Bank, and for this purpose, shall exercise all the powers delegated to them by the Board of Governors.” The Tribunal finds that the very nature of the role performed by Executive Directors requires them, as a basic standard of conduct, to maintain the highest standards of integrity in their personal and professional conduct and observe principles of good governance. Failure of an Executive Director to maintain these standards of integrity could potentially threaten the operations or governance of an institution which has assumed an international leadership role in the global fight against fraud and corruption. The abuse of position is expressly prohibited by the Code of Conduct for Board Officials which requires Executive Directors to “avoid conduct that could bring the Organizations into disrepute or create the appearance of impropriety.” It would hardly be consistent with the expressed aim of the World Bank Group to help “countries combat corruption” that it should take lightly allegations that an Executive Director, involved in a corruption case, misused his position to delay responding to a summons by a judge of a member country concerning that case. Under paragraph 3 of the Code of Conduct, Executive Directors are required to observe “the laws of each jurisdiction in which they are present pursuant to their duties as Board Officials so as not to be perceived as abusing the privileges and immunities conferred upon the Organizations and upon them as Board Officials.” Accordingly, in the singular circumstances of the present case, the Tribunal concludes that the contentions of the IFC and HRVP noted in para. 79 are unpersuasive.

81. If Mr. Forcieri provided inaccurate information to the Argentine court in order to delay the investigations, such conduct “could bring the Organizations into disrepute or create the appearance of impropriety.” However, what matters, for the purposes of Staff Rule 8.02, is not whether Mr. Forcieri was misleading the court, or whether there were legitimate reasons for his requests for postponement. In fact, the IFC has provided arguments supporting Mr. Forcieri’s requests for postponement of the hearing. The crux of the issue is whether the Applicants had a reasonable

suspicion that Mr. Forcieri was engaged in misconduct which could threaten the operations or governance of the Bank.

82. The record shows that on 12 June 2014 Mr. Forcieri was summoned to appear as an accused on 18 June 2014 in an ongoing and high-profile corruption case for his alleged involvement in the takeover of the Ciccone company. Due to the subject matter of the investigations, there was widespread media coverage on the case and the alleged co-conspirators. At this time, it was reported in the media that Mr. Forcieri's alleged co-conspirators, which included the former Argentine Vice-President Amado Boudou, were attempting to derail the investigations by removing the investigating judge, Judge Lijo, and threatening key witnesses. Such suspicion was not without precedent as one of the co-accused, Mr. Nuñez Carmona, an individual who the Argentine court found had personal and business connections with Mr. Forcieri, was also charged with threatening key witnesses. Furthermore, in 2012, it was reported in the media that the then presiding judge and prosecutor were removed from the case due to political interference. It was also speculated by the media, as early as May 2014, that efforts were underway to remove Judge Lijo from the case.

83. It was in this context that Mr. Forcieri's requests for postponement were scrutinized, by several employees of the IFC in Argentina, including the Applicants, the media and those monitoring the investigation proceedings. On 13 June 2014, *La Nación* reported that Mr. Forcieri had been summoned "for questioning [on June 18] as a participant in the maneuver for which the Vice-President was summoned to be questioned for acquiring the Ciccone printing business." The record shows that on 18 June 2014, Mr. Forcieri, through his lawyer, requested that the date for his appearance be postponed because of his work obligations as an Executive Director of the World Bank. In an order issued by the Fourth Federal Court for Criminal and Correctional Matters on 19 June 2014 it was noted that Mr. Forcieri stated that "this work requires his presence at several engagements that cannot be postponed and require his daily attention; as a result, he could not leave his job responsibilities until August 11."

84. The record further shows that the Applicants accessed Mr. Forcieri's travel records on 19 June 2014. The Tribunal finds that in light of the fact that Mr. Forcieri made his work as an

Executive Director the foundation of his request for the postponement, there was a reasonable basis for the Applicants to review his travel records to see if “he could not leave his job responsibilities until August 11.” Upon discovering that Mr. Forcieri was pre-scheduled to travel to Buenos Aires on 22 June 2014, the Applicants had a reasonable basis to suspect that Mr. Forcieri may be committing misconduct and misusing his position as an Executive Director to delay the judicial proceedings in Argentina. As noted above, whether in fact Mr. Forcieri had ulterior motives or committed misconduct is not the question under assessment. The Tribunal is not pronouncing on Mr. Forcieri’s conduct, but rather on whether the Applicants held a reasonable suspicion of misconduct given the apparent contradiction between Mr. Forcieri’s statement to Judge Lijo and his scheduled trip to Buenos Aires.

85. The record further shows that Mr. Forcieri, through his lawyer, made a subsequent request for postponement on 25 June 2014 after his aborted trip to Buenos Aires. The request was once again based on his position as an Executive Director. Judge Lijo was informed that Mr. Forcieri serves as the representative of the Argentine Republic, and also represents Bolivia, Chile, Paraguay, Peru and Uruguay, and “that work requires his presence at various engagements that cannot be postponed at this time of the year.” The request further stated:

With respect to matters on the agenda in the city of Washington pertaining to Argentina, which have a direct impact on his regular duties, of note are the agreement reached with the Paris Club, the situation with the bondholders who did not accept Argentina’s debt swap in 2005 and 2010, and the process underway at the International Monetary Fund for preparing the national statistics report for that organization.

These duties, which have been described in broad terms, relate to events of great relevance that have an immediate impact on the processes that are underway for Argentina in the World Bank Group. In addition, the series of events that have been taking place in recent days compel my client to revise his work agenda continuously and significantly increase his workload.

86. It is of interest that the request referred to the Argentine debt crisis and the agreement with the Paris Club in the context of Mr. Forcieri’s work. For instance, the request noted that

[i]t is public knowledge that there have been major developments with three issues, significantly increasing Mr. Forcieri’s workload. This situation has directly

affected Argentina's relations with some (and the most important) of the shareholders of the World Bank Group. Taken together, the situation with the statistics in the International Monetary Fund and the Agreement with the Paris Club have an impact on my client's work.

87. The request further stated “[w]ith respect to the court case that Argentina had with the creditors in default that did not take part in the public debt swap in 2005 and 2010, and which today can be found on the front page of any print media because the U.S. Supreme Court declined to hear the case, this has become a matter of daily discussion and of exchange of information between Mr. Forcieri and his colleagues.” According to his lawyer, “these are largely matters that Mr. Forcieri must deal with informally, which he can in no way delegate, given their nature.”

88. These allusions to the debt negotiations gave rise to confusion on the exact nature of Mr. Forcieri's work. It was on this basis that Judge Lijo submitted a formal request to the Government of Argentina to explain the nature of Mr. Forcieri's role in the Argentine negotiations. The Judge also issued a letter on 26 June 2014, officially notifying the World Bank Group of the charges against Mr. Forcieri and requesting information on the dates “on which the accused can appear in this Court to make his unsworn declaration.” These allusions furthered the pre-existing suspicion that Mr. Forcieri was misusing his position as an Executive Director, or in some way misleading the Judge about his responsibilities. The media reported on Mr. Forcieri's second request for postponement. The Applicants once again accessed Mr. Forcieri's travel records, discovering that his scheduled trip to Buenos Aires had been aborted. This information was once again disclosed to the journalist at *La Nación*.

89. The IFC refers to a private email conversation between Mr. Forcieri and his lawyer which was introduced into the record during the written proceedings of the case before the Tribunal. In the email, Mr. Forcieri informed his lawyer that he had planned a trip to Buenos Aires precisely for the purpose of cooperating with the Ciccone investigations. The record also contains the Board Calendar which shows the board meetings scheduled from 1 June until 11 August 2014. The IFC relies on these pieces of evidence to support its contention that the Applicants did not have a reasonable basis to suspect Mr. Forcieri was committing misconduct. While the Board Calendar may have been accessible to the Applicants, Mr. Forcieri's private communication with his lawyer

was not. The Applicants' belief is assessed based on the information which they possessed at the relevant time.

90. The Tribunal is satisfied that, in the singular circumstances of this case, and based on the information which the Applicants possessed at the time, they had a reasonable basis to suspect that Mr. Forcieri, as an Executive Director, was engaging in conduct which may be in violation of the Code of Conduct for Board Officials, and such conduct was one which may threaten the operations or governance of the Bank. The first requirement under the Whistleblower Policy has been met.

Whether the criteria for external reporting established in Staff Rule 8.02, paragraph 4 have been met

91. The Tribunal takes notes of Staff Rule 8.02, paragraph 4.01 which specifies that “[b]ecause a primary objective of this Rule is to enable the Bank Group to take institutional measures necessary to remedy misconduct, staff members are generally required to report suspected misconduct under this Rule through the internal mechanisms set forth in paragraph 2.02 of this Rule.” It nevertheless provides for external reporting, the standard for which is detailed in paragraph 4.02. The Tribunal will now assess whether the requirements in Staff Rule 8.02, paragraph 4.02(a), (b), and (c) have been met.

92. With respect to paragraph 4.02(c) which requires that the staff member does not accept payment or any other benefit from any party for such report, there is no evidence, nor has a contention been made, that the Applicants received remuneration for the disclosure of Mr. Forcieri's travel records. On the contrary, it is undisputed that the Applicants derived no personal benefit from the disclosure of Mr. Forcieri's travel records. The Tribunal will therefore focus its assessment on paragraph 4.02(a) and (b). The Tribunal notes that under paragraph 4.02, the burden of proof is on the Applicants to show that they meet the requirements of (a) and (b).

93. Paragraph 4.02(a) requires the Applicants to show that the external reporting was necessary to avoid: (i) a significant threat to public health or safety; or (ii) substantive damage to Bank Group operations; or (iii) a violation of national or international law. The Applicants contend that external

reporting was necessary to avoid “not merely a particular violation of law, but to prevent the rule of law from being undermined,” and that they believed Mr. Forcieri was trying to obstruct the course of justice. The parties disagree on the appropriate standard to apply to this test. According to the Applicants, it is sufficient to find that they reasonably believed that the disclosure was necessary to avoid a violation of national law. On the other hand, the IFC contends that the standard of proof for external reporting is much higher than the “reasonable belief” standard advocated by the Applicants. To the IFC, “such standard would make confidentiality of [the] Bank Group’s internal information dependent on the idiosyncratic judgment of any staff member, which surely cannot be the right result.” The IFC argues that the appropriate standard is an objective one and maintains that no law was broken by changing a flight itinerary, or by requesting, and obtaining, a postponement of the hearing from the court.

94. The Tribunal concurs with the IFC that Staff Rule 8.02, paragraph 4.02(a) requires an objective standard. Unlike the initial threshold which is met if it is established that the staff member in question held a reasonable suspicion of misconduct which may threaten the operations or governance of the organization, Staff Rule 8.02, paragraph 4.02(a) requires the Applicants to show – demonstrate – objectively that reporting the suspected misconduct externally was necessary to avoid a violation of national or international law. This objective test cannot be divorced from the context which gave rise to the external reporting in the first place. Furthermore, the Applicants are only required to show that the external reporting was necessary to prevent the violation of law as opposed to demonstrating it was the only means to prevent the violation of law.

95. The first question is whether national law was at risk of being violated by Mr. Forcieri’s alleged conduct. The record shows that Mr. Forcieri was perceived by the Applicants as using his position as an Executive Director to delay the judicial proceedings in order to “thwart a high-level public corruption investigation.” It was widely speculated in the media at the time of the Applicants’ disclosure that the accused persons would use Mr. Forcieri’s delay to bring removal proceedings against Judge Lijo in a different court and, if successful, the removal of yet another judge from the case might permanently derail the Ciccone corruption investigation. Though the Applicants do not refer to a specific national law in their pleadings, the obstruction of justice is a

sanctionable offence proscribed under Article 277(1)(a) of the Argentine Penal Code which prohibits assisting others to evade an investigation by the authorities.

96. The second question is whether reporting the suspected misconduct through external channels was necessary to prevent the obstruction of justice. To answer this question, the timeliness and efficacy of the means pursued must be evaluated. In addition, the Tribunal must review the outcome of the disclosure to assess whether it achieved the purpose for which it was made. In this case, time was reasonably seen to be of the essence as there were widespread speculations in the media that efforts were underway to remove the presiding judge from the case. It is imperative that any external reporting must be efficient and time-sensitive, otherwise it cannot be considered to have been necessary to avoid the violation of national or international law.

97. The evidence shows that within a day of the publication of Mr. Forcieri's aborted travel plans, Judge Lijo issued indictments against the suspects. The record contains no information that reporting the suspected misconduct internally would have yielded the same results. Neither EBC nor INT have jurisdiction over allegations of misconduct committed by an Executive Director of the World Bank Group. Rather, it is the Ethics Committee of the Board which, pursuant to Rule 19 of the Code of Conduct for Board Officials, has the mandate to review such allegations and determine whether an investigation is warranted.

98. The record contains no evidence of action, timely or otherwise, by the Ethics Committee in response to the allegations against Mr. Forcieri. The Committee was informed, through an anonymous email on 13 June 2014, of Mr. Forcieri's alleged involvement in the Ciccone case and was expressly asked if an internal investigation into the matter was underway. There was no response. Following the publication of his travel records and the published allegations that he had tried to delay the proceedings, Mr. Forcieri informed the Ethics Committee by email of 27 June 2014 of the Ciccone case and asserted his innocence with regards to the allegations against him. The record shows that the Ethics Committee met on 15 July 2014, and through an email informed Mr. Forcieri that the Committee took note of his email and one member expressed discomfort with the situation. There is no evidence that the Committee took action to review the matter for the

purpose of determining whether an investigation was necessary as required by Rule 19(b) of the Code of Conduct which provides that:

Allegations of Misconduct: Review and Decision Process

The Ethics Committee shall review the allegations (including confidential or anonymous allegations) and determine whether: (i) there is sufficient evidence to support an investigation of misconduct; and (ii) whether the allegations are appropriate for consideration by the Executive Directors. Counsel to the Ethics Committee shall assist with this review.

99. Pursuant to the Tribunal's order of 8 September 2016 for the production of certain documents, the IFC explained that

allegations received by the Ethics Committee against Mr. Forcieri dealt with misconduct that was allegedly committed prior to Mr. Forcieri assuming duties of an Executive Director. Mr. Forcieri left his post as the Executive Director in November 2014. Therefore, the scope for the Ethics Committee's investigation of allegations pertaining to the Ciccone matter has been very limited.

100. The record contains referrals by EBC and INT to the Ethics Committee, as well as direct complaints to the Ethics Committee from individuals outside the organization about Mr. Forcieri's alleged abuse of his role as an Executive Director to delay appearing before the Argentine court, as well as his alleged misuse of the Bank Group's travel benefits in charging his personal trip to the World Bank as "Official Business" in June 2014. The latter conduct is prohibited by paragraph 5 of the Code of Conduct which requires Board Officials to "ensure that property and services of the Organizations are used by themselves and persons in their offices only for the official business of the Organizations."

101. Though the incidents which form the subject of the Ciccone investigation occurred prior to his assuming his duties as an Executive Director, the aforementioned alleged acts of misconduct occurred while Mr. Forcieri was an Executive Director of the World Bank Group. The Ethics Committee was therefore entitled to investigate these allegations.

102. The Tribunal is satisfied that, in light of the above, external reporting was necessary to prevent the obstruction of justice, which is a violation of Argentine law.

103. Finally, the IFC has argued that if the Applicants genuinely sought to prevent the violation of national law, they should have disclosed the suspected misconduct directly to Judge Lijo, rather than a journalist. However, the Tribunal finds that the Applicants' choice in external reporting was motivated not only by their desire to prevent the obstruction of justice but also by their need for anonymity and protection, as they feared retaliation by the suspects in the Ciccone case. Argentine law expressly guarantees anonymity to a journalist's sources. In avoiding internal retaliation, the Applicants were not required to expose themselves to the risk of harm in their choice of external reporting.

104. The Tribunal will now assess whether the Applicants have met the requirement in Staff Rule 8.02, paragraph 4.02(b). This provision requires that the staff member demonstrate that established internal mechanisms are inadequate because:

- i. the staff member has grounds to believe that it is not possible to report the suspected misconduct pursuant to any of the established internal mechanisms because all such avenues would subject the staff member to retaliation within the institution; or
- ii. the staff member has grounds to believe that it is not possible to report the suspected misconduct pursuant to any of the established internal mechanisms because all such avenues would create a likelihood that evidence relating to the suspected misconduct will be concealed or destroyed; or
- iii. the staff member has previously reported the suspected misconduct through the established internal mechanisms (and not on an anonymous basis), and the Bank Group has failed to inform the staff member in writing of the status of the matter within six months of such report.

105. The Applicants contend that the Bank Group's internal reporting mechanisms were inadequate to protect them from retaliation by Mr. Forcieri. The IFC on the other hand asserts that the internal reporting channel prescribed in the Staff Rules – the Ethics Committee of the Board of Directors – offered sufficient protection against the possibility of Mr. Forcieri discovering their identities, and argues that the Applicants have failed to present evidence that Mr. Forcieri could “exert any power over the Ethics Committee or otherwise gain access to the identity of a staff member who had reported such misconduct.” To this assertion the Applicants respond that the records show that Mr. Forcieri ignored applicable internal procedures and immediately sought to

discover the identities of those who released his travel plans. However, the Applicants could not have been aware of the foregoing at the time that they revealed Mr. Forcieri's travel details. During the oral proceedings, the first Applicant described his state of mind at the time of the external disclosure. He stated: "I think the whole context within the IFC and within World Bank was one of be careful what you do, be careful what you denounce because you may get into trouble." The Applicants further refer to the 2015 Staff Engagement Survey which found that only 41% of over 10,000 Bank Group staff surveyed felt that they could report misconduct without fear of reprisal. According to the Applicants, the World Bank Group suffers from widespread staff distrust regarding its commitment to protecting whistleblowers, a perception which the Applicants contend "continues to be borne out by the Bank's treatment of [them] in this matter."

106. The Tribunal observes that Staff Rule 8.02, paragraph 2.02 is not sufficiently clear as to how staff members can anonymously report misconduct involving Board Officials to the Ethics Committee of the Board. The record shows that immediately following the disclosure of his travel plans, Mr. Forcieri's office, at his behest, contacted a staff member in the Information Technology Services (ITS) who felt obligated to commence an urgent and confidential investigation to discover which Bank staff member accessed and leaked Mr. Forcieri's travel plans. The ITS staff member felt obligated to conduct the investigation due to Mr. Forcieri's position as an Executive Director. When it was made clear that EBC was the appropriate channel to investigate the leak, Mr. Forcieri's office responded that he would like to proceed and wanted to know if he, the victim of this leak, could authorize the investigation. There was therefore a reasonable fear of reprisal from an Executive Director who demonstrated the inclination to wield the powers attached to his position in a manner which may result in retaliatory personnel action.

107. The IFC has contended that had the Applicants truly wanted Mr. Forcieri's actions investigated, they would have pursued internal channels which would have resulted in an internal investigation, a potential referral to the Argentine authorities and protection of the Applicants' identities and safety. While the Bank Group has strengthened internal mechanisms for protecting those who report suspected misconduct committed by staff members and external parties, it is debatable whether there is sufficient protection for those who report suspected misconduct by those who govern the institution. The effectiveness of the measures available to investigate alleged

misconduct by an Executive Director is limited. Both EBC and INT lack jurisdiction over such investigations. In the scenario where staff members report suspected misconduct by an Executive Director to EBC and INT, these units refer the reports to the Ethics Committee of the Board of Directors. In this case, EBC and INT received a number of reports concerning Mr. Forcieri between June and September 2014 and transmitted them to the Ethics Committee.

108. In the Tribunal's order of 8 September 2016 for the production of certain documents, the IFC was requested to produce "records of steps taken by the Board Ethics Committee between June and December 2014 to investigate or address the allegations made against Mr. Forcieri," and "documents [...] which document communications between representatives of the Bank and Mr. Forcieri regarding his appearance before Judge Lijo, the Ciccone investigation, and the publication of his travel records."

109. With respect to steps taken by the Board Ethics Committee, the IFC informed the Tribunal that:

After the Board Ethics Committee received notice of allegations made against Mr. Forcieri pertaining to his involvement in the Ciccone investigation, the Secretary and the Chair of the Ethics Committee engaged Respondent's General Counsel, Ms. Anne Marie Leroy and then-Chief Counsel of LEGIA (presently, Director), Mr. David Rivero (as her designee), seeking legal advice on how to address the allegations. As General Counsel or her designee act as counsel to the Ethics Committee under the Code of Conduct for Board Officials, para. 14, such communications are attorney-client privileged. Respondent, therefore, respectfully declines to produce such communications.

110. Regarding the communications between Mr. Forcieri and representatives of the Bank Group, the IFC informed the Tribunal that:

Communications responsive to this request are between Mr. Forcieri and Mr. David Rivero, acting as designated counsel to the Ethics Committee. As such, the documents are attorney-client privileged, and Respondent respectfully declines to produce the communications.

111. As noted above, the record contains no evidence that the Ethics Committee conducted a review into the matter and that recourse to the Ethics Committee would have been effective or

adequate to protect the Applicants from retaliation pursuant to Staff Rule 8.02, paragraph 4.02(b). In view of the responses or lack of responses by the IFC to the enquiries put to it, it is not possible to conclude that the action of the Ethics Committee, if any, was effective in this case.

112. In light of the foregoing, the Tribunal is satisfied that the Applicants' disclosure of Mr. Forcieri's travel records was a protected activity under the Bank's Whistleblower Policy. However, it is worth emphasizing that even where a staff member believes he or she is engaging in whistleblowing he or she cannot disregard the Bank's rules and commit misconduct. The finding that the Applicants' conduct was protected under Staff Rule 8.02 is based on the peculiar circumstances of this case and the apparent inadequacies of the internal mechanisms to address suspected misconduct by an Executive Director. It is not intended to provide blanket immunity from disciplinary proceedings in all acts of unauthorized disclosure of non-public information. The Bank Group is encouraged to strengthen its internal mechanisms to adequately investigate allegations of misconduct by Executive Directors and protect whistleblowers reporting suspected misconduct. The encouragement of staff members to report suspected misconduct carries with it the Organization's corresponding duty to establish effective internal reporting mechanisms and a non-retaliatory environment. By strengthening these internal mechanisms and demonstrating that whistleblowing results in accountability, confidence in internal reporting will rise.

113. Having held that the Applicants' conduct was protected under the Whistleblower Policy, the Tribunal finds that the HRVP was not entitled to impose disciplinary sanctions on the Applicants. It is apparent that absent the protected activity, the disciplinary sanctions would not have been imposed on the Applicants.

DECISION

- (1) The decisions of the HRVP imposing disciplinary sanctions on the Applicants are rescinded;
- (2) The IFC shall remove from the Applicants' personnel files all records relating to the finding of misconduct;
- (3) The IFC shall pay the Applicants full back pay for the five percent reduction in their salaries effective 22 May 2015, including recalculation of any annual salary increases or other benefits based on their salary level;
- (4) The IFC shall pay each Applicant three months' net salary as compensation for the imposition of disciplinary measures;
- (5) The IFC shall pay the Applicants' legal fees and costs in the amount of \$39,762.75 for Mr. DR and \$41,463.53 for Mr. DS; and
- (6) All other claims are dismissed.

/S/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, D.C., 4 November 2016