

## **JUDGMENT, CASE NO. 73**

### **ADA PIAZZE vs. IDB**

The Inter-American Development Bank Administrative Tribunal, composed of Judge María Ángela Poliche de Sobre Casas, President; Judge Guilherme Caputo Bastos, Vice-President; Judge Isaac Sandoval Rodríguez; Judge Robert A. Gorman, Judge Desiree Patricia Bernard and Judge German Leitzelar V.; considered the case following the procedures established in the Rules of the Tribunal.

Complainant was assisted by Shawn Jensen, Esq. The Bank was represented by Cynthia Coloiacovo, Esq. The Tribunal heard oral argument on 18 July 2011.

#### **WHEREAS:**

#### **I THE COMPLAINT**

On 29th October 2009 Ms. Ada Piazza, a national of Canada and Argentina and a former employee of the Inter-American Development Bank, filed a Complaint against the Bank, pursuant to Article 14 of the Rules of Procedure of the Tribunal.

A. In her Complaint Ms. Piazza asks that the Tribunal order:

1. That the decision to deny the extension (or conversion of) the Complainant's contract be rescinded;
2. That the Complainant be given a contract for three years at IDB, which is the employment contract she would have received had it not been for the premature demise of the Initiative in turn caused by the Complainant's whistleblowing;
3. That the Complainant be awarded the salary and benefits that the Complainant would have received since 1 February 2009, had her employment with IDB continued;
4. A monetary award in the amount of six months' salary for moral damages to the Complainant due to IDB's wrongful decision to not extend the Complainant's contract and for the injury the Complainant suffered to her career as a result of that decision;
5. The 11 August 2009 Record of Proceedings of the Conciliation Committee in Case No. 177 be quashed, and that and the Record of Proceedings by the Conciliation Committee and all other related documents be removed from the personnel file of the Complainant;
6. That the Complainant be awarded attorney's fees and costs, including those attributable to exhausting the channels of administrative review and the Conciliation Committee, as well as those incurred in the Administrative Tribunal.

B. In support of her requests the Complaint makes a statement of facts that can be summarized as follows:

1. Ms. Piazzе holds Master of Arts in International Affairs (International Development) from the Norman Paterson School of International Affairs, Carleton University in Ottawa, Canada

2. The Complainant began employment at IDB in November 1995 and worked continuously on a full time basis until 31 January 2009. From November 1995 to 31 January 2005 she worked as a full time consultant. On 1 February 2005 the Complainant became a staff member as she was given a turnover contract with one year duration. On February 1, 2006 the Complainant's turnover contract was extended for an additional three year period which expired on 31 January 2009.

3. In April 2004, the Complainant began working on IDB's Inter-American Initiative of Ethics and Social Capital (the "Initiative"). The Initiative had been created in March 2002 with a US\$750,000.00 funding contribution from Norway, and was placed under the direct supervision of the President's Office, coordinated through the Secretary's Office. On 1 December 2004 Norway and IDB signed a Letter of Agreement through which Norway agreed to almost double its financial support to the Initiative. Furthermore, IDB and Norway agreed that they would invite other donors to contribute to the Initiative in order to mainstream its activities. The invitation to other donors to support the Initiative was to be implemented through the creation of the Multi-Donor Trust Fund (the "Fund") which both parties agreed would be established in 2005. Also, IDB and Norway agreed that IDB would contribute to the Initiative by providing two professional staff. The Complainant was one of them. In a meeting between the General Coordinator of the Initiative, the Executive Director for Canada the Manager of the Sustainable Development Department (SDS)—where the Initiative had been moved in early 2005—it was agreed that Canada would provide additional funding, support the institutionalization of the Initiative and that the Complainant would have an opportunity to compete for a staff position in the last six months of her one year contract or during the three year extension of her turnover contract. The Fund was agreed to and signed by the parties in September 2005. As originally formulated, the Initiative was to last for an extended period of time, and even become institutionalized within IDB.

4. A General Coordinator of the Initiative had been appointed in March 2002. The appointee had already worked for several years at the IDB and had worked (for many years) with a United Nations anti-poverty program in Latin America. While General Coordinator of the Initiative he retained his position with UNDP. When the Complainant began working on the Initiative she served under the General Coordinator as his subordinate. The Complainant had an outstanding professional relationship with the General Coordinator.

5. In the course of assisting the General Coordinator—preparing for the IDB Ethics Day—in February 2006 and thereafter the Complainant found evidence that indicated that the General Coordinator was engaging in fraud and misconduct by using donor funds of the Initiative as well as IDB resources for his personal benefit. Accordingly, the Complainant brought evidence of the corruption to the attention of the Secretary of the Ethics Committee as well as to the Manager of SDS.

6. By memorandum dated 20 September 2006 the Complainant specifically reported and submitted evidence to the Ethics Committee that the General Coordinator

of the Initiative had committed fraud in his work for IDB. Thereafter, the Complainant was involved in providing other evidence for the Ethics Committee's investigation, including a memorandum dated 3 November 2006 which ultimately resulted in the General Coordinator being found guilty of ethics violations.

7. The finding that the General Coordinator was guilty of ethical violations resulted in damage to the Initiative, eventually to the Initiative's demise, and as a consequence in cutting short the Complainant's career at IDB, including the non-renewal or extension of her contract, as well as the preclusion of her being selected for another position in IDB.

8. This chain of events and the resulting damage to her career is confirmed by the Complainant's 2007 Performance Review which states:

“[The Complainant] managed the Ethics Initiative of the Bank all on her own, with almost no need for supervision and with little support from below. It was a very difficult year for the Initiative, as the consultant in charge was found to have violated the code of ethics of the Bank and [The Complainant] had to manage the transition, plus the fact that she was involved in providing the needed evidence for the case. She did a great job managing the Initiative, showing leadership, initiative and perseverance, in spite of the little priority that the Bank as a whole was giving to work of the Initiative. She did an outstanding job under difficult circumstances, when the Bank gave little or no support, maintaining the hope of the Donor's [sic] and supporting the Bank's reputation.”

9. The Initiative had been expected to continue for a long time and was to be institutionalized within IDB. However, the Complainant's whistleblowing resulted in the findings of ethics violations by the General Coordinator, which in turn virtually guaranteed the demise of the Initiative and of the Complainant's continued employment with IDB.

10. IDB had been using the Initiative as a tool to organize—both at IDB headquarters in Washington DC and in Latin America—a large number of highly visible events to promote ethics and development. When the General Coordinator of the Initiative was found guilty of ethics violations (using the Initiative's funds for his personal benefit) the reputation of the Initiative was destroyed. As soon as the Complainant brought evidence of corruption against the General Coordinator to the attention of the Secretary of the Ethics Committee, and the SDS Manager in early 2006, the number of people working for the Initiative was drastically cut. The number of staff and consultants was reduced from about 15 in December 2005, to 4 by January 2007, when the General Coordinator “was dismissed for violating IDB's code of ethics and professional integrity.”

11. After the General Coordinator's employment was terminated by IDB in January 2007, the Complainant continued to work on the Initiative, but the impetus of the Initiative had slowed dramatically. Then, when the Complainant's turnover contract expired 31 January 2009 her employment at IDB ended.

12. During the realignment process a 14 June 2007 email from the Advisor of the Office of Outreach and Partnership (ORP) invited the Complainant to attend a first staff meeting after having given her “temporary assignment to ORP.” The Initiative, on the

other hand, was placed in the Social Sector (SCL). The Human Resources Department (HRD) placed the Complainant through the same skills mapping exercise as every other regular IDB employee. Based on this exercise the Complainant was assigned to ORP. This assignment clearly reflected the best place for her skills. She was placed in ORP because of her solid experience building partnerships with all types of stakeholders in Latin America. From 1998 until 2004 the Complainant was the Regional coordinator of IDB Social Policy Dialogue program and had the opportunity to work in more than 10 countries organizing processes of dialogue and consensus building activities involving the government, civil society, the private sector and the donor community. Also, she had solid experience working with donors, from the preparation of proposals as well as the management of funds. As stated, the Initiative was located in SCL as no one in IDB wanted to have the Initiative in its Division or assume any responsibility for its activities after 2007. In the words of the acting manager for SCL, "the Initiative fell down the cracks" and it was finally placed in the Gender and Diversity Unit (GDI) against the will of its Unit Chief.

Early in 2008 the GDI Unit Chief told the Complainant that she did not know why she had to meet with her when she had so many other things to do relative to the GDI Unit and she consistently cancelled their meetings. The GDI Unit Chief even did not show up at the November 2008 meeting with the Norwegian Executive Director Advisor which had been called by the Executive Director Advisor seeking information on the steps IDB was taking to institutionalize the Initiative. In 2008, the GDI Unit Chief declined the Complainant's 6.5% merit pay increase corresponding to the outstanding evaluation that she had received from the Manager of SDS, her supervisor during 2007, and instead initially awarded a 4.55% merit pay increase. Later, in 2009 the GDI Unit Chief gave the Complainant a 4% merit increase despite never having observed her work. This progression of events illustrates the damage to the Complainant for her whistleblowing.

13. In contrast, even though the Ethics Committee found The General Coordinator of the Initiative guilty of misusing donors (as well as IDB funds), he was allowed to work for IDB until his contract expired on 8 January 2007. Furthermore IDB returned to the donors US\$109,000 of the misused funds on his behalf. Thus, The General Coordinator of the Initiative took with him the product of his corruption, for it was IDB and not The General Coordinator of the Initiative who returned the misused funds, in essence receiving a US\$109,000.00 benefits package.

#### C. The Complainant bases her Complaint on the following Legal Grounds:

1. In making the decision to not extend or convert the Complainant's turnover contract which expired 31 January 2009, IDB has maintained that due to the nature of her contract the Complainant had no expectation of continued employment beyond the duration of the contract. In this, IDB has argued that since IDB observed the terms of the contract by paying the Complainant's salary and benefits due under the contract, IDB had no further obligation to the Complainant. However, this argument is not legally defensible under the employment "...rules and regulations ... and the personnel and administrative policies in force at the time of the alleged non-observance" or of the "employment agreement ... and the terms and conditions of appointment"<sup>1</sup>, or generally recognized principles of international administrative law concerning judicial

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<sup>1</sup> IDBAT, Statute, Article VI(3)

review of administrative acts of international organizations as established by their Administrative Tribunals.

2. While a turnover contract is not a permanent contract, regardless of the duration or nature of any employment contract within IDB, it is a well established legal principle that further employment and career development in IDB cannot be denied based on legal rights which the Complainant holds as an IDB employee. Just as the Complainant had the right to not be denied further employment and career development in IDB based on her nationality, race, gender, or religion, so she also had the right not to be denied further employment and career development based on legal rights guaranteed to her by Staff Rule No. 328, Protection for Whistleblowers and Witnesses. Accordingly, the Complainant is legally entitled to have her IDB employment contract extended, because had she not engaged in whistleblowing, the Initiative would have continued, and thus so would her employment and career in IDB.

3. Under the version in force in December 2007 of Staff Rule No. 328, paragraph 101: "It is the duty of all Bank employees to report suspected fraud or corruption in Bank activities." Paragraph 103 of said Staff Rule provides that: "An employee should be free to initiate contact with such Bank resources or provide information in the context of an official investigation or other inquiry without reprisal." Paragraph 105 provides that "No employee shall be subject to reprisal as a result of having provided such information to the designated authorities."

4. Most importantly under Staff Rule No. 328, legal protection for whistleblowers against reprisal is not limited to reprisal against only an IDB employee's contract, but extends to the adverse affects of whistleblowing more broadly to career development in IDB. The last sentence of Paragraph 101 of the mentioned Staff Rule No. 328 states: "It is essential that Bank employees are confident that their fulfillment of these duties will not lead to reprisals affecting the terms of their employment or their career development." This is the specific legal guarantee of the Staff Rule which applies to the Complainant because her whistleblowing led directly to the premature demise of the Initiative, and therefore to her continued career in IDB. Again, if it were not for her whistleblowing activities the Initiative would have continued to be funded by the donor countries, supported by IDB and institutionalized in order to continue going forward after the Complainant's turnover contract expired. This continuation of the Initiative was expected to lead to the Complainant's continued employment and career development even after the term of her contract ended because she would have been given a new contract working with the Initiative.

5. The Complainant's claims of retaliation are predicated on their being a cause/effect relationship between her whistleblowing and her turnover contract not being extended or converted. While it was not personal retaliation for whistleblowing, clearly there was a harmful effect on the Complainant's continued employment in IDB under Staff Rule No. 328 because her whistleblowing caused the continued funding and support for the Initiative to be reduced significantly. This in turn caused the demise of the very project the Complainant was to continue to work on. Thus, a promise of continued employment, and personal retaliation, are not the only circumstances to consider in evaluating whether the Complainant is entitled to have her turnover contract extended or converted. Under this now well established legal doctrine, the Complainant is not required to conclusively prove that her whistleblowing was the exclusive reason that her employment and career at IDB was not continued.

6. As the Complainant has clearly established factually, her whistleblowing had an obvious negative impact both on her continued employment and her career (as demonstrated in her 2007 performance review quoted above). The Complainant cannot be required to establish that her whistleblowing was the only reason the Initiative was discontinued, or that had she refrained from whistleblowing the Initiative would have continued beyond 2009. She can establish by independent factual evidence that when the General Coordinator of the Initiative was found guilty of violating the Code of Ethics and Professional Conduct of the Bank in 2007, the Initiative's status was negatively affected. Furthermore, when the new President of the Bank initiated the total reorganization of IDB, the Initiative was put under pressure to justify its role within the organization. The strategy was to link the role of ethics and social capital with the concept of "development effectiveness." However, shortly after these attempts were undertaken, ethics violations by the General Coordinator came to light and the Initiative was hard hit. Attempts by the remaining staff did not have the necessary political support to succeed in promoting the ideas they were trying to feed into the reorganization of IDB. The Complainant not only alleges that she was legally entitled to have her contract extended or converted based on her protected acts of whistleblowing under Staff Rule No. 328, she has proven the legal basis for the relief sought.

7 In Ruiz de Gamboa vs. IDB<sup>2</sup>, the IDB Administrative Tribunal ruled that:

"4. Although the holder of a fixed term contract has no automatic right to renewal, the employer does not enjoy unfettered discretion in deciding whether or not to renew a fixed-term contract.

5. The discretion of organizations to renew or not to renew a fixed-term contract is not absolute. In other words, its exercise is subject to legal limitations protecting the employee against abuse of authority or arbitrariness and preserving his legitimate expectations.

6. Where an employee has legitimate expectations that his or her contract will be renewed, the Bank bears a special responsibility to consider carefully courses of action which would tend to result in meeting those expectations."

This clearly establishes, as a matter of internal law of IDB that the Complainant, while having a turnover contract, still holds the right to be protected in her further employment and career in IDB by the rights granted to whistleblowers under Staff Rule No. 328. Her whistleblowing activities had a clearly proven and obviously significant adverse affect on the extension or conversion of her contract because her whistleblowing led to the decline of the Initiative and its failure to continue within IDB over a longer period of time.

## II. THE ANSWER

The Bank answered the Complaint.

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<sup>2</sup> IDBAT, 054-RUIZ DE GAMBOA-IDB-04

A. In its Answer IDB requested that the Tribunal rule:

1. With regard to the substance of the Complaint generally: that the Complainant's plea that the Bank should protect her under Staff Rule No. 328, even when the Complainant raised no specific act of retaliation, be dismissed.
2. With regard to the Complainant's request for extension or conversion of her contract: that the Complainant's plea be dismissed on the basis of the Bank having properly observed its policy regarding turnover contracts of employment.
3. With regard to the Complainant's legal grounds for filing the Complaint: that the Complainant's legal arguments and citations be considered not applicable to this case (and to the Complainant's employment) as they refer to fixed-term contracts.
4. With regard to the Complainant's claims of retaliation: That the Complainant's pleas be denied, due to there being no direct or indirect link between the non-extension/conversion of the Complainant's contract and her acting as a whistleblower; and that the Complainant's pleas be denied due to the Bank having observed its duties pursuant to Staff Rule No. 328.
5. With regard to the Complainant's request for a monetary award in compensation of moral damages: That the Complainant's plea for moral damages be considered not admissible in the absence of any regulation governing the Tribunal's authorizing such award; and with regard to its substance, that the Complainant's plea for moral damages be dismissed when the Complainant has failed to identify any violation of her contract of employment or other Bank policy resulting in grave harm, or any other exceptional circumstance, such as a specific act of retaliation by another employee, supervisor or Bank official, justifying such an award.
6. With regard to the Complainant's request for the quashing of the record of proceedings of the Conciliation Committee in her case and removal of such record and related documents from the Complainant's personnel file: that her request be denied due to Complainant having cited no authority to support her request.
7. With regard to the Complainant's request for an award of costs and attorney's fees: that the Complainant's request be denied on the basis that rules for the Conciliation Committee do not allow for the Complainant to be represented by an attorney and the Statute governing the Tribunal explicitly requires that each party shall bear the costs of their own representation.

B. In support of its pleadings and with the purpose of providing background for its arguments, the Bank provides a statement of facts as follows:

1. On 1 February 2005 the Complainant was granted a turnover contract for a period of one year to work for the Social Capital, Ethics and Development Initiative. A second phase of the Initiative was established by a Donor Agreement signed between the Bank and the Royal Ministry of Foreign Affairs of Norway on 14 September 2005. Subsequently, the Bank offered an extension to the Complainant's turnover contract and she accepted it by signing an amendment to the original contract that stated that the expiration date of the Complainant's turnover appointment was 31 January 2009. Such contract contained language providing that the contract "is not subject to

conversion or renewal” and that it “shall automatically terminate upon its expiration date without any requirement of advance notice by the Bank.”

2. On 31 January 2009, the Complainant’s turnover contract expired in accordance with its terms. The Complainant’s termination benefits were duly liquidated at the end of her turnover appointment.

3. During the course of the Complainant’s turnover appointment, the Complainant reported to Bank officials that her supervisor at the time committed alleged acts of misconduct and her allegations were considered by the Bank. During the course of her employment with the Bank, the Complainant did not claim to be retaliated against by any Bank employee or official pursuant to Staff Rule No. 328.

C. In support of its requests the Bank argues as follow:

1. The Complainant’s allegations of wrongful termination are unfounded and her petition for reinstatement should be denied because her employment was terminated in accordance with the express terms and conditions of her contract of employment and the Bank’s policies.

The Complainant’s contract of employment of 1 February 2005 states that it “shall automatically terminate upon its expiration date without any requirement of advance notice by the Bank.” Further, the contract provides that it “is not subject to conversion or renewal” and that it “may be subject to one single extension provided that the total duration of the appointment, including this contract and such extension, does not exceed a period of five years from the starting date of this contract.”

That contract is in accord with Bank’s Staff Rule No. 311. Such rule provides that:

“The Bank may designate a staff position for a Turnover appointment. The Turnover appointment may be used to hire:

a. Special advisors and high-level experts, having unique skills, experiences or knowledge who will work on special initiatives related to their qualifications; or individuals to provide the Bank with expert support for short-term and medium-term projects, including activities such as the development of new policies and programs where new skills or expertise are needed; and”

Furthermore, Staff Rule No. 311 determines that:

“The contract period for a Turnover appointment is limited to the duration of the specific activities, special initiative, short-term or medium-term project, leave of absence, external assignment, or special assignment authorized for the Bank staff member, as described in Section 101 above. The contract period for a Turnover appointment may be extended once, provided that:

- the length of such extension does not exceed the maximum duration of the specific activities, special initiative, short-term or medium-term project; or the maximum period of the leave or assignment prescribed by applicable Bank policies; and

- the employment contract for the Turnover appointment expressly contemplates the possibility of one (1) extension provided that the total duration of the contract does not exceed a period of five (5) years from the commencement of services to the Bank.”

The Bank’s Human Resources Strategy provides that in some specific situations it may designate a staff position as a turnover position. These positions are specifically earmarked for incumbent turnover, i.e. the Bank does not want career staff to fill these positions. Instead, it uses them to ensure regular infusion of new skills, experiences, and ideas. These turnover positions are also useful for visiting or special advisors, i.e. high-level experts which whom Bank may wish to employ for a limited period of time. Turnover positions are to be limited to employees who will perform certain activities for a limited period of time.

Moreover, Section 303 of Staff Rule No. 311 clearly states that “turnover appointments shall end upon the expiration of the employment contract without any requirement of advance notice by the Bank.” Section 307 of Staff Rule No. 311 goes even further in clarifying that “regulations for converting fixed-term contracts to open-ended contracts shall not apply to Turnover appointments.”

Therefore, due to the temporary nature of a turnover appointment and the language of the Complainant’s contract she could not have reasonably expected that her contract would be extended or converted. In fact, the Complainant admits that a turnover contract is not a permanent contract and that she was fully aware of the conditions attached to a turnover contract.

Additionally, turnover appointments are normally given in relation to assignments that represent special initiatives of the Bank that are inherently of a temporary nature. In this case, the Complainant was appointed to support the activities of a non-reimbursable trust fund which, by its express terms, would be in operation for a fixed duration.

The Donor Agreement for the Social Capital, Ethics and Development Fund provides in Article 1 that the resources of the Fund would be used to finance non-reimbursable technical cooperation which would contribute, through ethics for development and social capital, to the reduction of poverty and inequality in Latin America and the Caribbean.<sup>3</sup> The nature of the Fund was such that the donated funds were to be used to finance non-reimbursable technical cooperation, which meant that, unless the Fund was replenished indefinitely, this Initiative would eventually end.

Also, the temporary nature of the Complainant’s appointment was reinforced by the manner in which the selection and appointment process was conducted. Section 501 of Staff Rule No. 311 provides that candidates for turnover positions such as the Complainant’s are usually interviewed by a smaller panel than for staff positions, the announcement for turnover appointments are advertised a minimum of five working days on the Bank’s Internet site (as opposed for a minimum of 15 working days for staff

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<sup>3</sup> Donor Agreement for the Establishment of the Social Capital, Ethics and Development Fund, 14 September 2005.

positions), and carves out an exception for direct appointments, which is not the case for staff positions.

The Complaint states that had the donor countries decided to replenish the Fund and had it become institutionalized within the Bank, the Complainant would have an opportunity to compete for a staff position. However, as stated in Section 403 of Staff Rule No. 311, in order for the Complainant to be eligible for a staff position she would have to apply as an external candidate and go through the same competitive selection process as other applicants.

As a matter of fact, several months prior to the expiration of the Complainant's turnover contract, the Complainant could have applied to any vacancies within the Bank as an external candidate and she indeed did so on at least two occasions prior to her contract expiring (Position No. 08/45, Ethics Program Officer, applied on 5 February 2008 and Position No. 08/112, Partnerships Officer, applied on 30 May 2008.) There were no impediments for her to have applied for vacancies at that time or even at the present date. If the Complainant wishes to apply to any vacancies currently available within the Bank she may do so as an external candidate.

2. The Complainant's arguments and citations that refer to fixed-term contracts are inapplicable to the Complainant's employment and should be disregarded in a consideration of her case.

The Complainant held a "turnover contract." As described above, this contract was non-renewable beyond a maximum duration and did not allow for conversion or extension into another form of contract. That is not the case for fixed-term contracts.

Turnover appointees may be granted a contract for a period of up to five years, are not subject to a probationary period and do not undergo the same competitive selection process as fixed-term appointees. The most noticeable distinction, however, is that Staff Rule No. 311 carves out certain exceptions that allow for renewal or conversion of fixed-term contracts. That is not the case for turnover contracts.

The Bank's Human Resources Strategy states that: under the proposed model, the initial employment contract for all staff positions is essentially the same, except for provisions to separate the incumbents in positions identified for turnover assignments after a maximum of five years. Prior to the completion of the fixed-term contract (usually three years) for staff in positions that are not turnover assignments, the incumbent is provided the opportunity to obtain an open-ended employment contract. Clearly, the Bank's intent when defining its employment model was to distinguish turnover assignments from fixed-term assignments, excluding the former from contractual renewal beyond a period of time and conversion.

Consequently, the Complainant's petitions to be awarded a fixed-term contract as compensation in this suit are completely unfounded in Bank policy, and should be denied.

3. The termination of the Complainant's contract was not motivated by retaliation for her having acted as a whistleblower, nor does the Complainant provide any evidence that would support a finding of retaliation.

The Bank affirms that the Complainant's employment contract expired in accordance with its express terms. The Bank additionally rejects the Complainant's allegation that the termination of her employment was motivated by retaliation for her having acted as a whistleblower.

Section 101 of Staff Rule No. 328 determines that "it is the duty of all Bank employees to report suspected fraud or corruption in Bank activities." It further notes that "it is essential that Bank employees are confident that their fulfillment of these duties will not lead to reprisals affecting the terms of their employment or their career development." Therefore, when the Complainant believed that she had found evidence that her supervisor was engaging in fraud and employment misconduct by using donor funds for the Initiative as well as IDB's resources for his personal benefit, she had the duty at the time to report such actions. The allegations made by the Complainant were thoroughly investigated by the Bank and the Ethics Committee made a recommendation to the Bank's administration that was duly implemented, and communicated to the Complainant. In coming forward with the above-mentioned allegations, the Complainant could have reasonably expected that the Bank would protect her from reprisals.

The Section IV(B) of the Bank's Code of Ethics defines reprisal as follows: "Reprisal is any adverse action taken against an employee by another employee or supervisor in response to the employee's reporting Misconduct, or otherwise being a "whistleblower" in accordance with Staff Rule 328 "Protection for Whistleblowers and Witnesses." Any employee who is found to have retaliated against another employee because he or she opposed or reported Misconduct shall be subject to disciplinary sanction. An employee who believes that he or she has been the subject of reprisal should refer his or her concerns to the Ethics Officer immediately.

The same concept is reflected in Section 105 of Staff Rule 328: "No employee shall be subject to reprisal as a result of having provided such information to the designated authorities. A reprisal for the purposes of this Staff Rule is an act of retaliation on the part of a staff member's colleagues, supervisors, or any other Bank officer carried out to punish a staff member for having provided such information. Reprisals are adverse actions on the part of co-workers or supervisors in response to the employee's acting as whistleblower which could include harassment, discriminatory treatment, assignment of work outside of the corresponding position description, inappropriate evaluations of performance, inappropriate awards of merit pay, or the withholding of any other entitlement. For the purposes of this Staff Rule, a reprisal includes the threat of reprisal.

The essence of reprisal is to punish a whistleblower for having acted as such. Reprisal against a whistleblower could take the form of adverse treatment or other personnel actions, or the withholding of benefits to which the whistleblower would otherwise have been entitled. The natural remedy for such reprisal would be to rescind such adverse actions, or to grant the benefits to which the whistleblower was entitled. In this case, the Complainant has not presented any evidence that adverse action has been taken against her for having acted as a whistleblower or that benefits to which she was entitled under her contract of employment were denied.

Reprisal does not include undertaking administrative actions that are warranted, or that are otherwise provided for in the contract of employment. Similarly, remedies

for reprisal do not include providing a security of employment, rights or other benefits that are not otherwise provided for in the contract of employment. However, the Complainant improperly alleges that she has been retaliated against because her contract of employment expired in accordance with its express terms, and claims entitlement to compensation that goes beyond the terms of her contract of employment or any Bank policy. The Complainant does not indicate that another co-worker, supervisor or any Bank officer retaliated against her for being a whistleblower. In fact, the Complainant states that she had good evaluations and was granted pay increases compatible with her performance for three years following her reporting such misconduct.

In the Complainant's case, there is no direct cause and effect between the expiration of her turnover contract and the reporting of her supervisor's misconduct almost three years earlier. Actually, the Complainant herself concedes that "it is not that directly because of her whistleblowing that her contract was not extended" and any attempt to make such connection is so implausible that it cannot be justified. The Complainant tries to link her whistleblowing with the natural conclusion of the Initiative's activity in order to make the allegation that if it were not for her having disclosed such misconduct the Initiative would have continued to exist and even become institutionalized within the Bank. Such expectation of continuity of the Initiative is mere speculation and cannot be used as the basis for claiming retaliation. In any event, regardless of the Complainant having engaged in whistleblowing, the terms of the contract that she was legally bound to left no room for interpretation: the expiration date of the Complainant's turnover appointment was 31 January 2009 and such appointment was "not subject to conversion or renewal". Therefore, even if the Initiative were to continue to exist, the Complainant could not have had her turnover appointment extended or converted. Consequently, the Complainant's claim that she was legally entitled to having her contract extended or converted based on her protected acts of whistleblowing under Staff Rule No. 328 is erroneous.

4. The Complainant's petition for a monetary award in compensation of moral damages is unfounded and should be denied. In Tanner<sup>4</sup>, the Administrative Tribunal stated that it "considers that in order for there to be a reasonable expectation that occasions a moral injury, there must be an act or conduct by management that is the cause of and therefore is responsible for the moral injury caused." Since the Complainant's status as a whistleblower had no bearing on the termination of the Complainant's turnover appointment, the Complainant failed to demonstrate that there was an act or conduct by management that caused moral injury.

5. The Complainant's request for the quashing of the record of proceedings of the Conciliation Committee in Case no. 177 and the removal of the record of proceedings of the Conciliation Committee and related documents from the complainant's personnel file is not appropriate and should be denied. The Complainant has cited no violation of Bank policy or any basis in the terms of her contract of employment to support her pleas. Therefore, the Bank respectfully requests the Complainant's pleas be denied.

6. The Complainant's request for an award of costs and attorney's fees is not appropriate and should be denied. At the level of the Bank's administrative review and

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<sup>4</sup> IDBAT, 063-TANNER-IDB-07

Conciliation Committee, only representation by individuals who are not attorneys is permitted.<sup>5</sup> An award for legal fees attributable to exhausting the channels of administrative review and the Conciliation Committee would not be appropriate. The Tribunal's Statute prohibits an award for costs in presenting a case to the Administrative Tribunal.

### III. REPLICATION

The Complainant filed a replication in which she argues that:

A. Contrary to the Bank's statement in the Answer, the Complainant did claim during the course of her employment with the Bank that she was being retaliated against pursuant to Staff Rule No. 328. She first made the complaint to the Ethics Officer in October 2007 when she complained that the Bank was not respecting her reassignment to ORP after the skills mapping exercise during the realignment process. Instead, The Complainant was made the Coordinator of the Initiative, a position for which she had not been hired, nor for which she was qualified, and when the Initiative was totally discredited within the IDB and no one wanted the Initiative in their Unit or Department. The Complainant also complained to the Ethics Officer in August 2008 and then to the Bank President's Chief of Staff on 11 September 2008. She then met with the head of ORP, the week of 6 October 2008 to follow-up on her claims of retaliation for whistleblowing. This was then followed by the Complainant's meeting with the Vice President for Finance and Administration (VPF) on 7 January 2009.

B. The Complainant does claim (in the Complaint) that she was retaliated against by having an adverse action taken against her as reprisal for her whistleblowing activities and provides further evidence (in the Replication) of such retaliation. During the realignment process HRD put the Complainant through the same skills mapping exercise as every other regular IDB employee. Based on this exercise in July 2007 the Complainant was assigned to the Office of Outreach and Partnership (ORP). The new assignment to ORP was within the Complainant's skills and expertise and clearly reflected the best place for her skills. However, instead of abiding by the results of the skills mapping exercise HRD sent an email on 23 October, 2007 removing the Complainant from ORP because: "As part of the staffing plan exercise, it has come to our attention that the technical expert managing the Ethics Fund, [the Complainant], was erroneously mapped to ORP."

The Bank removed the Complainant from ORP and made her Coordinator of the Initiative—outside of her skills and expertise and outside her position description—and made her do work for which she had not been hired. Furthermore she was placed under the supervision of the GDI Unit Chief, who told her several times that she did not want the Complainant or the Initiative in her Unit. This is evidence that IDB engaged in reprisal against the Complainant for her whistleblowing activities.

C. The Answer states that under the Complainant's turnover contract she could have applied to IDB vacancies as an external candidate and "she indeed did so on at least two occasions prior to her contract expiring." This factual assertion is incomplete. The three Partnership Officer positions for which the Complainant applied on May 30, 2008 were

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<sup>5</sup> Rules of the Conciliation Committee, Rule 8.

withdrawn by IDB. Thus, while the Answer is correct that the Complainant "applied" for the vacant positions her application was meaningless because the positions were withdrawn. The Complainant's skills and expertise did match the requirements of those positions.

D. The Answer states that the Complainant's 2008 performance review "was not completed due to the Complainant no longer being employed with the Bank when such evaluation took place." The statement appears to be incorrect because without the 2008 performance review, how could the Bank decide on her merit increase of 4% for 2008? By awarding the Complainant the salary increase of 4% effective 1 January 2009, the Complainant's supervisor, the GDI Unit Chief, must have decided upon her performance. Therefore the Tribunal should order that the Complainant's 2008 Performance Review be completed and produced in writing to the Tribunal and to the Complainant under Tribunal Rule of Procedure Article 14, paragraph 3. The Complainant is entitled to see her supervisor's evaluation given that her merit increase is lower than what she received the previous three years, and because the supervisor stated repeatedly she did not want her in her unit, and she did not supervise her throughout the year.

#### **IV. REJOINDER**

The Bank filed a Rejoinder in which:

A. The Bank reiterates that remedies for reprisal do not include providing a security of employment, rights or other benefits that are not otherwise provided for in the contract of employment. Therefore, the allegations that the Complainant's whistleblowing had adverse effects on her career development in the Bank are inaccurate. Her contract of employment expired in accordance with its express terms, and she claims entitlement to compensation that goes beyond the terms of her contract of employment or any Bank policy.

B. The Complainant disregards the significant differences between a fixed-term appointment and a turnover appointment. The Bank clarifies and reiterates that there is one substantial difference between these types of appointments: the fixed-term contract which the Complainant did not have and which is renewable, and the turnover contract which is expressly ineligible for renewal.

#### **V. THE EVIDENCE**

In addition to the abundant documentary evidence produce by the parties, the Tribunal heard the testimony of seven witnesses.

A. In its summation of the evidence, the Bank states:

1. That it is uncontroverted that the Complainant was aware of the temporary nature of her turnover appointment and the contractual language contained therein. Therefore, the Complainant could not have reasonably expected that her contract would be extended or converted. In fact, in the Complaint the Complainant concedes that a turnover contract is not a permanent contract and that the Complainant was fully aware of the conditions attached to her turnover contract, i.e., a contract of limited duration as opposed to indefinite duration.

In her testimony before the Tribunal, the Complainant was asked by her attorney whether she was claiming that her turnover contract was not complied with by the Bank. The Complainant answered; “No, I am not complaining about that at all. That has never been my complaint.”

In the testimony of a Human Resources Senior Specialist, counsel for the Bank asked the witness whether she believed that a person who held a turnover contract could have an expectation of having a career in the Bank. Her answer was “No. The Bank’s policy is quite clear, Staff Rule 311, which clearly establishes that the turnover appointment has a definite duration in time, whether the duration of the initiative, the duration of the leave of the person one is coming in to replace, or a maximum term of five years, which cannot be extended beyond that term.”

In the testimony of the (former) SDS Manager—the Complainant’s manager—Judge Sandoval Rodriguez asked the witness his opinion regarding the tension between two rules: on one hand a turnover contract—that the Bank says legitimizes the Complainant’s termination—and on the other Rule 328 that protects whistleblowers. The former SDS Manager’s testimony was: “In terms of the turnover contract, the Bank has also been absolutely clear with the employee and there were other cases presented, I think it didn’t go further than conciliation, and they were resolved, but the Bank has always been clear that it has the right not to renew that contract, it’s a fixed-term contract, and we have always been very careful and us managers are trained to make sure we do not create unnecessary expectations that go beyond what we can actually offer; in other words, the Bank has the full right not to renew a contract.” And later on the same subject, “I don’t think that the Bank should tell anyone that it will guarantee their employment if they report something. Because then we’d get into a witch hunt, one who has a contract that’s going to terminate, why not find some little case over there—may he who is free of guilt cast the first stone—you’ll find it. So if it’s active protection of employment, I don’t think it works like that...”

2. The Complainant provided no evidence that would support a finding that the termination of her contract was motivated by retaliation for her having acted as a whistleblower. The Complainant claims that her whistleblowing led to the demise of the Initiative, depriving her of the opportunity to compete for a staff position, had the Initiative been institutionalized within the Bank. However, even if the Complainant had not blown the whistle, there is no way to predict that the Initiative would have continued to exist, become institutionalized, a staff position would have been available, and the Complainant would have been selected for such position.

B. The Complainant’s comments on the probative value of the evidence emphasize:

1. Bank Management was aware of legal implications of the Complainant’s status as a whistleblower. The Complainant testified that she is not claiming that the Bank failed to comply with the terms of her turnover contract or of Staff Rule 311 on turnover contracts. As the Complainant testified, “I am not complaining about that at all. That has never been my complaint.” Instead she testified in support of her claims that: “I had an expectation of working continuously at the Bank after my contract was over” based on what she was told, apart from her turnover contract, and that “My own whistleblowing led to the demise of the Initiative and that since that moment, since the year 2006, I was retaliated against on several occasions until I left the Bank in 2009, and that is, all together, what I am claiming.”

The former President of the Staff Association testified that he spoke with the Vice-President for Finance and Administration about the Complainant's situation "I asked him to somehow look at how to review the case with [the whistleblower's] perspective, not with the closed perspective of this is a turnover case." He told the Vice President that "[the case was] 'linked to Staff Rule 328 and the whistleblower issue,'" and that "as I say 328 draws no distinction based on whether one is or is not a turnover employee."

2. The Bank created Complainant's legitimate expectation of continued employment. The Complainant produced two emails from the then Executive Director from Canada. The first one, dated 26 July 2005, addressed to the Bank President's Chief of Staff stated: "I told the President this morning that I would send him a message telling him the only way this is going to get resolved is if he tells [the HR Manager] to make the turnover position she occupies into a permanent position. This is that message because I thought it rather more elegant to send it to you than to him. I do not get angry very often. But this makes me furious because she is being royally screwed by the system (there is a lot more in this case that I could tell you) and everyone says she is first-rate. Can you move this forward? ..." The second, dated 23 December 2005, to the Complainant that was and stated: "I have had two conversations with [the HRD Manager], two with the [SDS Manager] and one with both ... they both assure me [the HRD Manager] in particular, that they are committed to resolving it permanently and that the current arrangement means that you, at least, are secure for three years, not just one year at a time. And this is going to give them the time to find the permanent solution."

The former Executive Director from Canada confirmed the expectation when he testified that: "Everybody was telling me she is very good and we are going to get this sorted out, and my expectation was that it was going to get sorted out and that she would become an employee" ... "I thought that at one point she would be converted from a term or contract position into a full-time employee position. ... The [Manager of SDS who] was her boss at the time the whole [General Coordinator] situation occurred, [then became Secretary of the Bank and now is the Bank Representative in the office in Paris, he was one of the very senior managers of the Bank with whom [the Complainant] had worked, and both of them had told me directly that they considered her to be a top employee." Thus he concluded his testimony saying: "Well, if I had been her my expectation would have been that 'yes' with all that was going on that I would be offered a position."

In addition, the Complainant testified there were practical reasons why she had a justifiable and legal expectation of continued employment: she had worked with the Bank for nearly ten years, from 1995 to 2005 "as a long term, full time consultant" on a continuous basis, and she was performing staff-like functions, which the Bank itself determined "during the 2001 conversion exercise had been classified as a staff like function." As the former Executive Director from Canada testified: "the Bank itself recognized that a lot of consultants who had had 'N' successive contracts should be converted to full time employees" and [the Complainant] was classified as "performing staff like functions, but was not converted to staff due to a technicality ... [s]he was being paid out of a trust fund..."

3. The Complainant's employment opportunities were ruined in violation of Staff Rule 328's prohibition of reprisal against whistleblowers. The Initiative had been expected to become institutionalized within the Bank. Proof of this is Bank's creation of the Multi Donor Trust Fund on Social Capital and Ethics Development in September 2005. A consultant with the Initiative (a development ethicist) testified that "the demand [for the Initiative] within the Bank was strongest among the regions that knew what development ethics was about and social capital". The former Executive Director from Canada testified that "As this support for it and interest evolved I became more and more convinced that we were going to have an Initiative that would become institutionalized and play a major role. Then you have the problem with the head of the Initiative and that changed everything." The SDS Manager testified: "the Initiative was transferred to me, I think sometime in November, December of 2005, so immediately I started asking questions about how it worked, because the Initiative was famous." , and later "...it's likely that the Initiative would have continued if the [corruption] case were not filed, I don't see why the Initiative should not continue, the only reason why it would not continue would be if the donors were to decide, because they also have the right to end their contribution, if the donors had said no, I don't think the Bank would have taken the Initiative to terminate the Initiative, so the case did have an impact on the termination of the Initiative..."

The demise of the Initiative was the result of corruption which came to light because of Complainant's whistleblowing. The former Executive Director from Canada testified: "until the [General Coordinator] incident I detected absolutely no reduction in the Bank's interest and support of the Initiative." In turn, with the demise of the Initiative the Complainant lost her main employment opportunity in the Bank. This is because her continued employment was tied to the continuation of the Initiative. As the Complainant herself testified: "So the Bank offered instead a turnover contract, and during the last six months of my contract I would be allowed to compete, basically in an external competition for my position, and I was working on the Initiative, and there was the intention of the Bank, and the intention of Canada to support the institutionalization of the Ethics Initiative in the IDB. So it was not something secure but that was the expectation of the contract that I was going to have and it was tied to the success of the Initiative."

Despite the limitations to her turnover contract in not having her employment in the Bank continued after the expiration of the contract, the Bank had the authority and the ability to provide an exception through a waiver. As the witness for the Bank—the Human Resources Senior Specialist—testified: "I know of one case where that happened and that was through a waiver granted by the President of the Bank." She then explained, "the issue is one for Human Resources and Legal, in my opinion it would be through the Vice-Presidency for Finance and Administration." As the Complainant's evidence has shown, the Vice-President for Finance and Administration knew of the Complainant's whistleblowing but did not provide an exception to her turnover contract through a waiver.

Indeed, the Vice-President for Finance and Administration knew that in 2008 the Bank's President had made an exception and that 16 people with turnover contracts were converted to fixed-term employees. In his meeting with the Complainant on 22 December 2008 the Vice-President told her the conversion of those 16 contracts were in response to business needs of the Bank and were authorized exceptionally by the President of the Institution. In light of Staff Rule 328, why didn't the Bank consider that

the Complainant's whistleblowing was in response to the business needs of the Bank?".

### **CONSIDERING THAT:**

In 1992 the Complainant graduated with an M.A. degree in international affairs from Carleton University in Ottawa, Canada and worked in international trade and social development from 1992 to 1995.

In November 1995 the Complainant began her employment relationship with IDB on a full-time basis and continued to work for the Bank for 14 years. During this time she carried out research into social policy reform in Latin America and the Caribbean and was tasked by the IDB with authoring a report based on her technical experience.

Her dedication and professional merits led to her working in 1998 as Regional Coordinator with the Social Division of the Sustainable Development Department (SDS/SOC). She secured then a one-year "turn-over" contract that was later extended for a period of three years which expired in January 2009.

The Complainant, in close coordination with other departments of the Bank, worked on integrating the social policy dialogue that was part of the institutional social development strategy of the IDB.

I

In April 2004 while still a consultant the Complainant began working as a Social Development Specialist at the Bank's Initiative on Ethics and Social Capital (the "Initiative") which was established in March 2002, and served there for nearly five years. From the beginning of her service there until January 2007 the Complainant was the immediate subordinate of the General Coordinator of the Initiative, a person well known and respected in the field of development ethics.

In 2004 and 2005 she participated in several meetings aimed at seeking donations from different countries, and met with high-level managers of the IDB and representatives of other donor countries, to which end she produced an analytical background paper. Evidence of her outstanding and dedicated performance of her functions can be found in her 2005 and 2006 evaluations. Her immediate supervisor recognized "results very important for institutionalization of the initiative, its goals for work in the region, and its institutionalization in the Bank" and that "It would not have been possible had [she] not had very significant professional capabilities, very high productivity, very relevant human qualities, and a total commitment to the institution and the region."

In February 2006, the Complainant came upon evidence that the General Coordinator was engaged in fraud and misconduct by using funds contributed by donors to the Initiative, as well as Bank funds, for his own personal benefit. The Complainant promptly so informed the Secretary of the Bank's Ethics Committee and the Manager of the Sustainable Development Department (SDS), the Bank unit in which the Initiative (and the Complainant) had been located. The Complainant was requested by these officials to provide further information and documentation for her charges against the General Coordinator, and she discreetly did so over the next several months. In September and November 2006, the Complainant sent to the

Ethics Committee detailed and exhaustive memoranda in which she made reference to dozens of computer and paper documents that unequivocally demonstrated that the General Coordinator was making illicit use of Bank funds.

The Ethics Office then instituted a misconduct investigation of the General Coordinator, which led to the termination of his employment at the ending of his contract in January 2007.

The Tribunal finds that it had been expected by the Bank in 2004 and 2005 that the Initiative in particular, and the Bank's general commitment to incorporating ethics in its staff work and operational programs, would become more influential and durable. Nonetheless, the Complainant's whistleblowing and the departure of the General Coordinator had the drastic effect of shrinking the Bank's commitment of funding, projects and staff (from 15 in December 2005 to 4, including the Complainant, in January 2007) within the Initiative. Although the Bank attempts to attribute the decline of the Initiative to other causes, the Tribunal finds this to be unconvincing.

As a result, both the Complainant and the Initiative were moved by the Bank from one unit to another, in ways that the Complainant persuasively asserts were not suitable and that reflected the Bank's lack of commitment to the mission of the Initiative. In particular, the Complainant in June 2007—after acting as the new coordinator of the Initiative, a post for which she considered herself unfit—was, as a part of the Realignment process, transferred to the Office of Outreach and Partnership (ORP). There she was assigned to work that she believed to be congenial and fully corresponding to her skills and experience. But by 2008, because of the Bank's "erroneous mapping" of ORP in the Realignment, the Complainant was transferred once again—as was the Initiative—to the Gender and Diversity Unit (GDI), where the Unit Chief was apparently altogether unsympathetic to overseeing the Complainant's work as well as the remnants of the Initiative.

Despite the Complainant's receiving an excellent annual evaluation by her previous manager in SDS for 2007—consistent with her very positive evaluations for prior years—the Complainant's GDI Unit Chief awarded her only a 4.55% merit pay increase, which subsequently had to be corrected and increased; and that Unit Chief gave her only a 4% merit increase effective in 2009 (the lowest in her employment history at the Bank), despite "never having observed her work" (the Complainant's words, unrebutted by the Bank). The Complainant's turnover contract expired by its own terms in January 2009.

Significantly, by "blowing the whistle" on her supervisor, as the duty of loyalty expressly incorporated in Staff Rule 328 required her to do, the Complainant saw the Bank's commitment to the Initiative drastically decline. This led to the complete dislocation of the Complainant's assignments, accomplishments and progress during the two years between the departure of the General Coordinator in January 2007 and her own contract termination in January 2009.

Moreover, during that same period, the Complainant applied for nine positions for which the Bank had posted vacancies. Most of these were posted during the Realignment in 2007, when new positions were being created and then filled by the Bank, and many staff members were being reassigned. Even so, the Complainant had no success in her searches for these nine positions: in only one instance was she interviewed, but she was not selected; in five instances, she was not selected for an interview; and the other three positions were canceled.

The Complainant asserts that her experience and skills well qualified her for these positions, and there is little in the record to contradict her, especially in light of her consistently

positive annual evaluations throughout her Bank service. In any event, the Tribunal is troubled that the Bank appears to have taken little or no initiative to help the Complainant secure interviews for several of the posts enumerated above, or to search for other suitable positions. The Tribunal notes the admirable vigor of the Bank's efforts in this respect in Ponciano<sup>6</sup>, and has found no evidence in the record that would warrant such passivity in the case at hand, in which the Complainant had, with loyalty and commitment, been altogether instrumental in assisting the Bank to rid itself of her General Coordinator, who had engaged in such grave misconduct and thereby so seriously caused damage to the mission of the Bank.

What is even more troubling is the contrast between the Bank's treatment of the Complainant and its treatment of the General Coordinator of the Initiative. Far from moving quickly to rid itself of the latter, possibly in March 2006 when the Complainant provided information about him to Bank officials and certainly by September 2006 when she produced the first of her detailed written memoranda, the Bank inexplicably allowed him to remain at his post—without suspension and with full pay—until January 2007 when his employment contract ended by its own terms. Moreover, after the Bank established that the General Coordinator had diverted to his own purposes more than \$100,000 in the funds of the Initiative, it chose to reimburse those funds from the Bank's own assets, rather than insisting that the General Coordinator return those funds himself. The Bank, in its treatment of both the General Coordinator and the Complainant, demonstrated an equivalent passivity if not indifference, when the just rewards of these two staff members should have been so vastly different.

Staff Rule 328, sections 101 and 105, which apply to employees with turnover contracts as well as regular staff members, provide in part:

“It is the duty of all Bank employees to report suspected fraud or corruption in Bank activities. . . . It is essential that Bank employees are confident that their fulfillment of these duties will not lead to reprisals affecting the terms of their employment or their career development. . . .”

“No employee shall be subject to reprisal as a result of having provided such information to the designated authorities. . . . Reprisals are adverse actions on the part of co-workers or a supervisor in response to the employee's acting as whistleblower which could include harassment, discriminatory treatment, assignment of work outside of the corresponding position description, inappropriate evaluations of performance, inappropriate awards of merit pay, or the withholding of any other entitlement. . . .”

Whether or not the Bank engaged in “reprisals” in the classic sense of intentionally withdrawing or withholding employment benefits as a punishment for whistleblowing, the Tribunal finds that the Bank's treatment of the Complainant in the period after her whistleblowing was an equivalent wrong, in violation of Staff Rule 328. Although the Complainant manifested to the highest degree the duty declared by the Bank in that Rule to report her manager's fraud and corruption, the Bank in 2007 and 2008 allowed her “career development” to take a turn for the worse—through unsuitable work assignments, through the failure to give more positive support to her several job applications, through the striking contrast between its treatment of the Complainant and that given to the General Coordinator, through the

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<sup>6</sup> IDBAT- 072-PONCIANO-11

inadequate merit pay increases and annual evaluations, and through its apparent decision to withdraw support from the Initiative.

Apart from its finding of a violation of Staff Rule 328, the Tribunal also finds that by so treating the Complainant, the Bank abused its discretion in managing her career and thus violated the Complainant's terms and conditions of employment.

## II

In addition to this finding of a violation of the Staff Rules it is the conclusion of the Tribunal that the Complainant derived a legitimate expectation that her employment status would be continued and the Bank failed to give effect to that expectation.

The Executive Director for Canada sought in a real and concrete way to seek a permanent position for the Complainant and in that endeavor he enlisted the assistance of the Bank's Management at the highest level including the HRD Manager, the SDS Manager and indeed even the President of the Bank as evidenced by the following emails:

a) the email of 26 July 2005, in which that Executive Director reiterated to the chief of staff of the Presidency of the Bank that "18 months ago, after I talked to the President about it, he said it was not acceptable that this continued and it had to be solved," and, moreover, that "I told the President this morning that I would send him a message telling him the only way this is going to get resolved is if he tells [the HRD Manager] to make the turnover position she occupies into a permanent position. This is that message because I thought it rather more elegant to send it to you than to him" to which he adds that "I do not get angry very often. But this makes me furious because she is being royally screwed by the system ... and everyone says she is first-rate," asking him to move the matter forward;

b) the email that said Executive Director of Canada sent on 23 December 2005 to the Complainant, conveying to her: "I have maintained two conversations with [the HRD Manager], two with [the SDS Manager], and one with both. Whilst the situation that results is still murky, they both assure me—[the HRD Manager] in particular—that they are committed to resolving it permanently and that the current arrangement means that you, at least, are secure for three years, not just for one year at a time. And this is going to give them the time to find the permanent solution."

The Executive Director of Canada communicated this information to the Complainant, thus generating a legitimate expectation of continued employment with the Bank.

It is important to note that because the Complainant had a turnover contract and she lacked an automatic subjective right to the renewal or conversion of her contract; nonetheless the Tribunal is of the view that the employer does not enjoy unbounded discretion when deciding the continuation of employment. This Tribunal recognized in Peroustianis<sup>7</sup> "the discretion of organizations to renew or not to renew a fixed-term contract is not absolute. In other words, its exercise is subject to legal limitations protecting the employee against abuse of authority or arbitrariness and preserving his legitimate expectations." Although Peroustianis

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<sup>7</sup> IDBAT, 042-PEROUSTIANIS-IDB-96

refers to a fixed-term contract and not a turnover contract, the general principles established therein are applicable to this case.

It was to be expected that the Complainant would pursue greater advancement, wanting to extend her employment at the Bank, in light of an impeccable service record, loyalty, and outstanding performance not only in the observance of and compliance with the internal policies of the Bank, but also as reflected in the dedication and responsibility with which she clearly performed her functions.

In Quintero<sup>8</sup> the Tribunal set forth as doctrine that regarding the legitimate expectations of continued employment of an employee “the Bank has the rigorous responsibility of carefully considering the possible measures conducive to meeting those expectations.”

The Tribunal is not convinced that the Bank has met that responsibility. No valid explanation has been given for its failure to adopt this course.

### III

For all of the foregoing reasons the Tribunal decides that the Bank should compensate the Complainant in the amount of US\$300,000.00

#### **NOW THEREFORE:**

The Bank will pay to the Complainant the sum of US\$300,000.00.

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<sup>8</sup> IDBAT, 043-QUINTERO-BID-97

Washington, 21 July 2011

María Ángela Poliche de Sobre Casas

Guilherme A. Caputo Bastos

Isaac Sandoval Rodriguez

Robert A. Gorman

Desiree Patricia Bernard

German Leitzelar V

Hernán Sáenz-Jiménez  
Executive Secretary

**PARTIAL DISSENT;** Judge Guilherme Caputo Bastos partially dissents as follows:

It must first be said that the Complainant worked at the Bank for 14 years and that in the end she had a turnover contract that expired on 31 January 2009.

Additionally, the Tribunal has determined that she had received a promise of employment from the Bank, which gave her the legitimate expectation that her employment situation would continue.

Finally, Staff Rule PE 328 was not fully upheld, because Management did not consider the adoption of measures conducive to fulfilling that expectation.

We have found the Complainant to be an exemplary employee who, in addition to her routine responsibilities, helped the Bank obtain evidence to show that the Coordinator of her area was working against the interests of the Bank, including serious suspicions that he was using his position for personal benefit. It therefore seems to me inconsistent for the Complainant to be let down, without any of the protections established in the aforementioned staff rule.

When Management failed to make the effort to find her a position as stipulated in Staff Rule 328, (*“it is incumbent upon the Bank to rigorously fulfill its responsibility to carefully consider possible measures conducive to meeting those expectations”*), it violated its own principles as expressed in its workplace rules.

We see that the Executive Director for Canada at the time made diligent efforts to find her a position. He even procured a promise from the Manager of HR and the Manager of SDS that they were determined to resolve the issue permanently, as is shown in an email in the case file. And the exhibits in the case include emails indicating the President of the Bank himself was concerned that the matter needed to be resolved.

This does not mean that Management is obliged to find an employee a job whenever he or she reports wrongdoing. Rather, this was a special situation in which those in charge of human resources and in the Complainant’s area demonstrated, as I said above, full interest in resolving the situation and even finding her a permanent position because they knew it was a unique situation and the case had not been resolved properly.

Furthermore, in my experience as a judge I have never seen a situation in which an Executive Director of the Bank looked for a job for an employee in which it was not a matter of honor, of justice, of fairness, and of real need.

The whistleblower protection dictated in the aforementioned rule will be rendered useless for future cases. Staff members will think twice before reporting wrongdoing because despite the fact that the Ethics Committee ultimately found that the person

accused of misconduct was guilty as charged, Management did nothing to protect the whistleblower.

In my opinion, the Bank should provide the Complainant with a three (3) year fixed term contract, with the possibility of reappointment or reassignment in a normal course, in a position compatible with the duties she performed at the end of her turnover contract, as promised by Management.

Additionally, should the Bank determine that it is not in its interest to hire the Complainant; I set compensation at the rate of 36 months of Complainant's salary at the time her contract expired.

Washington, 21 July 2011

Guilherme Caputo Bastos

Hernán Sáenz-Jiménez  
Executive Secretary