refuse to engage in it. Fairness to staff subject to disciplinary action requires that they be able to resist directives that can subject them to discipline. Under the regulation, the standard for refusal is the standard of good faith applicable to disclosures.

Part Two: Retaliation

Retaliatory Actions. The Bank's staff regulations broadly conceive of retaliation to include both formal and informal actions, threats, differential treatment of staff members, denigration of staff, creation of a hostile working environment or any action that harms an employee of the Bank. For example, requiring an employee to submit to a psychological fitness for duty examination would fall under the broad conception of retaliation as would denying a staff member information necessary to performance of his or her duties, isolation of staff members, and different treatment of the staff in the application of rules and standards. This view of retaliation is consistent with many whistleblower provisions that prohibit "threats" of retaliation or address "harassment" or "discrimination" against an employee. The whistleblower provision of the Sarbanes-Oxley Act describes retaliation "or in any other manner discriminate against an employee in the terms and conditions of employment" According to administrative law judges at the Department of Labor, an employment action meets this standard if "it is reasonably likely to deter employees from making protected disclosures." The law incorporated by the provision treats any job-related action, whether formal or informal, as affecting the "terms or conditions of employment."

This approach to the definition of retaliatory action is preferable to the attempt to identify particular employment actions that will constitute retaliation. Such efforts risk omitting important actions, encourage manipulation of actions to avoid retaliation claims, engender disputes and litigation, and require frequent amendment of the employment actions included in retaliation.

Recommendation Twelve: As the Bank develops experience with the determination of retaliation, it should set out the character of retaliatory actions in detail.

Comment: Although no list of retaliatory actions can be exhaustive, examples and illustrations give meaning to the general concepts. Because the standards of the Bank are internal and not anchored in any particular body of law, it is important that staff rules and guidance address issues in a detail not found in comparable rules and guidance in other organizations. In most organizations, many interpretative issues are resolved by other institutions and by a substantial amount of litigation. This is not the case with the Bank. Because of the limited number of formal adjudications, precedent develops slowly and Bank regulations must perform many of the interpretative issues normally left to others. This rationale also supports many of the recommendations of the report to clarify or develop these standards.

The Standard for Retaliation. The standard for retaliation is stated in different, and perhaps contradictory, ways in the staff rules and in the operating guidelines of offices charged with addressing claims of retaliation. Staff Rule 8.01 prohibits retaliation without articulating the standard for retaliation. Other guidance to employees varies. For example, the Office of Ethics and Business Conduct states that a person must suffer "retaliation as a direct result" of a protected disclosure. The Department of Institutional Integrity repeats this language but in discussing the standard of proof states "[i]f the evidence is reasonably sufficient to show that the complainant's whistle blowing was a 'contributing factor' then management must demonstrate by 'convincing' evidence that the personnel action would have occurred regardless of the whistle blowing." INT also indicates that the management officials who took the challenged action "knew or reasonably should have known, about the protected disclosure." Some language in INT's guidance as well some decisions of the Administrative Tribunal appear to focus on the motive of the alleged retaliatory officials.

INT's description of the standards of proof in a retaliation claim by a whistleblower is similar to the dominant standard for proof of retaliation contained in a number of whistleblower provisions. In order to establish retaliation, a whistleblower need only show by a preponderance of the evidence that the protected disclosure was a contributing factor to the alleged retaliatory action. It need not be the principal reason or a substantial reason. In determining whether the whistleblower has carried this burden, the finder of fact can draw inferences from the action closely following the protected disclosure.

INT's description that focuses on whether "managers" knew or should have known of the protected disclosures permits a finding that the protected disclosure was a contributing factor even if the final decision maker was unaware of the disclosure as long as other managers involved in the decision were. If the whistleblower carries this burden, the employer must prove by clear and convincing evidence that the employer would have taken the same action regardless of the protected disclosure. This scheme does not require a determination of the "motive"of the alleged retaliatory official and such a focus on motive makes the proof of retaliation more difficult. For example, a manager might say that he or she really liked the staff member, had no animus toward the staff member and did not take action through any desire to harm the staff member.

Although whistleblower statutes protect "disclosures," retaliation can occur without a disclosure. If a manager is aware that an employee is about to report misconduct or is in the process or doing so, retaliation can be taken to prevent the disclosure or to discredit any disclosure made. A threat of retaliation to silence a staff member discourages disclosures and undermines the purposes of whistleblower protection.

Recommendation Thirteen: The Bank should adopt the standard for proof of retaliation that uses the "contributing factor" standard for proof of retaliation which if satisfied imposes upon the Bank the burden of establishing by "clear and convincing evidence" that the involved

officials "would" have taken the same action absent the protected disclosure. This standard includes the understanding of the inferences that can be drawn from the timing of the challenged action and that the final decisionmaker need not know or should know of the protected disclosure as long as managers in the decisionmaking process were aware of it. In addition, this standard incorporates the rejection of the motive of the alleged retaliating official.

Comment: The Bank appears to be applying this standard of proof but the variance in language and the variety of statements regarding retaliation require the clear articulation of this standard. Experience with this standard shows that it gives whistleblowers the opportunity to prevail in meritorious cases. Under this standard, it appears that employers have prevailed in the majority of cases. In some instances in which an employer prevails, a disciplinary action was proposed or planned prior to a disclosure or before it was likely and thus not a contributing factor in the alleged retaliation. In other instances in which an employer prevails, an employer can demonstrate that the same action would have been taken in the absence of the protected disclosure.

Avenues for Redress of Retaliation. Staff members seeking redress for retaliation have several avenues within the Bank. A staff member can also ask human resources to overturn an action alleged to be retaliatory. Involvement by Human Resources in refusing to approve retaliatory actions sends a message both to staff members and to managers that retaliation against whistleblowers will not be tolerated within the Bank. Apart from Human Resources, a staff member may turn to one or more of the components of the Conflict Resolution System: The Office of Ethics and Business Conduct, the Ombudsman, and the Mediation Office. These offices can not render a formal decision and rely either on influence or the agreement of the parties to resolve the conflict. It is unclear whether the language in the staff rules declaring that "cases of alleged corruption or misconduct" are inappropriate for mediation applies to claims of retaliation as well as the disclosures of misconduct.

A whistleblower could seek an investigation by INT. INT's commencement of investigation permits its resources and expertise to be mobilized by the whistleblower. A decision by INT that retaliation has occurred would be expected to lead to redress for the whistleblower and disciplinary action against the retaliating official. A whistleblower could also turn to the more formal procedures provided by the Appeals Committee and the Administrative Tribunal.

It appears that Appeals Committee and the Administrative Tribunal may not have jurisdiction to adjudicate all claims for retaliation. The Appeals Committee is limited to an "administrative decision" which "alters or is in breach of the terms of appointment or conditions of employment, or any formal disciplinary action based on misconduct." Although the term, administrative decision, can be given a broad meaning it can be seen to exclude many of the "informal" actions that fall under the definition of retaliation. The filing deadline of an appeal to the Appeals Committee runs from receipt of "the written decision." This requirement suggests that informal acts of retaliation are not within the jurisdiction of the Appeals Committee.

In practice, it appears that the Appeals Committee reviews matters that are not strictly administrative decisions. Thus, it is not clear in what circumstances, the language of the staff rules may bar jurisdiction or whether the Appeals Committee has given a broad "gloss" to that language.

In addition, the Appeals Committee lacks jurisdiction over decisions made by some other committees and Bank managers. These decisions include, for example, those of the Committee on Outside Activities and Interests, and decisions of the Benefits Administrator, the Pension Benefits Committee of the World Bank, worker compensation claims, as well as the decisions of other specialized appeals procedures which deny the Appeals Committee jurisdiction.

The Administrative Tribunal may hear cases in which a staff member "alleges non-observance of the contract of employment or the terms or appointment of such staff member." Included within these terms are all "regulations and rules." Arguably, this standard of competency for the Administrative Tribunal is broad enough to allow it to consider any type of retaliation that violates the rules and regulations prohibiting retaliation for protected disclosures. Much rests on the meaning of the terms, rule or regulation.

Recommendation Fourteen: Members of the staff of the Bank should be able to adjudicate formally any allegation of retaliation for making protected disclosures or for refusals to participate in misconduct.

Option One: The Appeals Committee should unambiguously be given jurisdiction to adjudicate any claim of retaliation either by so defining the term, administrative decision, or by expanding the scope of its jurisdiction.

Option Two: The Appeals Committee should unambiguously be given jurisdiction to adjudicate any claim of retaliation alleged to have been made as a reprisal for protected disclosures or refusals to participate in misconduct

Option Three: The Bank should establish a special appeals tribunal to address claims of retaliation alleged to have been made as reprisal for protected disclosures or refusals to participate in misconduct.

Option Four: The Bank should adopt option one, two or three and in addition make clear that the Administrative Tribunal has jurisdiction over any claim of retaliation alleged to have been made as a reprisal for protected disclosures or refusals to participate in misconduct.

Comment: Options one, two and three make little difference if indeed the Appeals Committee does adjudicate any claim of retaliation regardless of the character of the retaliation. In this instance, the Bank need not consider whether to limit the exercise of jurisdiction over claims of retaliation by informal means to whistleblower cases. In this instance, the recommendation is only that the Bank clearly codify the breadth of the jurisdiction of the

Appeals Committee in the staff regulations. If the Appeals Committee lacks jurisdiction over certain acts of retaliation, the Bank should consider the identified options.

The first option would permit the Appeals Committee to hear any claim of retaliation in any case whether or not it involved protected disclosures. For example, claims for retaliation for raising issues of harassment or other workplace concerns would be covered. The second option would cover only whistleblower claims. The Bank must consider whether it wants to limit this broader jurisdiction solely to whistleblower claims. The third option is a variant of the second option but would create a special process just for whistleblower claims.

The Bank might conclude that it did not wish to provide this type of formal review of many informal actions by managers of the Bank beyond whistleblower cases. The second and third options, however, fragment the appeals process, discriminate based on different grounds for retaliation and encourage employees to cast their claims as whistleblower ones in order to adjudicate some claims of retaliation not otherwise within the jurisdiction of the appeals committee.

The last objection can be addressed in manner analogous to the treatment of this problem under the Whistleblower Protection Act. Generally, federal employees may only appeal enumerated personnel actions to an administrative court, the United States Merit Systems Protection Board. Whistleblowers, however, may seek redress of a number of personnel actions not otherwise appealable to the Board. The Board has managed the problem of attempts by employees to present their claims as whistleblowers claims in order to obtain review by the Board. Similar devices and techniques could be used if the Bank adopted option three.

Recommendation Fifteen: The Bank should ensure that employees can efficiently adjudicate claims concerning a "pattern and practice" of retaliation.

Comment: Staff Rule 5.01 requires that a staff member, with an exception when mediation has been commenced, file an appeal with the Appeals Committee within "90 calendar days of receiving the written decision." Not only does this language seem to exclude informal actions that would prevent a staff member from appealing a pattern of informal harassment and retaliation designed to intimidate and punish but it also makes difficult the appeal of a series of administrative decisions to this same effect. The exclusion of informal actions is addressed in Recommendation Thirteen. The covering of informal actions would require some change in the language "the written decision." This change would also make it easier to argue that the retaliation consists of a series of informal actions or a series of formal decisions. The Bank, however, should make clear that the 90-day limit permits a pattern and practice claim.

The Bank appears to treat this 90-day period like a statute of limitations rather than a filing deadline. A statute of limitation would be jurisdictional and bar claims thus restricting pattern and practice claims. A filing deadline could be waived or adjusted depending on the circumstances of the case. The Bank could resolve this problem by declining to treat this period

as jurisdictional. The Bank could also resolve this problem by redrafting the provision to insure that "pattern and practice" claims could be adjudicated.

Discipline of Those Persons Responsible for Retaliation Against Whistleblowers. The Staff rules establish that the Bank may discipline employees responsible for retaliation. Discipline for retaliation is an important protection for whistleblowers because it discourages retaliation. Many whistleblower statutes permit discipline of officials for retaliation. Some statutes go further imposing criminal fines, punitive damages, or other personal sanctions. Thus, the Bank's staff rule is an important one. Knowledge of such retaliation could reach Bank officials in a number of ways.

Recommendation Sixteen: The Bank automatically should advise staff of the discipline of Bank managers for retaliation against whistleblowers.

Comment: The Bank has notified staff of the discipline of Bank managers for sexual harassment (It appears to effect because more than one person mentioned it). Such notifications regarding discipline for retaliation against whistleblowers assure employees that standards of conduct are being applied, encourage staff to make protected disclosures because they believe that the Bank supports them, and discourage managers who might be tempted to retaliate against whistleblowers. A similar approach has been suggested for the announcement of sanctions against third parties for fraud or corruption. That suggestion likewise rested on the deterrence effect of such announcements.

Part Three: Institutional Design

Analogies to External Disclosures. If the Bank were subject to a particular legal system, a whistleblower protection law would likely permit disclosures regarding various types of misconduct to persons within the Bank and to persons outside the Bank. Depending upon the statute, such disclosures would be protected when made to law enforcement agencies or to persons or organizations with responsibilities for regulating the misconduct at issue.

If the Bank were treated as a governmental entity, whistleblower provisions likely would protect staff for disclosures to members of the legislative and executive branches. In some countries protection for disclosures to legislative bodies would rest on powers of the legislature regardless of the content of whistleblower protection laws. In other countries, the right of free expression of public employees would protect disclosures apart from whistleblower protection laws.

If the Bank were treated as a private company, many whistleblower provisions would protect disclosures to regulatory bodies. Some provisions would protect employees who appeared in legal proceedings to testify regarding activities of the corporation and would protect employees who cooperated in investigations of violations of criminal or regulatory statutes. Laws also protect employees of a private corporation who disclose evidence of misconduct to

legislative officials. In some instances, statutes protect disclosures by employees of government agencies and private companies to the public and to the media. In some countries, such as Sweden, with laws or statutes protecting freedom of expression, those provisions, not whistleblower statutes, would protect public disclosures by citizens.

Moreover, most of these whistleblower provisions rest on the premise that the protection of external disclosures encourages the development of internal schemes of disclosure that compete with these external avenues. Thus, businesses and government agencies must seek to develop efficient and effective internal mechanisms to persuade employees that allegations of misconduct will receive a fair evaluation and that improvements will follow disclosures. The Bank, however, is not subject to a particular legal system and institutional design regarding disclosure must consider this central aspect of the Bank.

Recommendation Seventeen: The report suggests that the Bank consider pathways of disclosure that are analogous to the external disclosures protected by most whistleblower protection laws.

Option One: The Staff Rules of the Bank could protect certain disclosures to Executive Directors or Committees of the Board.

Option Two: The Staff Rules of the Bank could protect disclosures "in connection with or related to" the jurisdiction of an inspection panel and participation and assistance regarding the proceedings of an inspection panel.

Option Three: The Staff Rules of the Bank could protect certain disclosures to external bodies that are identified in those rules. In addition, those Staff Rules could protect participation and assistance regarding an examination of the Bank's practices by external bodies that are identified in those rules.

Comment: The language of this recommendation is intentionally more tentative than any in the report for it touches upon the governance of the Bank, particularly the relationship between the Board and the management of the Bank. The recommendation, however, addresses the implications of the Bank's insulation from any national or international body of applicable law.

These options are not mutually exclusive. Each, however, moves protected disclosures more from the interior of the Bank to external recipients. The first option emphasizes the role of Board and its committees in oversight and guidance in the policy of the Bank and in its effectiveness rather than in the resolution of individual disputes. Still, the line is not an easy one to draw; acceptance of allegations of misconduct by the members of the Board or by its committees risks embroiling them in the resolution of individual cases. In some instances, the character of the individual complaint may be such that it raises serious policy considerations within the purview of committees of the Board. Moreover, disclosures to individual directors raise concerns not applicable to committees of the Board, particularly appeals to nationality by

staff of the Bank.

In considering the first option in regard to disclosures to committees of the Board, there are ways to limit the character and number of disclosures. Consider three of the possibilities. First, disclosures could be limited to ones regarding specific types of misconduct. For example, disclosures to the audit committee would have to concern matters within its purview; disclosures to the personnel committee would have to concern governance issues. Another way of limiting the specific types of disclosures would be to limit them to corruption or fraud in the case of the Audit Committee or to serious breaches of standards of governance in the case of the Personnel Committee.

Second, a different standard could be applied to disclosures to the committees of the Board. Instead of good faith, such disclosures could require a standard of reasonable belief. For example, a staff member's good faith belief regarding fraud or corruption within the Bank would have to be reasonable to an objective observer in the position of the staff member.

Third, committees of the Board might provide confidentiality but not anonymity to staff making such disclosures. However, the Sarbanes-Oxley Act, applicable to some private financial institutions, requires that employees be able anonymously to contact the Board. A system of anonymous contact, however, does not foreclose this technique of limiting disclosures. Both avenues to committees of the Board could be provided.

Option two in some ways raises fewer governance issues than option one. Inspection panels are approved by the Bank to evaluate and assess the effects of the operations of the Bank. Logically, staff members should receive protections for the same disclosures to this organ of the Bank as they do to other offices in the Bank.

Option three most departs from internal disclosures and thus most affects the independence of the Bank. One can, however, image circumstances where disclosures outside the Bank justify protection. The interests of the Bank and of others in these circumstances could be accommodated by imposing a more rigorous standard for these disclosures.

Most whistleblower statutes are "single standard" statutes in which the same standard, such as reasonable belief, is applied to all disclosures made to any entity to which disclosures are protected under the statute. Some statutes are "multiple standards" statutes that apply increasingly rigorous standards depending upon the identity of the entity receiving disclosures. For example, the British Public Interest Disclosure Act contains multiple standards for disclosure.

The British statute covers most public and private sector employees in Britain and protects disclosures regarding "crimes, civil offenses (including negligence, breach of contract, breach of administrative law), miscarriages of justice, dangers to health and safety or the environment or cover up of any of these." The standard for such disclosures, however, varies.

The statute protects internal disclosures under the standard of reasonable belief. It also protects disclosures to certain prescribed persons, who are likely to be health or safety or financial regulators. In these circumstances the whistleblower must reasonably believe that the allegations are *substantially true.*

Other disclosures, including public disclosures, must meet a more demanding standard. The whistleblower must reasonably believe that the allegations are substantially true; the disclosure must be reasonable under the circumstances; and the disclosure must not be made for personal gain. In addition, the whistleblower must meet one of three preconditions. These conditions include: (1) reasonable fear of reprisal for disclosure to the employer or to a prescribed person under the Act; (2) reasonable belief of the concealment or destruction of evidence relating to the misconduct; and (3) previous disclosure of the misconduct to the employer or to a prescribed person.

This standard for external disclosures offers opportunities for the Bank to protect certain external disclosures. When the disclosures concern serious misconduct that threatens important interests of the Bank or of third parties, including health and safety or environmental harm, disclosures could be protected to persons prescribed by the Bank. The three preconditions of the British statute specifically describe circumstances where the internal safeguards of an employer fail to provide the protections due whistleblowers or are unable to receive and evaluate fairly or expeditiously the allegations of misconduct.

The Bank, much better than the consultant, can define the topics regarding which external disclosure should be protected, can determine the identity of entities that may receive such disclosures and can consider the propriety of other disclosures. Protection of such disclosures, however, could strengthen the Bank by assuring stakeholders and critics of the transparency of the Bank, by accepting the standards applicable to many public and private institutions, and by creating incentives for the performance of the Bank's internal system for the receipt and evaluation of allegations of misconduct in programs of the Bank.

Analogies to External Adjudication: If the Bank were subject to a particular legal system, a whistleblower protection law would likely permit an employee to present a claim of retaliation before an administrative body separate from the Bank or to a court of general jurisdiction. An employee would likely have these options regardless of the character of the internal grievance system provided by the Bank. It is likely that an employee would not be compelled to seek internal redress at all.

The character of adjudication would vary depending upon the character of the legal system and turn upon whether procedure was inquisitorial in character and upon whether emphasis was placed on written rather than oral presentations. In some countries adjudications might occur before administrative bodies or before the courts. In the United States some of the actions before the courts, as with the whistleblower provision of the Sarbanes-Oxley Act, would require trial by jury.

If the Bank were treated as a governmental entity, it is possible that a whistleblower could submit a claim to courts even in the absence of a whistleblower stautue. Countries with freedom of expression protections would most be most likely to apply them to public employees. In countries with a tradition of civil service protections, it is likely that at least the most serious disciplinary actions would be subject to external review if not adjudication.

If the Bank were treated as private company, many whistleblower provisions would provide for redress in the courts. In some countries, such as the United States, a private company, as a condition of employment, could require employees to agree to arbitration of a claim rather than an action in the courts. In some jurisdictions lacking a whistleblower protection statute, courts permit employees to challenge, in court, dismissals taken in retaliation for disclosures of an employer's violations of law even if the employee served at the will of the employer and was otherwise entitled to no legal protection.

Moreover, these external adjudications would be seen as encouraging internal resolution of whistleblower claims. In many countries both public and private sector employees would be able to organize and through collective bargaining agreements provide for grievance arbitration before independent arbitrators.

Most aspects of the Bank's Conflict Resolution System emphasize informal resolution of claims through alternative dispute resolution. The Mediation Office facilitates resolution through discussion between the parties, but this resolution requires the agreement of both parties to participate in mediation. The Ombudsman and the Office of Ethics and Business Practices provide redress through persuasion.

The closest analogy in the Bank's system to independent adjudication is the Administrative Tribunal whose decisions are binding on the Bank. However, the Tribunal meets infrequently and although it can decide matters *de novo*, it acts as a reviewing body for the grievance systems within the Bank. The requirement that, in most cases, an employee exhaust other remedies within the Bank suggests that it is not a substitute for the independent adjudication of whistleblower claims. The time and expense required to reach the tribunal reduce it as an option for many staff members. The rules of the Tribunal permit but do not require a hearing before it and the requirement of exhaustion of remedies may reduce the number of hearings. In many cases, the Tribunal will have transcripts, documents and other materials generated by the Appeals Committee. In these circumstances, hearings become less likely and it is more likely, as a practical matter, to be restricted by the limitations on the scope of review of the Appeals Committee.

The Administrative Tribunal remains an important protection in the most complex and controversial cases and is important in reviewing other administrative decisions in the Bank, including those regarding pensions and retirement.

Recommendation Eighteen: The Bank should provide, in the first instance, an opportunity for a staff member to adjudicate claims of retaliation the determination of which will bind the Bank.

Option One: The decision of the Appeals Committee regarding a claim of retaliation for protected disclosures or the refusal to participate in misconduct should be binding on the Bank.

Option Two: In addition to bringing an appeal to the Appeals Committee, a staff member should be able to elect binding arbitration of a claim of retaliation for protected disclosures or for refusal to participate in misconduct.

Option Three: Options one or two would apply to any claim brought by staff member under the Bank's regulations.

Comment: The third option addresses whether changes in the grievance process should be limited to whistleblower claims. Such a limitation fragments the grievance process and forces an initial determination of whether a claim is actually a whistleblower claim. Systems in which procedural rights turn on the classification of a case as one of retaliation against a whistleblower seem to have dealt with the attempts of employees to characterize their claims as whistleblower ones.

The ability of the Vice-President of Human Resources to reject a decision of the Appeals Committee can undermine confidence in the system, particularly in the most controversial cases. Many of these cases are likely to be whistleblower cases. What might be acceptable for internal grievance procedures in an institution that is part of legal system in which external adjudication takes place is not acceptable when the Appeals Committee forms the principal adjudicatory option within the Conflict Resolution System.

Staff members should also be given the option of choosing binding arbitration to resolve whistleblower claims. An employee should be given the option but not required to choose arbitration. Choice helps to ensure the perception of fairness.

An arbitrator should be chosen by agreement of the parties or through other generally accepted techniques from lists of professionally certified arbitrators compiled by recognized arbitration associations. Professional standards also address the procedures of arbitration. An employee should be permitted to choose arbitration because it is likely that the review of an arbitration award by the Administrative Tribunal would be limited.

The costs of arbitration are usually shared by the parties. The terms of arbitration should permit an employee who prevails in arbitration to recover representation fees and arbitration costs. An arbitrator should be authorized to provide the remedies available before the Appeals Committee. Recommendation Twenty-One addresses remedies. Because arbitration is likely to be more expeditious than an appeal before the Appeals Committee, many staff members who

would be harmed by delay in adjudication of claims of retaliation may find arbitration an attractive option.

Recommendation Nineteen: Changes should be made in the procedures of the Appeals Committee to emphasize its role in adjudication of claims of retaliation for protected disclosures or for refusals to participate in misconduct. These changes include:
1) a staff member's ability to be represented by counsel in all proceedings of the Appeals Committee. If a staff member chooses to be represented by counsel, then the Bank could be represented.
2) formalized discovery of documents and records relevant to the adjudication of the claim.
3) process for compelling the presence of witnesses.
4) testimony of witnesses under oath or affirmation with penalties provided for perjury
5) change of the "abuse of discretion" standard of review.
6) articulated procedures to address allegations regarding the intimidation of witnesses including powers of the panel hearing an appeal or the Appeals Committee to seek discipline for such intimidation
7) open hearings when an appellant consents
8) written decisions articulating the findings of the committee and the reasons for its decision
9) availability of hearing decisions with appropriate redaction to protect the identity of the staff member when requested by the staff member

Optional Recommendation Nineteen: The recommended changes would be applied only in whistleblower claims.

Comment: This recommendation relies upon the importance of a credible adjudicatory alternative in an institution, such as the World Bank, that is not subject to external adjudication of claims of retaliation by its staff. The suggestions rely upon conventions of administrative adjudication. For example, the rules of evidence do not apply in the same way that they do in the courts. Administrative adjudications are also more flexible in procedure. Most administrative adjudicators turn to conventions of administrative adjudication as well as to rules of judicial procedure to guide the process of adjudication. The consultant believes that Appeals Committee already follows some of these conventions of adjudication and to this extent, the recommendation memorializes those practices.

The optional recommendation addresses whether changes in the grievance process should be limited to whistleblower claims and many of the considerations discussed earlier apply here as well. As a practical matter acceptance of the optional recommendation seems a costly undertaking for it would require differing appeals structures. Such an approach also seems cumbersome and potentially confusing. If the Bank did not want to create separate appeals processes or alter the procedures of the Appeals Committee, binding arbitration would remain an option under Recommendation Eighteen.

The Appeals Committee seems to mix adjudication with peer review resolution of disputes. The close connections between the Appeals Committee and mediation also suggest this mixture. Such a system has advantages. It can have an informality of tone even if its procedures are more formal. Among other advantages is the acceptance of a decision in favor of a staff member by management and staff within the Bank. This recommendation also is in tension with the desire expressed to "de-legalize" the appeals process.

However, it is not subject to the 1999 criticism by the General Accounting Office of the internal grievance systems of the Bank as too adversarial. Since that criticism, the Bank has developed a Conflict Resolution System that offers a number of less adversarial and more informal conflict resolution alternatives. If the Bank adopts the option for binding arbitration but rejects the recommended changes in the procedures of the Appeals Committee, staff members will still have the choice between these two options.

The Appeals Committee applies an abuse of discretion standard of review to discretionary actions by managers. It would seem that almost all actions by managers involve the exercise of discretion. The abuse of discretion standard is rarely applied in adjudication but is used as a standard for limited review of the actions of judicial and governmental officials. In this context, the standard could be applied to uphold a decision in the exercise of discretion even though the fact finder would reach a different conclusion as long as the conclusion reached by the government official is one that falls with in the discretion of that official. Such a standard would be inconsistent with adjudication of the claim.

In whistleblower claims it must be clear that retaliation against a whistleblower is not within the discretion of a manager. Nor should the standard alter the burdens on the parties in a whistleblower claim or the assessment and weighing of the evidence. The consultant does not read this language in the regulation regarding the abuse of discretion standard as necessarily limiting adjudication of whistleblower claims but the Bank could consider its replacement in other cases. In many employee appeals to adjudicatory bodies, the employer has the burden of persuasion by a preponderance of the evidence to establish the propriety of the action taken. In some agencies the standard of administrative adjudication of the propriety of agency actions is substantial evidence.

However, the Annual Reports of the Appeals Committee suggest that the standard, abuse of discretion, is applied in ways that limit the review of the Appeals Committee and the scope of its consideration. In this context, its role seems more like that of a reviewing than an adjudicatory body. For example, it considers whether procedural requirements have been followed by managers within the Bank but emphasizes that it does not substitute its judgment for that of managers unless the managers' judgments can be characterized, in different circumstances, as an abuse of discretion or as arbitrary or discriminatory. Thus, the Bank should ensure the adjudication of the merits of a whistleblower's claim under the standards of proof contained in Recommendation Thirteen.

Recommendation Twenty: The Bank should devise other ways of selecting the members of the Appeals Committee.

Comment: The General Accounting Office, now the Government Accountability Office, expressed concern about the composition of the Appeals Committee. Specifically, the GAO believed that members of the committee might be concerned about their own career prospects and influenced thereby in deciding actions before the committee, particularly controversial ones of import.

The selection process also gives the management of the Bank, through the Vice President of Human Resources, significant influence over the composition of the Appeals Committee. One possibility is to let those members chosen by the Staff Association and by the Vice President of Human Resources choose by agreement the remaining third of the committee. Still, the GAO's concern seems harder to address without moving to a professional staff as adjudicators of these claims.

One way to address the GAO's concern is to disqualify as a member of a panel any person with a reporting relationship with anyone implicated in the appeal. However, the rules of the Appeals Committee already permit the disqualification of a member of the committee or of a panel at the member or panel's request or on the request of the appellant. The criteria for "Disqualification at Member's Initiative" permits self-disqualification in those circumstances in which the appeal concerns a matter with which the member has dealt administratively or a person with whom the member has a close "personal" association. Probably the first and perhaps the second should be considered automatic grounds for disqualification.

One strength of peer review rests on the expertise that can be brought to bear on adjudication. Perhaps an appeals panel should contain, with the limitations discussed above, as many members as possible who have subject matter expertise. Even in this context, it would make sense to exclude as members persons who have worked on the same project. Again, as long as whistleblowers have the option of binding arbitration, staff members will assess the credibility of the Appeals Committee in exercising that option.

Recommendation Twenty-One: The remedies provided to whistleblowers by the Bank should make them whole. Such remedies should include the following:
1) reinstatement to the same or comparable position in salary, responsibility, opportunity for advancement and job security
2) back benefits and pay, considering the likely advancement and salary increases that a staff member would have received
3) compensatory damages, including all financial losses linked to the retaliatory action by the Bank and significant emotional distress, including any physical aliments suffered as a result of that distress and related medical costs
4) adjudication expenses, including representation fees, costs of expert witnesses, travel and other costs associated with the claim of retaliation (These costs should be automatically paid to a

prevailing whistleblower)
5) transfer upon the request of the prevailing whistleblower to another part of the Bank
6) intangible benefits, including public recognition of the vindication of the whistleblower, and in appropriate circumstances public recognition of the contributions of the whistleblower to the Bank.

Comment: Many whistleblower statutes, such as the whistleblower provision of the Sarbanes-Oxley Act, have the remedial principle that the whistleblower should be made whole. This proposition leads to several conclusions regarding remedies. First, a whistleblower who has been dismissed should be entitled to reinstatement and back pay. Few provisions limit the amount of back pay. Second, some provisional remedies should be available. Now provisional remedies are available only in cases of undue hardship. However, if the staff member establishes that they are likely to prevail on the merits a provisional remedy including pay or reinstatement could be provided.

Third, monetary awards should also include costs associated with the vindication of a claim, including representation fees, expert witness fees, travel costs. If a whistleblower prevails, he or she should be entitled to receive reasonable representation fees. A whistleblower should be seen to prevail if the whistleblower wins an important part of the relief sought or if the Bank settles a case after the whistleblower brings the claim to adjudication.

In addition, whistleblowers should recover compensatory damages caused by the retaliation. Such damages include pain and suffering, medical costs, and economic losses connected to the retaliatory action. Some whistleblower statutes provide relief beyond this recommendation. For example, they require recovery of a multiple, such as two or three times, of back pay. Others impose exemplary damages, such as punitive damages.

Within a particular legal system the enforcement of judgments permits the courts to require that persons be provided the remedies contained in a judgment. All legal systems use a variety of such enforcement devices. Administrative agencies also have the power to enforce their orders directly or to seek enforcement of them through the courts. A fair system of remedies requires some enforcement mechanism. Within an organization, such as the Bank, this enforcement authority rests on the regulations of the Bank. As a matter of efficiency and the credibility of an adjudicatory body, that authority should rest directly with it.

Recommendation Twenty-Two: The Bank should aggressively pursue claims of retaliation for use of the Conflict Resolution System and claims of retaliation or intimidation of witnesses. The Bank should automatically advise staff of the discipline of managers for such retaliation.

Comment: The Bank's regulations prohibit retaliation for use of the Conflict Resolution System. These regulations also protect witnesses from retaliation, including threats to retaliate against a person likely to be a witness. Particularly, if the Appeals Committee or an arbitrator

has the power to compel the testimony of witnesses, fairness dictates the strongest protections for such witnesses. The integrity of the Conflict Resolution System recommends that the Bank emphasize the importance of these regulations and pursue allegations of such retaliation. As with discipline for retaliation for protected disclosures, the Bank should inform staff of discipline of managers for retaliation connected with use of the Conflict Resolution System.

The reasons supporting such notification of discipline of managers for retaliation against whistleblowers apply here as well. Such notification assures employees of the integrity of the Conflict Resolution System and its adjudicatory alternatives and discourages managers who might be tempted to engage in such retaliation.

Part Four: Comments Without Recommendations

On some topics the consultant lacks sufficient information to make specific recommendations or is reluctant to do so but can identify topics for additional study and evaluation by the Bank.

Comment One: *Country offices* Several persons expressed concern about how the Bank's whistleblower procedures would work in country offices, including the difficulties of protecting local staff. It appears that the Bank has given considerable attention to how the Conflict Resolution System would operate in country offices . The units within the Conflict Resolution System have addressed the provision of services to these offices. Still, this concern was widely enough expressed that it deserves consideration.

Comment Two: *Staff holding G-4 visas* Concern was also expressed about the particular vulnerabilities of staff holding G-4 visas. For example, such staff might be very reluctant to do anything that they believed might jeopardize their positions. As such, they are susceptible to intimidation and reprisal.

Comment Three: *Management practices that could improve protection of whistleblowers* During the course of this project, the consultant received varying comments about different practices that could encourage disclosures and improve protections for whistleblowers.

First, the Bank transfers persons who have made protected disclosures elsewhere within the institution. Such transfers do not appear to be common and may be difficult to arrange particularly when a staff member does not possess fungible skills that can be used in other offices. Some persons believed that it was important that such transfers be accompanied by a recognition of the contributions of the whistleblower. Otherwise, the transfer could be viewed negatively and affect the career of a whistleblower.

Second, some persons suggested awards for whistleblowers and public celebrations of their contributions. These persons believed that such displays were as important as legal

protections in vindicating whistleblowers and in creating a climate accepting of them.

Third, education and publicity were crucial to whistleblowing. Some persons believed that more visible evidence in the form of posters, guidelines, and statements of rights should be provided in the Bank.

Fourth, as the recommendations suggest, more specific and precise guidance to staff and to managers would be helpful. The tone as well as the content of this guidance is important because of the ways that tone can signal the Bank's attitude toward whistleblowing.

Comment Four: *Poor Performers* Some persons believe that whistleblower protection increases the difficulty of addressing poor performers within the Bank and discourages managers from taking indicated action against some staff members. A claim of retaliation becomes a tactic for responding to unfavorable evaluations of or administrative actions against staff members.

This report suggests that this opinion rests in part on ambiguities in the definition of whistleblower and in part on the absence of an adjudicatory option in the first instance. One cost of whistleblower protection, like any other employment protection, such as the allegations regarding harassment, follows from persons claiming redress who have no legitimate claim. The clearest claims for protection and the frivolous are not difficult to identify but many claims require more attention. A conflict resolution system, including an adjudicatory option, should do a good job in distinguishing claims. The cost of that conflict resolution system can be justified on several grounds. The introduction to the report describes the advantages to the Bank of an exemplary whistleblower protection system.

Conclusion

The Bank has undertaken the challenge of addressing its whistleblower protection system. The Bank's consideration of the future of this system comes at an opportune time for the Bank and for other international organizations. The report presents a number of recommendations and options regarding some of them. If the Bank adopts any recommendations, implementation of them becomes crucial.

The report demonstrates that the Bank faces a number of important choices. Despite the benefits, these are choices that involve costs. The effectiveness of any changes undertaken by the Bank requires setting out those changes in detail. Because the Bank can not rely on an external body of law, on practice under that law, on experience with it, or on precedent in administrative or judicial interpretation of it, the Bank's rules, regulations, manuals, guides and advice must be precise and detailed beyond that expected of most institutions. In this area, the term, law, in the phrase, rule of law, depends upon its articulation by the Bank.

As under the Bank's present system, the articulation of standards, procedures and practices may be found in a variety of documents and in many places. Bank rules and regulations

are by their nature more concise than guides and manuals but in the Bank the merits of conciseness must be balanced with the importance of standards and procedures having legal effect. The Statute of the Administrative Tribunal raises the importance of this legal effect. The contract of employment on which the jurisdiction of the Tribunal depends includes pertinent "regulations and rules." If it is true that only rules and regulations have "legal" effect, then standards or procedures not contained in rules and regulations do not have the same status as rules and regulations. In this instance, the rules and regulations of the Bank need to contain detail beyond what might ordinarily be expected in such rules and regulations. The Bank, however, can agree to have itself bound by manuals, directives and guides and advice issued by offices within the Bank. In this instance, the Bank can rely more on manuals, directives and guides and these can be used to provide much of the detail that otherwise would be available from external sources.

Implementations of recommendations, particularly if the Bank accepts several of them, requires education of staff and training of management and staff. The Bank is more expert than the consultant in the techniques and avenues available and the efficacy of their use.

Perceptions of the fairness and effectiveness of a whistleblower system does much to determine its success. Those perceptions influence the willingness of persons to make disclosures and their acceptance of judgments regarding their allegations and claims. Adoption and implementation of an exemplary system should thus affect perceptions and practice.

Annex A

Methodology of the Report

The consultant reviewed staff rules and regulations and other documents addressing the protection of whistleblowers. The consultant also reviewed articles and studies addressing whistleblower protection by the Bank or evaluating its Conflict Resolution System. The consultant's review also included examination of a number of whistleblower provisions.

The consultant interviewed officials representing several offices and departments within the Bank, including the Office of Mediation, the Office of the Ombudsman, the Appeals Committee, the Administrative Tribunal, the Office of Ethics and Business Conduct, the Human Resources Vice Presidency, the Internal Audit Department, the Department of Institutional Integrity, and the Legal Vice Presidency. The consultant discussed this review with five Executive Directors of the Bank, including the Dean. The consultant met with members of the Executive Committee of the Staff Association and with a number of persons who had either submitted allegations of misconduct within the Bank's system or had pursued claims of retaliation in the Bank's Conflict Resolution System.

The Report was first submitted to the Legal Vice Presidency on April 6, 2005. Subsequently, the consultant meet with persons from the Legal Vice Presidency, the Human Resources Vice Presidency, and the Department of Institutional Integrity to discuss the recommendations in the Report. These discussions focused on clarification of the comments of the consultant. As a result of these discussions, the consultant was able to revise comments to some of the recommendations to make them more clear or to eliminate inaccuracies. No recommendation was removed; minor changes were made in the wording of some. The consultant made more extensive changes in Recommendations One and in the comments accompanying it. These changes expand the scope of this recommendation and strengthen it. The revision also corrected typographical and grammatical errors contained in the Report as first submitted.

Background of the Consultant

Robert G. Vaughn is Professor of Law and A. Allen King Scholar at American University's Washington College of Law. At the Washington College of Law, he teaches Torts, Civil Procedure and Seminars on Public Information Law and Public Employment Law. During his career he has been a scholar in residence at King's College of the University of London and taught as visiting professor at the University of San Diego College of Law and at the Ritsumeikan University Law School in Kyoto, Japan.

Professor Vaughn has worked in the area of whistleblower protection for over thirty years. He has testified before committees of Congress on major pieces of legislation affecting whistleblowers. At King's College, he studied public service ethics in Britain, including an

examination of whistleblower protection. While in Britain, he served as a consultant to the Treasury and Civil Service Committee of the House of Commons. At Ritsumeikan University, he examined the need for whistleblower protection in Japan. Under a contract with the Office of Legal Cooperation of the Organization of American States, he helped to draft a model whistleblower protection statute to implement the Inter-American Convention Against Corruption. He has authored articles on whistleblower protection addressing major pieces of legislation in the United States, including the whistleblower provision of the Civil Service Reform Act of the 1978 and the whistleblower provision of the Sarbanes-Oxley Act. He has also produced articles that examine state whistleblower protection laws and that compare and contrast whistleblower provisions in other countries and that examine international agreements to protect whistleblowers.

His work on whistleblower protection is closely related to his work regarding transparency and open government. He is the editor of a book on freedom of information, and the author of a book on U.S. federal open government laws and articles addressing freedom of information laws. He was the plaintiff in the landmark case, *Vaughn v. Rosen*, that established important procedural requirements under the federal Freedom of Information Act in the United States. He has lectured on freedom of information and transparency in several countries, including Argentina, Colombia, Chile, Great Britain and Japan. At Ritsumeikan University, he taught a seminar on freedom of information law. One of his recent articles discusses the relationship between freedom of information laws and whistleblower protection.

His interest in whistleblower protection also relates to his expertise in public employment law. He is the author of several books, including one on the administrative body, the United States Merit Systems Protection Board, that adjudicates appeals by federal employees, including whistleblower claims; one on conflict of interest regulation in the federal government; one on principles of civil service law; and one on civil service reform. Several of his articles address issues in public employment law; one of these articles considers the role of public employment law, including the right to disobey illegal orders, in the transition to democracy in Chile.

Professor Vaughn is also experienced with approaches to adjudication and dispute resolution. He has taught civil procedure for over thirty years and has written regarding the use of simulations in teaching civil procedure. He is the coauthor of a widely used supplement to civil procedure texts that employs the litigation documents from a well publicized environmental tort case to permit students to examine the application of adjudicatory principles. In one article, examining the bureaucratization of the federal courts, he discusses the relationship between the adjudicatory approaches of civil law and common law countries. He has also published an article regarding judicial reform in Chile that compares civil and common law systems.

Much of his work is comparative in nature. In addition to the comparative aspects of his work in whistleblower protection, transparency and open government, public employment law, and adjudicatory procedure, he is the coauthor of a book about consumer protection laws in South America and has written two articles on the same topic. One of the articles explores how

international standards, the laws of countries in the Americas and Europe, model laws, and professional commentary influenced the content of South American consumer laws.

Annex B

This Annex contains examples of protected disclosures These examples suggest a range of standards. The consultant recommends the standard described in Recommendation Two of the Report which is similar to several of the examples.

Argentina
illegal or corrupt practices

Australia
corrupt, criminal, biased or dishonest conduct by public officials (Western Australia)
corrupt conduct, mal-administration, or substantial waste (New South Wales)
corrupt conduct, mal-administration, substantial waste, or a substantial risk to public health and safety (Queensland and South Australia)

Great Britain
crimes, civil offenses (including negligence, breach of contract, breach of administrative law)
miscarriage of justice, dangers to health and safety or the environment or coverup of any of these

Japan
-any criminal act related to [certain offenses] as specified in laws, including orders based on those laws. . . concerning the protection of individuals' lives and health, the protection of consumer benefit, the protection of the environment and the protection of fair competition, and other laws concerning the protection of peoples' lives, health, property and other interests

-violation of a disposition under listed laws

Korea
Act of corruption including a public official's seeking gain for himself, abusing his authority or violating Acts and subordinate statutes in connection with his duties

causing damage to the public property in violation of Acts and subordinate statutes, in the process of executing the budget of the relevant public agency, acquiring, managing or disposing of the property of the relevant public agency, or entering into and executing a contract to which the relevant public agency is a party

Netherlands
dangerous or illegal acts

Organization of American States Model Statute Implementing the Inter-American Convention Against Corruption
violation of law, rule or regulation, gross waste, an abuse of authority, or a substantial and specific danger to public health and safety

United States
violations of law, rule or regulation, abuse of authority, gross waste of funds, gross mismanagement, or a substantial and specific danger to public health and safety (Whistleblower Protection Act of 1989)

"The overwhelming majority of state statutes protect disclosures regarding violations of law. In fact most of the state provisions that protect only one type of disclosure limit that disclosure to violations of law. . . Most also protect violations of rules and regulations promulgated under these laws. . . Others include executive orders or codes of ethics. . . .

. . . .

No other category of protected disclosure appears as frequently as violations of law. The three other most frequent are disclosures regarding governmental waste, substantial and specific dangers to public health or safety, and abuse of authority. A fourth, less commonly permitted disclosure, addresses mismanagement." 1999 article describing whistleblower statutes in individual states within the United States