



HOW THE WORLD BANK'S PEER REVIEW SERVICES DENY STAFF THE RIGHT TO A FAIR HEARING

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EXECUTIVE SUMMARY

For the past two decades the World Bank Group – the premier international development institution – has dedicated a portion of its portfolio to promoting adherence to the rule of law in developing countries. At the same time that the Bank has promoted the importance of independent justice institutions and the rule of law to its borrowers, however, it has struggled to apply these concepts to its own operations.

Because the Bank is not subject to national law in the countries where it operates, its staff members are dependent on the functioning of its Conflict Resolution System (CRS) when their rights are violated. Over the years, reviews commissioned by the Bank have repeatedly exposed severe shortcomings in this system. Many studies were especially critical of the Bank's Appeals Committee, a first-level peer review panel that heard grievance cases, many of which were subsequently brought to the Bank's Administrative Tribunal, the formal and final level of internal adjudication.

To address these criticisms, in July 2009 the Bank reformed its Appeals Committee and replaced it with Peer Review Services (PRS). Using this reformed process, staff members present their grievances to a panel of three Bank employees which can recommend that the institution take corrective measures to address and resolve the dispute. PRS is similar to the Appeals Committee in several ways, but it is designed to be simpler, more expedient and less adversarial.

Although the transition to PRS did result in certain efficiencies, the reforms did not address many of the fundamental concerns raised by experts who had previously reviewed the Bank's Conflict Resolution System. Moreover, even the "reformed" system fails to comply with numerous international human rights standards – such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights – that establish the requirements for a fair trial. The following shortcomings are among the most serious flaws in the system:

- In many types of cases, applicants are denied the right to appeal in violation of the International Covenant on Civil and Political Rights. Cases that challenge actions, inactions or decisions (including the imposition of disciplinary measures) taken in connection with misconduct investigations conducted under the Bank's whistleblower protection policy go directly to the Administrative Tribunal, with no possibility of a subsequent appeal to another body.
- PRS fails to guarantee the rights to call or cross examine witnesses.
- The right to obtain documentary evidence can also be limited by the Panel, contrary to recommendations made in several Bank studies.
- Oral hearings are not guaranteed before PRS or the Administrative Tribunal and are not required to be public, in violation of several international standards.

These shortcomings are exacerbated by the fact that staff members are not permitted access to advice from counsel during a hearing and must draft all PRS submissions themselves. The decision to limit attorney involvement – which was done to reduce antagonisms and enhance

equality of arms between staff (who previously had to pay for counsel) and management (who were always represented by a Bank attorney) – was one of the most significant PRS reforms. But although the intention was to address the imbalance in representation between staff and management, this change may have the opposite effect. Since the burden of proof will rest with the applicant in most cases, denying the requesting staff member the right to an attorney could disadvantage him or her. In 2006, when an independent panel of experts reviewed the United Nation’s justice system, it concluded that “access to lawyers and legal services is crucial”ⁱ and a necessary component in a contest. At least one Bank study echoed this sentiment, only to be disregarded during the PRS reforms.

Structural shortcomings of PRS also jeopardize its impartiality and effectiveness. For example:

- PRS decisions are *non-binding* and can be rejected by the Vice President of the requesting staff member and responding manager, in consultation with the Vice President of Human Resources.
- The Peer Review Secretariat and Peer Review panels are perceived by staff members to lack independence. The Secretariat, which consists of an Executive Secretary and other staff members reporting to him or her, provides administrative support to the panel members and decides which members will serve on a particular panel. The Executive Secretary reports to the Office of the President, is appointed by him or her (in consultation with staff selected by the Staff Association) and depends on the President for his or her employment security, salary and benefits
- Although PRS processes cases more quickly than the former Appeals Committee, gaps in the timeline remain in the PRS rules – including Rule 10.03, 11.03, Procedure D(6) and Procedure J(21)(a)
- The PRS lacks a provision for immediate provisional relief when urgent action is required to prevent undue hardship resulting from an administrative decision.
- The time limit for filing a grievance is too constrained.
- Strict confidentiality requirements are imposed and confidentiality agreements may be used as gag orders.

Unfortunately for staff at the World Bank, these shortcomings are not simply theoretical. According to an unreleased internal review of the PRS for 2010, only 26 percent of staff grievances were given favorable recommendations (five out of 19) by the peer panels, and management rejected two of these decisions.

For the reasons identified in this report and in previous Bank studies, five options for reforming the PRS are suggested:

- Peer Review Services would remain intact, but significant reforms would be enacted, including but not limited to: safeguards to protect the applicant’s right to a fair hearing, guaranteed right to counsel, right to call and cross-examine witnesses, and the right to appeal. Decisions should be binding and not subject to managerial approval. While this is the simplest option for the Bank, it is probably the least likely to produce a fair resolution for staff members, as it appears that issues of impartiality and independence

can never be fully rectified within a peer review system at an Intergovernmental Organization.

- A professionalized, two-tier justice system would be established, staffed by professional judges, based on the current United Nations Model outlined by the Redesign Panel in General Assembly document A/61/205.
- Staff would be given the option to access independent external arbitration (using a three strike method for determining the arbitrator), an option that has been suggested in several studies commissioned by the Bank.¹
- An external Appeals Tribunal would be established to review cases from all the Multilateral Development Banks, the International Monetary Fund and perhaps other Intergovernmental Organizations. This Tribunal, which could have its own independent secretariat, funding and judges, could eliminate duplication of effort, while saving financial resources and increasing independence.
- The World Bank could opt to waive its immunities from national courts in employment disputes, as recommended by several legal scholars.

Regardless of which option the Bank chooses, it must commit to providing its staff members with an impartial justice system that will comply with the standards established in international human rights instruments. A failure to do so could seriously undermine the Bank's overall mission and its current push to promote impartial national judicial systems in borrowing countries through its governance projects. Indeed, as World Bank President Robert Zoellick said, "[t]he most fundamental prerequisite for sustainable development is an effective rule of law."ⁱⁱ

¹ Although the Bank currently allows whistleblowers access to external mediation, it requires that the mediator be selected from a roster of candidates chosen unilaterally by Bank Management, which destroys the impartiality and independence of the process.

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I. Introduction

As the world's flagship international development institution, the World Bank Group annually loans tens of billions of dollars to developing countries as part of its mission to reduce global poverty.ⁱⁱⁱ For the past two decades, a small portion of this portfolio² has been dedicated to promoting adherence to the rule of law,^{iv} which the Bank views as a “fundamental element of economic development and poverty reduction.”^v The Bank is currently considering scaling up this support for judicial reform at the country level, as recommended in its 2007 Governance and Anti-Corruption Strategy.

In preparation for this expansion, in February and March 2011 the Bank conducted public consultations on its proposed approach to justice reform and prepared a corresponding Discussion Note. According to this note, there is “broad consensus that an equitable, well-functioning justice system is an important factor in fostering development and reducing poverty. A country's justice system shapes whether firms can rely on their contracts, whether citizens have recourse from breaches in policy or failures in service delivery, whether corruption and other crimes are punished, and whether the power of the executive has limits. According to World Bank President Robert Zoellick, “[t]he most fundamental prerequisite for sustainable development is an effective rule of law.”^{3vi}

Unfortunately, while the Bank is promoting justice reform and the rule of law in its projects, its own justice system remains severely compromised. As Matthew Parish, a lawyer and scholar who previously worked in the Legal Department of the World Bank, observed, Intergovernmental Organizations, including the World Bank, have “no impartial adjudicative body to apply or enforce” laws and are “lawless creatures.” He notes that, when confronted with a staff member's grievance:

The customary response by international organizations is that domestic courts are inappropriate venues because the national law of the place where the

² In 2008, two of the Bank Group's institutions, the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA) lent approximately \$304.2 million combined for justice sector activities. As of 2009, the World Bank's justice sector and reform assistance portfolio included almost 2,500 activities. (see <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf>), p. 2-3)

³ The United Nations defines “rule of law” as a “principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” (United Nations Security Council. *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. S/2004/616. 23 August 2004. 8 March 2010 <http://www.un.org/Docs/sc/sgrep04.html>), para. 6).

employee is employed is inapplicable; the only applicable law is the ‘international law of the civil service’.⁴ This branch of law is remarkable because it does not exist. It has few sources, no statutes, refuses to draw even upon the most elementary principles of human rights law, and is created entirely by the organization against which it is sought to be enforced.^{vii}

Indeed, studies have repeatedly found problems with the internal justice systems at the World Bank and other Intergovernmental Organizations (IGOs). In response, on July 1, 2009, both the United Nations and the World Bank launched reforms to their internal justice systems.

Prior to these reforms, the World Bank and United Nations had similar internal justice systems. The first level of the formal justice system at both organizations consisted of a peer review process, in which a panel of staff members would review an employee’s grievances and make recommendations on the case. At the United Nations, recommendations were made to the Secretary-General, who had ultimate decision-making authority,^{viii} while at the Bank recommendations were submitted to the Vice President of Human Resources, who was the final decision maker.^{ix} Applicants at both organizations could then appeal the decision to an internal Administrative Tribunal.

In 2006, an independent group of experts (known as the Redesign Panel) reviewed this system at the United Nations and found that it was ineffective. The Panel also found that the system lacked independence and failed “to meet many basic standards of due process established in international human rights instruments.”^x According to its report to the General Assembly, “an overwhelming majority of stakeholders consulted by the Redesign Panel believe that the present system, established early in the life of the Organization over half a century ago and based largely on a peer review mechanism in which participation is voluntary, has outlived its relevance.”^{xi} Moreover, the Panel wrote that it was “satisfied that the present system of peer review cannot be sustained.”^{xii} Finally, the Panel found that “the financial, reputational and other costs to the Organization of the present system are enormous, and a new, redesigned system of internal justice will be far more effective than an attempt to improve the current system.”^{xiii} Because the World Bank and United Nations had similar justice systems at that time, many of these observations were equally applicable to the Bank’s judicial practices.

The Redesign Panel recommended that the United Nations create a new two-tiered justice system that would replace the peer review system with a “decentralized first-instance adjudicatory body that issues binding decisions that either party can appeal” to an Appeals Tribunal.^{xiv} In both the first instance and in an appeal, judicial bodies would be staffed by professional judges, appointed by the General Assembly,⁵ with the power to make binding

⁴ Because of the functional immunities of Intergovernmental Organizations (IGO), most IGO staff do not have access to national courts when they try to contest abuses. Since most IGO employees are entirely reliant on internal tribunals when their rights have been violated, it is crucial that these tribunals operate in an impartial and independent manner that delivers a fair outcome for all parties.

⁵ These judges are appointed from a list of candidates compiled by an Internal Justice Council comprised of a staff representative, a management representative, and three external jurists (one chosen by staff, one by

decisions.^{xv} Many of the Panel’s recommendations were approved by the UN General Assembly and a new, formalized system of justice, based on a Dispute Tribunal and an Appeals Tribunal, was established on July 1, 2009.

In contrast, the World Bank took the opposite approach to reform. The Bank made the first stage of its formal justice system, the Appeals Committee, even less formal than it had been. The Committee was renamed Peer Review Services (PRS), to better “reflect the Appeal Committee’s origins as a peer review system”^{xvi}

While criticism of the PRS has been increasing over the past year, staff representatives also acknowledge certain improvements over the system that was replaced. For example, the new system is seen as simpler, more streamlined and less adversarial. The panel of peers is also larger, more diverse and more representative than under the Appeals Committee.^{xvii} In addition, the Bank Group now provides funds for the employment of an attorney by the Staff Association. This attorney is enfranchised to provide legal assistance to staff members, a step toward a more level playing field for staff and management.^{xviii} The new system is also more expedient.^{xix} Finally, and perhaps most importantly, the PRS can review certain types of decisions that the Appeals Committee could not. Under the old system, the Appeals Committee could only review administrative decisions, whereas under the new system PRS can review any disputed employment matter not excluded from review, including a managerial action, inaction or decision that was not consistent with the employee’s contract or terms of appointment.^{6xx} This change is especially beneficial to whistleblowers – employees who disclose information about waste, fraud, abuse of power or dangers to public health and safety – as retaliation against them frequently takes the form of inaction, such as a refusal to promote them, provide the training they need, or protect them from harassment.

This paper will discuss those gains, as well as the ways in which the PRS falls short of international human rights standards and of recommendations made by experts who have reviewed the World Bank’s justice system or analogous IGO systems. Although data upon which to draw long-term conclusions about the new system are still scarce, this report can already identify deficits that are likely to become problematic in the future, as well as existing weaknesses that were identified by several knowledgeable World Bank staff with whom the

management and the third by the Secretary-General, after consultation with the other members). Judges of the lower court must possess at least 10 years of judicial experience in the field of administrative law and judges of the higher court must possess at least 15.

⁶ This is one area in which the World Bank’s justice system is actually stronger than the United Nations justice system. The UN Redesign Panel was critical of the fact that under the previous UN justice system, only administrative decisions could be challenged, and it recommended that the new Tribunals have the jurisdiction to review any complaints “alleging non-compliance with terms of appointment, conditions of employment or the duties of an international organization to its staff, regardless of the type of contract under which they are employed and whether or not there has been a formal decision.” (A/61/205, para. 77) Unfortunately, this recommendation was not adopted by the General Assembly, and the United Nations Dispute Tribunal is therefore limited to reviewing appeals of administrative decisions (see A/RES/63/253, p. 7)

Government Accountability Project (GAP)⁷ spoke. Finally, the report will make suggestions for how the system could be improved, especially in regards to whistleblower cases, which is GAP's primary concern and area of expertise.

II. Background

A. An Introduction to the World Bank's Conflict Resolution System

Collectively called the “Conflict Resolution System” (CRS), several departments operated by the Bank are responsible for resolving internal administrative disputes using both formal and informal means.⁸ Two of these departments, Peer Review Services (PRS) and the World Bank Administrative Tribunal (WBAT) are capable of issuing rulings and making recommendations to the Bank for this purpose. While both the PRS and the WBAT have a similar mandate, they differ significantly in their composition, jurisdiction, and rules.

The WBAT is the more formal and established of the two bodies. Created in 1980, it is the Bank's senior judicial body. It is staffed by an international panel of judges who are considered experts in the fields of international and administrative law. According to the Tribunal's Statute, the judges are selected by the Executive Directors of the Bank from a nomination list compiled by the President, who must first consult with a four person advisory committee.^{xxi} Judges serve for a term of five years, renewable once. The WBAT has the jurisdiction to hear claims by staff provided that the employees have exhausted the required internal remedies first.^{xxii} Although this paper will occasionally mention the Tribunal, the focus will be on the PRS, which is newer and has received less external scrutiny to date. However, this focus is not meant as an endorsement of the Tribunal, which also has its share of shortcomings with respect to impartiality and due process.⁹

⁷ The Government Accountability Project was created in 1977 at the Institute for Policy Studies in response to White House scandals. Our mission is to ensure the accountability of governments, corporations and Intergovernmental Organizations by advancing occupational free speech, defending whistleblowers and empowering citizen activists. GAP helped to draft the Organization of American States model whistleblower legislation for the western hemisphere (to implement the Inter-American Convention Against Corruption) and provided technical assistance in the drafting and adoption of whistleblower protection policies at the African Development Bank, the World Bank, the Asian Development Bank, the Inter-American Development Bank and the United Nations Secretariat and Peacekeeping Forces. In order to help promote accountability at the World Bank, GAP monitors the Bank's lending and corporate practices closely by providing safe haven for World Bank whistleblowers. For more information, see <http://www.whistleblower.org/program-areas/international-reform/world-bank>.

⁸ According to the Bank's website, the institutions that comprise the Conflict Resolution System are: Respectful Workplace Advisors, The Ombudsman's Office, Mediation Services, and Peer Review Services. The Internal Justice System also includes the World Bank's Administrative Tribunal, Ethics and Business Conduct and the Integrity Vice Presidency. (<http://go.worldbank.org/GA9N4HD110>)

⁹ See, for example, the Administrative Tribunal section of GAP's report on “Racial Discrimination at the World Bank,” available at <http://www.whistleblower.org/storage/documents/RDWB.pdf>.

Peer Review Services, in contrast, is staffed by employees of the Bank, meant to represent “peers” of the disputants involved. PRS serves as the *de facto* entry point into the Bank's internal justice system and is a requirement for most applicants prior to a hearing before the Administrative Tribunal. In the case of PRS these disputants are a “requesting staff member” (applicant) and a “responding manager” (respondent).^{xxiii} One benefit of this arrangement is that it makes the relevant manager directly accountable for responding to the requesting staff member. This accountability does not exist before the Tribunal, as the Legal Vice Presidency becomes the respondent at that stage, and the defendant Vice Presidency often fails to engage.

PRS provides an opportunity for staff members to present a grievance to a panel of three Peer Review Members, who attempt to decide a case based on its merits, and recommend corrective measures, if applicable. Unlike the WBAT, Peer Review Panels cannot make binding decisions and can hear only certain types of cases. Further, neither applicants nor respondents have the same protections before the Peer Review Panels that they have before the Administrative Tribunal. Peer Review Members are volunteer staff members who are appointed “by a Managing Director based on the joint recommendations of the Vice President, Human Resources and the World Bank Group Staff Association...”^{xxiv} The Peer Review Secretariat – which consists of an Executive Secretary appointed by the President and other staff members reporting to him or her –^{xxv} designates a panel of three Peer Review Members to examine each request for review. All panels include members at both the managerial and non-managerial levels. Where feasible, each panel includes a Peer Review Member who shares the same grade level or similar work experiences to the requesting staff member and a member who is from the same arm of the Bank Group as both the applicant and the responding manager.^{xxvi} Each Peer Review Member holds a three year term that is once renewable.

The creation of Peer Review Services was intended to address serious flaws in the Appeals Committee (ACO), which it replaced. Multiple independent studies commissioned by the Bank reported deep dissatisfaction with the ACO among Bank staff.¹⁰ One of them, released twelve years ago, concluded that the ACO could “no longer be regarded as providing staff sufficient procedural safeguards.”^{11 xxvii}

¹⁰ Studies that cite problems or staff dissatisfaction with the World Bank’s Conflict Resolution System include: “Reforming the World Bank Group’s Internal Conflict Resolution System,” by the Grievances Process Review Committee (1998); “Assessment of the Functioning and Performance of World Bank Mechanisms, Offices and Services for the Resolution of Personnel Complaints and Grievances,” by CDR Associates (2005); “Report on the World Bank’s Whistleblower Procedures” by Robert Vaughn (2005); “World Bank Group Conflict Resolution System: Some Issues and Recommendations,” by Graham Scott (2006) and Staff Association Newsletters.

¹¹ These findings were based on the GAO’s review and interpretation of a 1998 report by The Grievances Process Reform Committee, an internal World Bank task force. This Committee was convened by the Bank in 1998 in response to perceived lack of fairness and credibility in its internal justice system. This Committee was tasked with conducting a broad review of Bank internal justice and suggesting reforms that would improve the process.

Unfortunately, many of the structural problems that weakened the ACO were inherited by the Peer Review System. To some extent, this persistence of weaknesses is attributable to the way in which PRS rules were developed, but in many ways, the representation of “peers” who review an administrative decision as an impartial body is the fundamental conceptual problem. Although, as mentioned above, PRS does address select deficiencies of the former Appeals Committee, the underlying conflict of interest in which peer reviewers find themselves when placed in potential opposition to their management remains unresolved. As we set out below, these structural problems undermine the credibility of the PRS as an impartial process.

B. The Standards for and Importance of an Effective Justice System

Because of the legal immunities enjoyed by the World Bank, employees have no recourse to national courts and must pursue their grievances in-house. CDR Associates, a firm of internationally recognized conflict professionals who were commissioned by the Bank in 2005 to assess the functioning and performance of its grievance mechanisms, asserted that as a result of this immunity, the Bank as an institution has a special obligation to create “the functional equivalent of the best practices that might be available to the Bank staff if they did have access to effective external systems and procedures.” The reviewers noted that these best practices included: a fair and impartial system for selecting dispute resolution providers; clear policies and procedures that provide for independent providers; the ability to compel the testimony of witnesses and access relevant documents; openness to public scrutiny; and access to legal counsel.^{xxviii}

The UN Redesign Panel outlined further requirements for creating an impartial and effective justice system:

International standards establish the right to ‘an effective remedy’, ‘the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal’ and ‘the right to an appeal’. Hearings, too, are a clear requirement in international standards whenever there are disputed issues of fact. To guarantee due process and to facilitate decisions, oral hearings should be promoted and accepted. Finally, to guarantee equality before courts and tribunals, access to lawyers and legal services is crucial.^{xxix}¹²

As is readily apparent, the Bank’s Peer Review Services do not meet these minimum standards of international law. This failure is significant because it leaves the WBAT as, effectively, the *only* instance of formal judicial review at the Bank. As a result, staff members with grievances lack the right of appeal, a fundamental due process right under international law.

¹² The Redesign Panel cited the following documents to justify these rights: the International Covenant on Civil and Political Rights, article 14; the Convention for the Protection of Human Rights and Fundamental Freedoms, article 13; the American Convention on Human Rights, article 25; the African Charter on Human and Peoples’ Rights, article 7; the Universal Declaration of Human Rights, article 10; and The Basic Principles on the Role of Lawyers.

III. Fundamental Rights Violations in PRS Rules

A. The Denial of a Right to Appeal

The right to appeal a judgment is a necessary component of any credible judicial system, enshrined in international human rights instruments, including Article 14 of the International Covenant on Civil and Political Rights and Article 8 of the American Convention on Human Rights. As the United Nations Redesign Panel stated in its review of the UN’s internal justice system, when ‘in the determination of ... his rights and obligations in a suit at law’ an individual is deprived of the right to appeal, this severely weakens the fairness of the procedure. International standards establish... the right to an appeal.”^{xxx} The right to an appeal has been interpreted by case law to include at least one appeal on both facts and law, and not only law.^{xxxi}

Nonetheless, Article XI of the Administrative Tribunal Statute states that all “judgments shall be final and without appeal”. Although the Tribunal may serve as a second review of grievances that have previously been submitted for peer review, the compromised character of the PRS – its lack of impartiality – renders the WBAT the *first* instance formal review.¹³ Moreover, in many cases the Bank categorically denies disputants the right to have their case reviewed even by Peer Review Services. According to section 6.04 of the World Bank’s PRS Rule (9.03), Peer Review Panels are unable to review:

- a. Any decision made by the Outside Interests Committee (a group that provides advice and decisions on conflict-of-interest violations).
- b. Decisions made by certain officials concerning pensions and benefits.
- c. Decisions about claims for workers’ compensation, disability insurance or health insurance benefits.
- d. “[A]ctions, inactions, or decisions taken in connection with staff member misconduct investigations conducted under Staff Rule 3.00, Staff Rule 8.01, or Staff Rule 8.02,¹⁴ including decisions not to investigate allegations, decisions to place a staff member on administrative leave, alleged procedural violations, factual findings, performance management actions taken pursuant to Staff Rule 3.00, and the imposition of disciplinary measures;”

¹³ The European Court of Human Rights (ECtHR) has specified that for a body to be considered a tribunal, it must have independence from the executive and impartiality. Impartiality has been interpreted to mean freedom from subjective personal prejudice or bias on the part of judges or jury members and there must be guarantees of objective impartiality. Because the members of PRS are subject to the authority of Bank management, there can be no assurance of impartiality in their decisions and PRS cannot be considered an independent first-level Tribunal.

¹⁴ Staff Rule 8.02 is the World Bank’s whistleblower protection policy, “Protections and Procedures for Reporting Misconduct (Whistleblowing)”.

- e. "...[A] challenge to the enforceability of a settlement agreement or memorandum of understanding between the Bank and a staff member;"
- f. Any request that has not complied with the time limitations established in section 7 of the rule;
- g. "...[A]ny other type of decisions for which specialized appeal procedures may be established or in relation to which it is specifically provided that peer review is not available."¹⁵

Under this policy, numerous whistleblower related issues cannot be reviewed by PRS, as the system does not have jurisdiction over actions, inactions or decisions taken in connection with staff member misconduct investigations conducted under the Bank's whistleblower protection policy (Staff Rule 8.02). For example, whistleblowers are unable to challenge before PRS the factual findings of their retaliation investigation, due process violations in that investigation¹⁶ or a decision not to investigate their retaliation allegations; these claims must now proceed directly to the Administrative Tribunal and cannot be further appealed. However, it appears that whistleblowers can still challenge retaliatory actions before PRS as, according to World Bank Staff Rule 8.02, "a staff member who seeks relief from an adverse employment action alleged to constitute retaliation has the right to a fair, prompt and thorough review of the challenged action through the CRS. A staff member may formally challenge the alleged retaliatory action before the Appeals Committee and Administrative Tribunal."^{xxxii} This results in a convoluted process in which a whistleblower can challenge a retaliatory action before PRS, but has to file a separate complaint with the Tribunal to challenge the investigation of that retaliatory action.

Similarly, decisions related to misconduct investigations, including disciplinary decisions, go directly to the Administrative Tribunal and cannot be appealed. According to PRS' 2009 Annual Report, misconduct claims were the second most common issue raised by applicants, after benefits & compensation cases.¹⁷ The report states that "one quarter of all filings had misconduct as an issue."^{xxxiii} Because these are some of the most important grievances heard by the Bank's internal justice system, where careers, reputations and corruption are at stake, it is particularly noteworthy that staff members who raise these issues have no right of appeal. Because many institutions, including the World Bank, have been known to launch retaliatory

¹⁵ This paragraph of the Article is disturbingly vague. The circumstances under which it can be decided that "specialized appeal procedures may be established" or "peer review is not available" are undefined. Nor does the rule identify the authority enfranchised to make such determinations.

¹⁶ In GAP's experience, due process violations frequently occur during IGO investigations of whistleblowers' retaliation claims. For example, GAP knows of several cases in which the respective IGO failed to interview the whistleblower or his/her witnesses before concluding that no retaliation occurred.

¹⁷ GAP obtained the Annual Reports of the Appeals Committee, as well as a 2002 mediation report and the 1998 Grievance Committee Report, by filing an Access to Information request under the World Bank's Policy on Access to Information. However, the Bank denied our requests for the guidelines for compensation for PRS complaints, as this document purportedly contained "personal information," and for training materials for peer review members, as it pertained to "corporate administrative matters."

“witch hunt” investigations against those who have reported misconduct, denying applicants with misconduct related grievances the right to appeal can be particularly detrimental to whistleblowers.

Even requesting staff members who are allowed to have their cases reviewed by PRS have limited appeal rights, as the World Bank Administrative Tribunal conducts its hearings *de novo*, or “anew” and does not consider itself an appellate court. A 2002 Tribunal decision asserted this character of the body explicitly: the Tribunal does not review the proceedings, findings or recommendations of the Appeals Committee (nor, presumably the new PRS).¹⁸ All decisions by the Tribunal are final and without appeal, except in extraordinary circumstances.¹⁹ Thus, the only bodies authorized to rule on whether procedures were followed during hearings are the bodies conducting the hearings in question. This removes the “appeal” as a mechanism to ensure that hearings are conducted according to established rules. As Judge Arnold Zack, President of the Asian Development Bank Administrative Tribunal, explained during a speech at the WBAT’s 30th Anniversary Celebration:

A Tribunal decision that is deprived of insights as to what occurred below may not effectively end the dispute... or it may end it by a decision that does not overcome the problems that gave rise to the application... Thus, we are faced with two unpleasant prospects: a delegalized in-house peer review or conciliation step which if unsuccessful forces a new consideration of the conflict before judges who proceed from scratch, and who may despite sincere and honest and knowledgeable interpretations of law and rule, hand down unacceptable judgments...^{xxxiv}

B. The Non-Binding Nature of PRS’ Decisions

According to paragraph 3.01 of the PRS rules, PRS Panels “may *recommend* that the Bank award relief to the staff member and/or take other corrective measures. A Panel’s recommendations generally are submitted to the requesting staff member’s and responding manager’s Vice President, who renders a decision in consultation with the Vice President, Human Resources or, in IFC cases, with the Vice President, Human Resources and

¹⁸ See WBAT Decision No. 275 (2002): *Peprah v. IFC*, para. 20. “Furthermore, the Tribunal found in *Lewin*, Decision No. 152 [1996], para. 44 that “[t]he Tribunal is not an appellate body reviewing the proceedings, findings and recommendations of the Appeals Committee. Its task is to review the decisions of the Bank; it is not to review the Report of the Appeals Committee.””

¹⁹ These circumstances are described in Article XIII of the WBAT statutes: “A party to a case in which a judgment has been delivered may, in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party, request the Tribunal, within a period of six months after that party acquired knowledge of such fact, to revise the judgment.” However, one former staff member who researched the Bank’s jurisprudence on this issue said that the WBAT has never agreed to revise a decision, even when it was presented with new evidence.

Administration, IFC.” (*emphasis added*) The reviewing parties can then “decide whether to present to the requesting staff member some or all of the corrective measures and relief recommended by the Panel to resolve the case.”²⁰ Therefore, the Panel’s recommendations, like those of the Appeals Committee, are non-binding.²¹

The fact that PRS decisions, like those of the Appeals Committee before it, are non-binding leaves another basic weakness of the CRS unaddressed. When CDR Associates reviewed the performance of the World Bank’s mechanisms for the resolution of personnel complaints and grievances in 2005, they recommended that the Appeals Committee be authorized “to make binding decisions that do not have to be submitted to the Vice President of Human Resources for final approval”²² as this would “significantly impact staff perceptions of its independence.”²³ Similarly, an internal Grievance Process Review Committee established by the Bank in 1998 found that “some grievants objected to the fact that final authority to act on panel findings and recommendations lay with management – most often the Vice President for Human Resources.”²⁴ Likewise, in his 2005 report on the Bank’s whistleblower procedures, Robert Vaughn wrote that:

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 a 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.

In addition, when the UN Redesign Panel reviewed the United Nation’s former justice system, it was extremely critical of the fact that the first level of its system (a peer review body called the Joint Appeals Board) could:

²⁰ The Administrative Tribunal has ruled that Bank management is not required to prove an abuse of discretion when it rejects recommendations made by the Appeals Committee, a precedent that presumably also applies to PRS. In *Lewin* (Decision [No. 152](#), 1996), the Staff Association contested the fact that the Vice President “rejected the recommendations of the Appeals Committee ‘out of hand, substituting his own interpretation of the facts for that of the Appeals Committee’ without demonstrating that the recommendations of the Appeals Committee had been arbitrary, discriminatory, improperly motivated or procedurally flawed.” (para. 39) The Tribunal ruled against the Staff Association, as “the Appeals Committee is a body whose mission is to assist management – and, in the last resort, the Tribunal – in reaching proper solutions.” (para. 43) Therefore, not only are PRS decisions nonbinding, they can also presumably be rejected without sufficient justification. (see Peter C. Hansen, “The World Bank Administrative Tribunal’s External Source of Law: A Retrospective of the Tribunal’s First Quarter Century (1981-2005).” *The Law and Practice of International Courts and Tribunals* 6(2007): 1-87. p. 56.)

²¹ The Appeals Committee’s decisions were occasionally overturned. According to the 2005 report by CDR Associates: “In 2004, management accepted 17 of 18 recommendations from the Appeals Committee, or 94%. The Appeals Committee recommended relief to appellants in 4 of its 18 recommendations. The Human Resources Vice President accepted three of the four.” (p. 51)

Only make recommendations and thus cannot determine the rights or obligations of the persons concerned. This leaves UNAT as a one-tier justice system with no right of appeal. At the same time, JAB [Joint Appeals Board] and JDC [Joint Disciplinary Committee] are composed of staff members acting in an advisory capacity to the Secretary-General and, thus, do not meet the basic standards required to guarantee their independence. That the administration of justice in the United Nations lags so far behind international human rights standards²² is a matter of urgent concern requiring immediate, adequate and effective remedial action.²³^{xxix}

This criticism is equally applicable to the World Bank.

These concerns are not simply theoretical. According to PRS' 2010 Annual Report, only 26 percent of staff grievances were given favorable recommendations (five out of 19) by the peer panels, and management rejected PRS' recommendations in two of these cases.²³ ^{xl}

In addition, PRS Panels may also submit non-binding reports recording "observations and recommendations regarding areas for potential improvement in Bank practices and procedures that came to light through its review of a matter."^{xi} These recommendations are also submitted to the applicant and respondent's Vice President and to the Vice President, Human Resources.²⁴ These decisions, too, are non-binding and not necessarily circulated to a wider audience (such as the World Bank Board of Directors) or implemented.

C. Witness and Evidence Limitations

Rule 10.03 (g)²⁵ grants Peer Review Panels the power to decide which documents and witnesses will be used as evidence in a hearing. Rule L(26) of the Peer Review Procedures also

²² For example, the European Court of Human Rights (ECtHR) has specified that for a body to be considered a tribunal, it must possess a judicial body with the power to make a binding decision that cannot be altered by a non judicial authority. (Findlay v. United Kingdom (1997) 24 EHRR 221, [1997] ECHR 22107/93)

²³ At least one of these cases was reportedly considered time barred for technical reasons, and management decided that better training was necessary to resolve this issue.

²⁴ According to PRS' 2009 Annual Report, eight such recommendations were issued in 2009. Examples of these recommendations included that:

- Standards be provided guiding the length of Integrity Vice Presidency (INT) investigations;
- When a decision is made that a staff member will be reassigned in the 'interests of the Bank', the staff member should be provided with the reason and given time to respond before the reassignment occurs; and
- Guidelines be established when INT or another investigative Bank entity conducts an "accountability" or similar review, in order to ensure that staff members are afforded adequate protections.

The PRS report did not say whether or not these recommendations were adopted.

²⁵ According to this rule, "at any stage in a proceeding, a Panel may decide upon the parties' document and witness requests."

grants Panels the power to decide “which witnesses are called, in what order they are called, and who questions the witnesses.” These rules grant Panels sole discretion to decide upon which witnesses and documents are used as evidence in the proceedings.

Witnesses: The right to call and cross examine witnesses is an important protection enshrined in international human rights instruments. For example, Article 8 of the American Convention on Human Rights guarantees “the right to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts.” According to the European Court on Human Rights, parties must be able to cross examine witnesses during public proceedings.^{xliii}

The Bank’s Peer Review System does not necessarily respect the right to call and cross examine witnesses. As a body, the Panel can decide not to interview witnesses; moreover it may deny the parties the opportunity to question witnesses who are called or to obtain documents. Although staff representatives indicate that PRS panels often honor witness and document requests, there have been instances in which a panel has denied witness requests. A staff member reports that in one recent case, for example, a panel allowed three people to testify for the responding manager, but limited the requesting staff member’s witnesses to only one out of the five witnesses that s/he had requested. The Panels’ discretion in this regard may bias a hearing if requests for witnesses or documents are denied, and the applicant is therefore unable to produce a significant evidentiary base from which to pursue his or her case.

When CDR Associates reviewed the Bank’s grievance mechanisms in 2005, it recommended that the Bank “give appellants the right to have a certain number of witnesses,” as “parties need to have some control over presenting witnesses and getting them to testify.”^{xliii} But the Bank did not incorporate these recommendations into its CRS reform. Instead, it appears that the Bank took a step backwards with respect to due process rights regarding witnesses. The right of disputants to question witnesses was guaranteed under the rules of the ACO, but was eliminated in the new Peer Review Services system. This omission was striking because the right to question witnesses was instituted after the Administrative Tribunal decided that the due process rights of an applicant were violated when he was “denied the right to confront his accusers or cross-examine them.” The Tribunal found this to be a “serious impairment of the applicant’s rights under due process of law” and referred to the “basic right of the accused to a fair trial and an unhampered opportunity properly to be heard.”^{xliiv} Although, under the PRS rules, the Panel “may” allow the parties to question witnesses, it appears that there is no longer specific language that guarantees the right to cross-examination.²⁶

Evidence: When Robert Vaughn reviewed the Bank’s whistleblower protection procedures in 2005, he recommended that the Appeals Committee rules be changed to allow for “formalized discovery of documents and records relevant to the adjudication of the claim.”^{xlv} Similarly, CDR Associates recommended that the Bank “examine procedures for how parties can more easily get documents related to their case both before and after the Appeals Committee

²⁶ Under the PRS Procedures the Panel “*may* permit the parties to make a brief statement; to answer questions; and to question witnesses.” (L.29, emphasis added)

hearing” as this was “a complaint by a number of former users of Appeals.”^{xlvi} Finally, Graham Scott’s 2006 review of the Bank’s Conflict Resolution System, noted that “panelists often lack the expertise and time to be able to resolve document disputes and order parties to produce information.”^{xlvii} He recommended that the Bank “better define the discovery process in the Committee’s rules to make it more efficient and less demanding while ensuring full disclosure of information between the parties.”^{xlviii}

While the new rules do allow Panels to request an individual to produce documents or information relevant to the case,²⁷ they allow the Panel, rather than the parties, to decide which documents can be requested and provide little guidance on the discovery process.^{xliv} As one Bank staff member pointed out, there are no explicit rules that guide how evidence is produced, what documents are admissible in a hearing, or the process through which the parties can object to the admission or rejection of evidence.

Matthew Parish noted that “discovery is particularly important in employment disputes, because the employer’s internal personnel files (including for example internal memoranda discussing an employee’s performance, promotion or dismissal) are often pertinent to the question of whether an employee was fairly treated.”¹ One major obstacle for requesting Bank staff members is that they are unable to obtain the feedback section of their performance evaluations, which is used by managers to prepare their evaluations, through the discovery process. According to the staff members with whom GAP spoke, this feedback is treated as confidential by the Bank and therefore cannot be seen by the staff member, even when he or she challenges the evaluation before PRS. Rebutting negative or retaliatory performance evaluations is therefore difficult. This is especially problematic for whistleblowers, as performance reviews can sometimes include comments that reveal the retaliatory motives of their supervisors.

These limitations of the PRS represent a serious weakness in the CRS as a whole. The inclusion of evidence and witnesses in dispute proceedings often makes or breaks individual cases. As it is, the PRS allows each Panel to issue different guidelines and make unique decisions on evidence. To be effective and impartial the system itself should include robust regulations governing the basis on which a Panel could reject requests for documents of limited relevancy and the criteria to be used by a disputant who wishes to challenge that rejection.

D. No Right to Counsel

According to the 2009 Annual Report of Peer Review Services:

The major emphasis of the reforms was to move away from an adversarial process which the ACO had become, and to one that was more conducive to

²⁷ However, a Panel may not obtain: “(i) medical records without the express consent of the individual concerned; (ii) documents covered by the attorney-client privilege; or (iii) records of an ongoing investigation until the completion of all formal proceedings.”

resolution of conflict. In the ACO process, the parties were each entitled to be represented by attorneys. The Bank Group's management whose actions or decisions were the subject of the appeal was always represented by an attorney and frequently, staff hired an attorney as well. This placed an economic burden on staff members and also tended to lengthen the process to accommodate additional arguments and requests for discovery by counsel. It also made scheduling more difficult because not only did the parties' and relevant witnesses' availability have to be considered, but also that of both attorneys.

Thus, one of the centerpieces of the reforms of the peer review process is the elimination of attorney involvement in both the hearing and in the drafting of documents. The objective of the reform is to place both staff and management on the same level playing field and to reduce the antagonisms that attorneys sometimes engender. To further make the process easier for staff and more on par with management, the Bank Group agreed to fund the hiring of an attorney who will work in the Staff Association to provide legal assistance to staff members contemplating filing or [sic] have filed a Request for Review with the PRS.^{li}

Although this is a practical rationale for denying staff access to legal counsel, it creates significant problems in practice.

According to Rule 8.03, managers are able to consult with the Office of the Legal Vice Presidency, where they can obtain expert advice from attorneys who are familiar with (and in some cases the authors of) Bank policies and practices. As a result of the PRS reforms, requesting staff members now have access to an attorney provided by the Staff Association (funded by the Bank) and to a roster of Peer Review Counselors who can provide advice and assistance, a significant advance toward providing equality of arms.²⁸ But, according to Staff Association rules (SA), in order to have unlimited access to the SA attorney, an applicant must be a dues-paying SA member who has been in good standing for six months or more. Requesting staff members who do not meet this criterion (including former staff members who are contesting a termination decision) are only able to obtain two hours of assistance from the Staff Association attorney.

With or without counsel, the requesting staff member and responding manager are now required to draft submissions in their own words and are no longer allowed to have an attorney

²⁸ Providing asymmetric legal resources could be a violation of the right to equality of arms, which has been established by multiple international agreements, including Article 14 of the International Covenant on Civil and Political Rights (1966), Article 8 of the American Convention on Human Rights (1969), Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), and Articles 7 and 26 of the African (Banjul) Charter on Human and Peoples' Rights (1981). Therefore, World Bank management should guarantee that – at the absolute minimum – it will devote at least the same amount of financial resources to providing legal aid to its staff as it does to providing legal services to management in labor disputes.

present with them in hearings, though they are allowed to be accompanied by an advisor who is not engaged in the practice of law and who is a current or former staff member. This arrangement does not address some of the problems raised by the U.S. Government Accountability Office (GAO) when it reviewed the Bank's former Conflict Resolution System. The GAO noted that the:

Staff Association, as well as grievants, pointed out that employees bringing complaints before Appeals Committee panels often felt overwhelmed by the enormity of the Bank as an opponent. These sources noted that this feeling may be exacerbated by rules that permit grievants to be accompanied by only one person ... as they participate in panel hearings.^{lii}

Even the right to have a non-attorney advisor present at a hearing is not guaranteed. A Bank staff member informed GAP that, in one case, a requesting staff member wrote to the Executive Secretary to request a postponement because several of the advisors who had been assisting the applicant had a conflict with the hearing date. The Executive Secretary denied this request, as the role of the advisor during the hearing is "limited." For example, the advisor can only speak with the consent of the panel and, in many cases, advisors are silent for the full duration of the hearing. Staff representatives report that in several cases, when advisors were allowed to speak, they were only allowed to ask questions and were not allowed to make statements.

The elimination of a right to counsel is contrary to the recommendations made by Robert Vaughn in his 2005 study on the World Bank's Whistleblower Procedures. In that study, Vaughn recommended that the Bank allow a staff member 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."^{liii} GAP recommends that requesting staff members be given this choice.²⁹

The Basic Principles on the Role of Lawyers establish that "all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them" (para. 1) and that "governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons."^{liv} Based on

²⁹ It should be noted that some Bank staff members expressed disagreement with this recommendation for various reasons. First, the costs of attorneys could unfairly advantage staff members who have greater financial resources. Secondly, an attorney may make a hearing more adversarial and may be unnecessary in some of the more informal cases the PRS receives, such as those dealing with benefits and compensation. As one staff member explained, "some of the cases that are brought before the PRS do not require a great deal of documentary evidence or legal process and might be more susceptible to resolution through an informal hearing, such as the PRS provides, rather than a more formal legal process." In addition, outside lawyers are frequently unaware of Bank procedures and can delay the resolution of a case due to scheduling conflicts. These are, of course, valid concerns that the PRS reforms attempted to address. Nonetheless, these concerns do not trump the applicant's right to be represented by counsel, as established by international human rights standards.

these standards, the UN Redesign Panel concluded that “access to lawyers and legal services is crucial”^{lv} and a necessary component in a fair trial. Although many of the cases before PRS may be conflicts of an informal nature, the PRS still has jurisdiction over some cases of a legalistic, adversarial nature – such as whistleblower retaliation claims – in which access to counsel is crucial. Because the World Bank represents PRS as the first instance for an impartial hearing in an employment dispute, the international stipulation concerning the right to counsel should apply.

Finally, because the burden of proof will rest with the applicant in most cases, denying the applicant the right to an attorney could disadvantage him or her and render it difficult for the staff member to prevail. This possibility is exacerbated by the fact that hearing transcripts from PRS are no longer provided to the parties. As a result, an attorney who represents a requesting staff member before the Tribunal will have little knowledge of, or evidence from, the PRS process.

E. No Guarantee of Hearings

The UN Redesign Panel found that hearings “are a clear requirement in international standards whenever there are disputed issues of fact,”^{lvi} a finding which they based on the Universal Declaration of Human Rights³⁰ and the International Covenant on Civil and Political Rights.³¹ These articles also require that the hearing be public.^{lvii} According to the International Covenant on Civil and Political Rights, the public may only be excluded for reasons of “morals, public order, or national security in a democratic society, or when the interest of the private lives of the parties so requires.”^{lviii}

The Bank’s PRS process does not guarantee a hearing. Although PRS “shall generally include a hearing,”^{lix} the Panel can decide not to hold a hearing in several circumstances including if it “determines that it is not feasible to conduct a hearing.”^{lx} No guidelines are provided regarding what constitutes a situation in which it is not “feasible” to have a hearing and this provision could therefore be arbitrarily invoked to deny an applicant this right. When the PRS does hold a hearing it is not open to the public and attorneys are not allowed to attend.^{lxi} Only the Panel, Secretariat staff, the parties, the parties’ advisors, approved witnesses (when testifying) and an observer, such as a Peer Review Counselor in training, (provided that both parties consent) are

³⁰ According to Article 10 of the Universal Declaration of Human rights, “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” According to Article 2, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind... Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.” Therefore, these rights should apply to IGO employees as well.

³¹ According to this Covenant, “ in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

allowed to attend the hearing.^{lxii} Also, staff representatives have informed GAP that because panel members are volunteers, it is difficult for them to devote hours at a time to a hearing. Therefore, the hearings are usually four hours at most, and primarily consist of the testimony of Human Resources personnel and Vice Presidents. Often, less time is devoted to the requesting staff member's witnesses.³²

Nor is a hearing guaranteed before the Tribunal, as the WBAT is given the discretion to decide whether oral proceedings are warranted.³³ According to an article written by Howard Dean, former Senior Counsel of the World Bank Legal Vice Presidency, "the Tribunal decides the great majority of its cases based on the written pleadings submitted.... It may be noted that oral hearings before the Tribunal have never been held in a misconduct case."^{lxiii}³⁴ Similarly, former Executive Secretary of the WBAT C.F. Amerasinghe noted that the Tribunal, "has eschewed oral hearings in general, perhaps, for one thing, because they may be used as an opportunity to sling mud and wash dirty linen."^{lxiv} In practice, then, staff members accused of misconduct will be denied the right to a hearing, as misconduct cases now go straight to the Administrative Tribunal. Because retaliation against a whistleblower often takes the form of misconduct allegations, whistleblowers are especially vulnerable to this violation of their due process rights.³⁵

F. Oppressive Secrecy Requirements

In addition to denying oral hearings, the PRS rules also contain strict confidentiality requirements. According to Rule 12: "Peer Review Members, the Peer Review Secretariat, the parties, their advisers, and individuals asked to participate in the peer review process by providing advice or testimony or by producing documents or information shall treat all information obtained in connection with the peer review process in a confidential manner.

³² The Bank has recently introduced a Pilot Alternative Program in which a requesting staff member can choose between a traditional hearing and a hearing in which only the panel members would be present when witnesses testify. In this pilot program, witnesses would not have to testify before their managers or the requesting staff member. As a result, they may be less fearful of retaliation and more forthcoming. On the other hand, the requesting staff member will not hear any of the testimony in the case, except his or her own, so s/he will not have the opportunity to rebut any testimony that may be inaccurate.

³³ According to Article IX of the Tribunal's Statute, "oral proceedings shall be held in public, unless the Tribunal decides that exceptional circumstances require that they be held in private."

³⁴ According to Matthew Parish, paper reviews are often done by Tribunals at International Organizations "even though complaints are usually about the conduct of individuals and so hearing from witnesses should be an essential part of the fact-finding process." (p. 9)

³⁵ It should be noted that on May 23rd, 2011, the WBAT granted an oral hearing in a misconduct case for the first time. In this case, the applicant claimed that the finding of misconduct applied to him was, in fact, retaliation for whistleblowing.

‘Confidential’ means that such information may not be disclosed except to persons who require access to it for legitimate business purposes of the Bank Group.’³⁶

Such secrecy has repercussions for the Bank’s work. As a lawyer who previously worked in the Legal Department of the World Bank wrote:

From time to time, virtually every organization is susceptible to misconduct. It is an inevitable consequence of the agency problems inherent in shared endeavors: no matter how well intentioned the participants in a collective enterprise, the persons they employ to pursue their joint goals may have their own ends and incentives that pull the organization’s acts in directions undesired by its founders. Where indiscretions occur through the medium of incompetent or poorly intentioned agents, or where the aims of the founders themselves become malicious, the organization has an interest in suppressing knowledge of the wrongs. Managers, in fear of becoming scapegoats, will do what they can to avoid criticism of agencies for which they are responsible. Hence there is an incentive within a bureaucracy for a culture to develop that whitewashes wrongdoing. The only solution to such dangers is constant vigilance, oversight, transparency and accountability through law, publicity and political pressure. For international organizations, these goals are hindered, because so much those organizations do is secret.^{lxv37}

In addition, Bank staff members are often asked to sign nondisclosure agreements, which can prevent them from giving or receiving documents for use in the higher levels of the internal justice system. Staff representatives whom GAP consulted described these agreements a “problematic” and suggested that an overriding rule be created that would allow all documents to be available before the CRS, even those that would normally be prevented by a non-disclosure agreement.

³⁶ GAP’s experience with the CRS in general at the World Bank demonstrates the intense preoccupation of management with secrecy in disputes, especially in whistleblower cases. Ironically, the details of these cases cannot be disclosed due to the strict confidentiality requirements imposed. In one case, suffice it to say, the HRVP went so far as to claim that a termination letter was confidential.

³⁷ The Bank recently passed a new Policy on Access to Information, which is a major shift toward transparency. Prior to this policy, the Bank’s approach was to only release information that was listed as being acceptable to disclose. Now the Bank can release any information in its possession unless it fits into a list of exemptions. However, this policy is unlikely to increase the transparency of the Bank’s internal justice system, as “information relating to proceedings of the Bank’s internal conflict resolution mechanisms,” is exempt from disclosure.

IV. Structural Limitations of PRS

A. Biased Decision Makers

Vice President of the Department: Under the Appeals Committee’s rules, the decision on whether or not to enforce the Committee’s ruling was made by the Vice President of Human Resources (HRSVP), whereas under PRS the decision is made by the Vice President of the department(s) that employs the requesting staff member and responding manager, in consultation with the HRSVP. According to PRS’ 2009 Annual Report, it was “anticipated that by involving Bank Group management in the decision concerning whether corrective measures are appropriate in a given case, managerial accountability will be increased.”^{lxvi}

This is problematic, as, from the outset, an applicant's Vice President may be biased against him. As the World Bank Group Staff Association has pointed out: “Management of any organization in reality can’t be neutral in staff grievance cases. The Bank cannot be police, prosecutor and judge without many forms of conflict of interest arising. For due process, the institution needs broadly based independent oversight of its behavior toward staff.”^{lxvii}

In many cases an applicant's complaints would have already come to the attention of the departmental Vice President, before Peer Review Services are involved. Presumably the staff member would have first exhausted existing channels (including petitioning the head of his or her department) regarding his or her problem. If an amicable solution had been found, the applicant would not have submitted a request for review. The fact that a case is being heard by PRS at all indicates that a department Vice President did not sympathize with an applicant's stance in a dispute. If a Peer Review Panel finds in favor of an applicant, this puts a Vice President in the uncomfortable position of choosing whether or not to defer to the Panel and reverse his or her own prior judgment. Moreover, as a member of senior management, a Vice President has an interest in showcasing a problem-free department to his or her peers, the President and donors. Granting a Vice President decision-making authority on matters of internal justice institutionalizes this conflict of interest.³⁸

While the rules do allow measures that address an explicit conflict of interest, they do not address every potential conflict that could arise. According to PRS Rule 11.01, a Vice President must recuse himself from the decision making process if s/he has “a conflict of interest affecting his or her ability to decide a case” or “was the Responding Manager” in a submitted request-for-review. If this occurs, then the “President or a Managing Director shall designate an appropriate, alternative decision-maker at the level of Vice President or above.” This rule applies only to situations where the Vice President is either a participant in the proceedings or has a relationship with either the applicant or respondent that might affect his or her decision. It does not address potential and structural conflicts of interest. Moreover, the rules imply that

³⁸ It should be mentioned that the Vice President does *not* have a financial interest in reducing grievance compensation, as these awards are paid out of the Bank’s central budget, not department budgets.

the Vice President in question must decide to recuse him or herself, leaving the applicant no recourse should the VP involved fail to do so. Finally, the rules are silent about alternative decision-making channels should the Department of Human Resources, which must be consulted, have a conflict of interest.

Vice President Human Resources: The fact that the Vice President of the applicant's department is required to consult with the Vice President, Human Resources, before making a final decision is also problematic. The Department of Human Resources is a party to many of the employment disputes that go before PRS before the advent of a review. As Graham Scott wrote in his 2006 review of the Bank's Conflict Resolution System (CRS), HRVP has a potential conflict in playing such a decision making role, as it is involved in, "deciding on and implementing disciplinary measures, considering recommendations from Appeals on specific cases and about weaknesses in rules that have been evident in the case flow. HRVP substantially controls rule making on personnel matters... There are several areas of potential conflict for which solutions must be found."^{lxviii}

HRVP could be especially conflicted in whistleblower retaliation cases. Because retaliation often takes the form of an adverse administrative action approved by Human Resources, it is particularly inappropriate to involve the HRVP in decision making concerning the enforcement of a Panel's decision regarding the nature of that action and the required remedy. Quite simply, assigning a role to HR in the decision-making regarding a Panel's recommendation following peer review undermines the perceived and actual independence of the PRS system.

B. Lack of Independence

The Peer Review Secretariat: The Peer Review Secretariat, which consists of an Executive Secretary and other staff members reporting to him or her, provides administrative support to the panel members and information regarding the peer review process. The Secretariat also decides which members will serve on a particular panel. The Secretariat is headed by an Executive Secretary, who reports to the Office of the President. The Executive Secretary is appointed by the President after consultation with staff representatives selected by the Staff Association, and serves a five-year term, with the possibility of one renewal.

The independence of the key Executive Secretary position could be improved by requiring the "consent of" rather than "consultation with" the World Bank Group Staff Association. However, this alone is not enough to address the structural conflict of interest inherent in the Peer Review Secretariat. The Secretariat is tasked with being "impartial," but reports directly to the Office of the President. Moreover, the Executive Secretary is beholden to the President for his or her employment security, salary and benefits. This is a potential problem in high profile cases, in which the President may arguably be more concerned with the Bank's interest and reputation than with the complainant's. In such cases, the Secretariat could potentially be pressured by Bank management, and even if not actually pressured, perceive an interest in validating the claims of management. The lack of mechanisms to address conflicts of interest that may arise for the Executive Secretary in specific cases is also problematic.

World Bank staff members consulted for this paper also mentioned the difficult role of the Coordinator of the Conflict Resolution System, whom they described as potentially operating at the will of management. One representative recommended to GAP that internal justice system managers should report to a Board Committee, rather than the President, in order to increase the independence of the system.

The Composition of Peer Review Panels: The Peer Review Secretariat designates a Panel of three volunteer staff members to review each PRS case. This composition constitutes a structural conflict of interest. Indeed, concerns about the informal, peer review nature of the Appeals Committee were expressed by the U.S. GAO, which observed that the Appeals Committee was:

Composed of regular Bank employees — not legal professionals — who serve as panel members in addition to their other duties. According to Bank employees we interviewed, these individuals are frequently pressed for time. In addition, panel members must concern themselves with their own career prospects in the Bank. Some employees expressed concern that, as this is the case, panel members may not be entirely immune from worry about how their decisions on controversial grievances will be regarded by senior Bank management.^{lxix}

Similarly, in his study, Graham Scott wrote that it “[...]is not easy to see how the President can practically give a committee of staff the right to overrule decisions of his and of those to whom he has delegated powers.”^{lxx} Such critiques are equally applicable to Peer Review Services.

Lack of judicial experience is also a potential problem in any peer review system. Most staff members are not experts in personnel matters or in legal and judicial disputes. Indeed, staff representatives informed GAP that people with legal degrees are usually not appointed as panel members. In contrast the judges of the Administrative Tribunal are experts in their fields, with years of experience as justices prior to arriving at the Bank. Even those who serve in mediation and the Ombudsman's office have lengthy résumés in conflict resolution techniques. Although one could argue that juries also lack such expertise, the problem is more acute in PRS, as the members are not only serving as juries, but also, in many respects, as judges. For example, the Panelists are able to choose which witnesses will be allowed to testify and what evidence is admissible.

When they reviewed the United Nation’s former justice system, the Redesign Panel members repeatedly commented on the importance of an impartial, professionalized justice system. They noted the difficulties experienced by volunteer staff members when confronting the responsibility for evaluating cases. Specifically, the Redesign Panel wrote: “[W]ith the increase in fixed-term contracts relative to permanent contracts, there is a growing concern on the part of staff about the independence of both bodies.”^{lxxi}

Panel members' vulnerability to pressures from management in administrative disputes has become more of an issue in recent years. On March 13, 2009, the Bank's Managing Directors announced a dramatic increase in the use of fixed-term contracts for new staff members, as well as strict limitations on the use of future open-ended appointments. Even staff members in investigative and audit units are now to be retained on fixed-term contracts. Bank staff report that these relatively tenuous employment relationships make it extremely difficult for them to oppose the policies or decisions of management. The expectation that they could remain impartial if faced with perceived or real intimidation is simply unrealistic.

The Redesign Panel suggested that the UN replace its peer review system with a professional first-instance tribunal staffed by judges who met specific criteria. The Panel also considered:

[I]t advisable to retain some elements of peer review, with assessors sitting with the judge in disciplinary cases and, if the judge so decides, in exceptional cases involving serious allegations. Accordingly, it is proposed that panels of assessors be established for each region and that they be appointed by the management and elected by the staff. The judge should also sit with medical assessors, appointed by the management and the staff member, in cases involving medical issues. Assessors will have the right to question witnesses if so permitted by the judge. They will provide the judge with advice, but the final decision will be made by the judge alone.^{lxxii}

If the Bank were to follow this recommendation, it would benefit from the expertise of those familiar with the Bank's culture and practices, while creating a more independent system that better complies with the due process standards established in international law.

At a minimum, the Bank should consider implementing CDR Associates' recommendation that each Panel "include a respected, independent person from outside the Bank... Having one of the three members of the Committee be an outsider would help improve perceptions of both independence and impartiality."^{lxxiii} The International Monetary Fund's (IMF) Grievance Committee could serve as a possible model in this regard. This Committee consists of a panel that has historically been chaired by an external, professional labor-management arbitrator and two staff members, one appointed by management and the other by the Staff Association Committee.^{lxxiv}

CDR Associates also recommended that the Bank "introduce and publicize rules that prevent retaliation or consequences to the careers of members of Appeals Committees who make decisions that may be unpopular with management."^{lxxv} Given a perceived history of retaliation and intimidation at the Bank it is not unreasonable for staff members to fear spillover retaliation if they rule against the Bank.³⁹ As CDR Associates pointed out:

³⁹ The Bank's 2004 "Conflict Resolution Survey" identified fear of retaliation as the number one reason that Bank employees do not use the Bank's Conflict Resolution system. This fear was raised by 41% of 1,107 respondents. (CDR Associates, p. 27).

The potential for and fear of retaliation is fed and reinforced by aspects of the Bank's structure as well as its culture. For example, from the perspective of structure, the Bank is a unique creature. If an individual loses their job here, where can they go? ...People don't perceive they have career choices and so the stakes to stay at the Bank are high... Because of this dynamic, many employees, whether old hands or new hires, are reluctant to risk damaging their reputation by using dispute resolution systems that publicly raise conflicts, even if it is only with one other employee. Even some CRS providers have stated they would be reluctant to use the system given what they know of the culture of the Bank.^{lxxvi}

C. Timeline Loopholes

Numerous international instruments establish the right to a prompt trial (especially when someone has been accused of misconduct/a criminal offense) including the International Covenant on Civil and Political Rights and the American Convention on Human Rights. On this count, it appears that the PRS is more efficient than the Appeals Committee was, and this is an important advance. The average processing time in 2009 for Appeals Committee cases was approximately 10.6 months, whereas this period was reduced to 3 months under the PRS system.

Nonetheless, loopholes in the PRS rules remain that could potentially lead to substantial delays in certain cases. Provisions that should be revised include:

- Rule 10.03(e): “At any stage in a proceeding, a Panel may... suspend the review of a Request for Review for a reasonable period of time as warranted under the circumstances.”
Problem: The phrase “a reasonable period of time” is undefined. Nor is a description of the circumstances that would warrant this suspension provided.
- Rule 11.03: “If a decision-maker and the Requesting Staff Member agree on resolution of the case, the Bank shall promptly provide to him or her the agreed corrective measures and relief.”
Problem: The word “promptly” is undefined and theoretically, the Bank could therefore delay implementation of a recommendation indefinitely.
- Peer Review Procedures (Annex A), Rule D(6): “The Peer Review Chair or a Panel may at any time, independently or upon the written request of either party, temporarily suspend the proceedings for a reasonable period of time to allow for efforts at informal resolution or for other good cause.”
Problem: The phrase “a reasonable period of time” is not defined, nor is “other good cause.”
- Peer Review Procedures Rule J(21)(a): “After the Responding Manager has submitted his or her Response, the Panel shall resolve any outstanding issues relating to the documents that the Panel needs to review the case.”

Problem: No limit on the amount of time allowed for the Panel to acquire all documents is imposed.

In addition, the system should identify options for expedient relief. Under the previous system, applicants could request immediate provisional relief when urgent action was required to prevent undue hardship resulting from an administrative decision. This was consistent with international best practices in whistleblower protection, which require the establishment of a process for the provision of interim relief. Under the PRS reforms, the possibility of provisional relief was eliminated. Apparently, reformers believed that the system would operate in a more efficient manner and saw that requests for provisional relief were rarely made or granted under the former Appeals Committee system. However, because loopholes exist in the PRS timelines and lengthy delays can potentially occur, it is crucial that the option for provisional relief be reinstated.⁴⁰

Finally, according to PRS Rule 7.01, staff members are currently only given 120 calendar days from receiving notice of the disputed employment matter to contest the decision. However, most employees (especially whistleblowers) are not even aware of their rights within this time frame. One-year statutes of limitations are consistent with common law rights and are preferable.

V. Recommendations

It is clear that the Bank's PRS fails to comply with the rights to due process and an impartial forum established in international law. Moreover, the new system failed to address many of the shortcomings raised by the external experts contracted by the Bank itself to review the Conflict Resolution System mechanisms for the purpose of instituting reforms. To address these shortcomings, we have identified the following five options.

It should be noted that several Bank staff members suggested that, no matter which option below the Bank chooses to follow, it should consider requiring the offending Vice Presidency to pay part of any reward made through the internal justice system. Because financial damages come from the Bank's central budget and are not currently borne by the offending Vice Presidency, there are few consequences for responding managers or units who are found to have violated a staff member's rights. Requiring the offending Vice Presidency to contribute to a financial award from its own budget could serve as a deterrent and could lead to managers addressing grievances earlier in the process, before they escalate.

⁴⁰ At the Inter-American Development Bank, the Conciliation Committee (the body most comparable to the PRS), is enfranchised to recommend the suspension of an adverse termination or contract expiration until the dispute resolution process is completed. The Committee's recommendations in this regard are routinely accepted by HR.

A. Option #1: Close Loopholes and Add Protections to the Existing System

This recommendation would leave Peer Review Services intact as a major component of the World Bank's formal CRS, but would require that significant changes be made to better protect the due process rights of staff members. While this is the simplest option for the Bank, it is also the least likely to produce a fair resolution for staff members, as it appears that issues of impartiality and independence can never be fully rectified within a peer review system at an IGO.

Some of the changes that should be made under this option include:

- The right to appeal must be granted in all cases. To guarantee this right, Panels must be allowed to review all forms of requests, especially those involving misconduct, unless the staff member seeking review of a decision elects to bypass the peer review process and file directly with the World Bank Administrative Tribunal.
- Peer Review Panels must be granted the power to make binding decisions that are appealable only to the WBAT, and the role of the deciding Vice President and Vice President of Human Resources must be eliminated.
- All parties must have the right to call an agreed-upon number of witnesses of their choosing. Additional witnesses could be considered by each panel on a case by case basis.
- All parties must be guaranteed the right to question and cross-examine witnesses.
- Procedures must be created for a formal discovery process. The rules should clarify in what instances a panel would be allowed to reject document or witness requests. In the event that a panel decides to reject a request, it must report in writing its reason for doing so, so that this statement will be available to the Tribunal and the applicant's counsel in a possible appeal. Panels should only be able to reject document requests if they are proven to contain limited relevancy. If disputants are able to make a prima facie case that the document in question is in fact relevant to their case, then the document should be included. Applicants who allege retaliation or discrimination should be allowed to obtain the feedback section of their performance evaluation.
- Internal justice system oversight offices and managers, such as the Peer Review Secretariat and CRS Coordinator, should report directly to a Board Committee rather than to the Bank President or Bank management.
- Each panel must, as CDR Associates recommended, "include a respected, independent person from outside the Bank... Having one of the three members of the Committee be an outsider would help improve perceptions of both independence and impartiality."^{lxxvii}
- The Bank must restrict the use of fixed-term contracts and return to open-ended appointments. Staff members with fixed-term contracts should not be able to serve on a Panel, as their relatively tenuous employment relationships could make it extremely difficult for them to oppose the policies or decisions of management.

- The Bank must create a rule that prevents retaliation against panel members for performing their duties.⁴¹
- Applicants must be allowed to be represented by counsel in all proceedings before PRS, if they so choose. If, and only if, requesting staff members opt to have counsel, then responding managers should also be allowed counsel. If the applicant opts to have a staff advisor instead, then that advisor must be allowed to attend the hearing, confer with the applicant, speak and make statements, if the applicant authorizes him or her to do so.
- In order to ensure that justice is delivered in an expedient manner, specific timelines must be included in the rules and loopholes must be closed in the following provisions: 10.03(e), 11.03, Peer Review Procedures D(6), and Peer Review Procedures J(21)(a).
- The options for provisional relief that existed under the Appeals Committee system must be reinstated.
- The deadline for submitting a request for review should be extended from 120 calendar days to one year.
- Oral and public hearings must be mandatory, unless the applicant decides to opt-out of his or her right to one.
- Confidentiality requirements must be reviewed and non-disclosure rules revised so that a presumption of disclosure (before the CRS) is established.
- The WBAT must be granted jurisdiction to rule on PRS decisions and practice. This would provide an additional accountability mechanism over the PRS.

B. Option #2: Create a Professionalized, Two-Tier Justice System, Based on the United Nations Model

Alternatively, the Bank could apply the recommendations of the UN Redesign Panel to its own system and create a professionalized two-tier system of justice, staffed by professional judges. Safeguards should be provided that protect the applicant’s right to a fair hearing, and staff members must be guaranteed the right to counsel, to call and cross-examine witnesses, and to appeal. Decisions should be binding and not subject to managerial approval.⁴²

This option would comply with the observations and recommendations about the Bank’s Conflict Resolution System made by Graham Scott, who wrote that “while there are improvements that can be made to the Appeals Committee, it cannot reach the judicial standing that is inherent in the Tribunal’s construction and should not try. If the Tribunal needs a ‘lower court’ then it should create one within its own mandate.”^{lxxviii}

⁴¹ Staff Rule 8.01, para. 2.03 prohibits retaliation against any person who “uses the Conflict Resolution System.”

These protections should be extended to encompass PRS members, to protect them from retaliation for making a decision that may be unpopular with Bank management.

⁴² The recommendations of the Redesign Panel are available at <http://www.un.org/ga/president/62/issues/resolutions/a-61-205.pdf>

The Bank may be concerned about the costs of creating such a system. However, as noted by the UN Redesign Panel when it reviewed the UN justice system, “the fact that the various advisory bodies are composed of volunteer staff members generates the illusion that they involve little cost. The truth is the exact opposite.”^{lxxxix} The report noted that the UN’s overall productivity was limited by the fact that many staff members were engaged in peer review “when they would otherwise be performing their official duties.” The Panel also noted that there were hidden costs of the peer review system:

The lack of due process and the uncertainty of outcome generate a climate of restlessness and demoralization, which exacts a heavy cost, not only on individual staff members, but also on work relations in the units in which they perform their functions and, ultimately, on the Organization as a whole. The proposed new system will evidently require significant resources. However, they will be considerably less than if an imaginative effort were made to make the present system perform better — an effort that would still not guarantee an effective or efficient system. By contrast, the proposed new system will save time, provide due process and ensure predictability. This will reduce the demotivation and demoralization of staff and result in a more efficient use of the Organization’s resources.^{lxxx}

C. Option #3: Voluntary Access to Independent External Arbitration

This recommendation would provide staff who request it access to independent external arbitration using a three strike method for determining the arbitrator. Staff wishing to pursue their grievances through in-house channels would retain the option to do so.

Alternative dispute resolution (ADR), including independent arbitration, is a counterweight to more traditional adversarial methods and often provides an effective resource, especially for resolving whistleblower complaints and controversial misconduct cases. Commercial ADR programs can reduce much of the delay, expense,⁴³ and hostility associated with litigation.

The World Bank currently allows whistleblowers access to external mediation, a form of ADR in which a third-party facilitator assists the disputing parties in reaching a consensual agreement. However, the Bank requires that the mediator be selected from a roster of candidates chosen unilaterally by Bank Management, which destroys the impartiality and independence of the process. This particular process is less effective where there is a lack of good faith, an imbalance of power, or when basic rights have been violated, which often

⁴³ A survey by the Center for Public Resources found that its 652 reporting companies saved on average more than \$300,000 each by implementing ADR programs. A similar survey indicated that 80 percent of business executives and lawyers found that mediation helped preserve business relationships. (see Mazadoorian, Harry. “Building an ADR program: What Works, What Doesn’t.” *ABA section of Business Law: Business Law Today*. American Bar Association. March/April 1999. 8 March 2011 <<http://www.abanet.org/buslaw/blt/8-4adrprogram.html>>).

happens in whistleblower and misconduct cases. Under these circumstances, binding independent arbitration is more appropriate.

Arbitration is a hybrid form of ADR that combines traits of both mediation and traditional litigation. In arbitration, parties choose to refer their dispute to one or more “arbitrators” and agree to be bound by his or her decision. The arbitrators may conduct a formal hearing with witnesses, testimony, evidence, and legal arguments, but have the discretion to simplify the process as they see fit. In addition, arbitrators may base their decision-making on actual statutory and case law or personal judgments about what is a fair and equitable outcome. ADR methods could be applied both to the alleged wrongdoing an employee challenged by making a disclosure and to any alleged retaliation. However, arbitration only has legitimacy when two factors are present: 1) mutual strike selection of the arbitrator to ensure a consensus on the person who renders a final decision⁴⁴ and 2) sharing in the cost of compensating the arbitrator, so as to eliminate a real or perceived conflict of interest.

Through binding arbitration clauses in employment or collective bargaining contracts, this method of dispute resolution long has been used to resolve labor disputes, including whistleblower reprisals against U.S. government employees in federal trade unions. Alternative dispute resolution is also the standard forum for World Trade Organization resolution of free trade disputes between nations and the primary mechanism used to resolve employment disputes in the auditing and accounting professions. The African Development Bank’s whistleblower policy provides for arbitration, although it is GAP’s understanding that the measure has not been effectively implemented. Moreover, the Organization of American States Model Law Protecting Freedom of Expression Against Corruption⁴⁵ provides for arbitration and establishes detailed standards for implementing it. These standards include mutual consent selection of the arbitrator; the application of International Arbitration Rules (except that any arbitration proceeding shall be open to the public); and the public disclosure of the outcome.

For many years, GAP has advocated that the World Bank adopt a measure providing staff members with access to a truly independent external arbitration procedure. In 2006 we discussed this process with the Office of Legal Affairs when the Bank was formulating its whistleblower protection policy. On that occasion, we called the attention of the Bank’s lawyers to a U.S. law regarding international financial institutions: the Foreign Operations Act of 2006. This legislation directs the US Executive Director at the Bank to support the establishment of a whistleblower’s right to “access to independent adjudicative bodies,

⁴⁴ Government and intergovernmental organization professional societies – such as the International Centre for Dispute Resolution (www.icdr.org) and The International Arbitration Association (<http://www.i-a-a.ch/>) – maintain lists of experts certified to act as arbitrators for almost any matter that requires adjudication. These websites also contain arbitration guidelines and other useful resources.

⁴⁵ The full law is available in Spanish and English at http://www.oas.org/juridico/spanish/preventivas/guate_docs/Devine_Vaughn_Henderson.htm#MODEL%20LAW%20PROTECTING%20FREEDOM%20OF%.

including external arbitration based on consensus selection and shared costs.”⁴⁶ Unfortunately, however, neither World Bank Staff Rule 8.02 (the whistleblower protection policy) nor the reform of the Conflict Resolution System included this provision.

Numerous experts who have reviewed the Bank’s Conflict Resolution System have also emphasized the need for external arbitration. For example, CDR Associates recommended that the Bank:

Consider using an external arbitration process if the independence and impartiality of the Appeals Committee or the Tribunal cannot be internally guaranteed, if issues raised involve either senior management or members of the Board or its committees, or if confidentiality or disclosure issues are at stake... a mutually acceptable, independent, international panel of arbitrators could be established through joint consultation between senior Bank management and the SA [Staff Association]. The panel would have a Secretariat that is outside and independent of Bank management and an independent funding mechanism such as the one described above. The panel would need to be large enough to provide disputants with choices regarding intermediaries, but small enough to be manageable, provide arbitrators with a regular case load and induce them to learn Bank rules and procedures. Third party services should be contracted case by case and there should be term limits for panel members....^{lxxxii}

In his work, Robert Vaughn also recommended that whistleblowers at the Bank be given the option of choosing binding arbitration. He wrote that:

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.^{lxxxiii}

Similarly, Arnold Zack, president of the Asian Development Bank Administrative Tribunal, gave a speech at the WBAT’s 30th Anniversary, where he said that the step before the Tribunal should be reformatted so that:

The organization would, with the cooperation of the staff association, create a panel of ad hoc, neutral, outsiders, experienced in dispute resolution, retired judges or attorneys competent in official languages, offering the disputants their

⁴⁶ See Sec. 1505 (a)(11) of the 2006 Foreign Operations, Export Financing and Related Programs Appropriations Act, which became Public Law 109-102 on November 14, 2005.

mutual choice of arbitrator for their pending case, who on an agreed upon schedule at an agreed upon location, would facilitate discussions between the disputants, and hear evidence and argument on the issues between them. If unsuccessful in bringing them together, following the hearing the arbitrator would issue a written statement including findings of fact and reasoned recommendations for resolution of the dispute consistent with the organization's governing laws. The arbitrator would be bound by a code of professional responsibility and precluded from subsequent employment by either disputant.

The opinion and recommendations would then be provided to the head of the organization and if accepted by both parties would end the dispute on the recommended terms. If the response of the organization is unacceptable to the applicant appeal to the Tribunal could proceed with the Tribunal retaining the right to create a de novo proceeding to rehear the facts, or if accepting the proffered facts, determine whether it accepts the legal reasoning recommended by the arbitrator.^{lxxxiii}

In addition, the Bank's Staff Association has noted that accountability and staff morale would be improved by introducing independent, binding external arbitration.^{lxxxiv}

External arbitration could be used as either an alternative, or as an extra dimension to the Bank's Conflict Resolution System. It should not, however, be used alone, as it does not by itself meet all the standards for an international tribunal. As pointed out in the essay "Immunity of International Organisations and Alternative Remedies Against the United Nations," "arbitration courts are not 'established by law, and do not offer the same procedural guarantees as courts at law... arbitration therefore, may be acceptable only as an alternative, but not as the exclusive settlement mode."^{lxxxv}

D. Option #4: Create an Independent Tribunal for use by Multiple International Organizations

The creation of an external Appeals Tribunal that would review cases from all the Multilateral Development Banks (MDBs), the International Monetary Fund (IMF) and perhaps other Intergovernmental Organizations constitutes a fourth option. This Tribunal would have its own independent secretariat, funding and judges. Because of economies of scale, this alternative would be economically efficient and eliminate the need for each MDB to maintain its own tribunal(s), with the corresponding costs and duplication of effort.

In its analysis CDR Associates recommended that the Bank:

Explore the creation of a tribunal for use by multiple international organizations. A very 'out of the box' idea suggested by a few interviewees was for the Bank to join with other international institutions that either have tribunals or are establishing them, to create an international tribunal that would serve the needs

of multiple institutions. Existing panels could be merged to provide a broader panel of judges, an integrated international panel could contribute to a body of international employment law that could be applied across organizations and significant costs savings could be realized by the involved institutions. There would, however, no doubt be significant hurdles involved in either merging or dissolving existing tribunals.

One of the Bank's Tribunal Judges when presented with this option noted that it had already been tried when the World Bank's Tribunal was first being established. At that time no other international organizations were willing to join with the Bank in creating a tribunal with jurisdiction over multiple organizations. If Bank management believes that exploring this option is feasible, a task force should be created to poll existing international organizations and their tribunals to determine if they have changed and might consider an integrated interorganizational tribunal to have merit.^{lxxxvi}

While it is true that certain IGOs may oppose such unification, the reasons presented for doing so illustrate why such an external body may be necessary. In his article on "The Future of International Administrative Law," C.F. Amerasinghe, the former Executive Secretary of the WBAT, enumerated reasons underlying the historical opposition of IGOs to unification. He concluded that "the biggest obstacle is the loss of control that one or other of these institutions would experience, as a result of unification, over the appointment of judges and the administration of the court... the desire to control the appointment process for judges is certainly a major obstacle to unification of any kind."^{lxxxvii} In other words, the institutions may oppose an external tribunal simply because they would lose the benefit of the bias implicitly inherent in an internal court.

E. Option #5: Waive its Immunities

The World Bank Group and other IGOs enjoy immunities for employment decisions that have rarely been pierced in national courts. Several legal scholars have suggested that IGOs should waive their immunities in employment cases. As Matthew Parish wrote:

The interminably slow procedures to which international organizations subject every decision suggest that there might be more propitious ways of improving their effectiveness. As every employee of an international organization knows, employing new staff is a bureaucratic and slow process, requiring form-keeping, delays, and approvals and interventions by human resources departments. Why could the costs of observing these procedures instead not be directed to ensuring compliance with relevant national labor laws? The same rationale applies to adjudication costs. The costs of running internal administrative tribunals, even were those tribunals fair, are significant. The tribunals have case backlogs of years. It may be more efficient to take advantage of well-staffed, experienced, subsidized and relatively prompt national courts to resolve employment

disputes, rather than establish a slow, expensive *ad hoc* system of the kinds international organizations currently use....

The history of employees' complaints against international organizations suggests that at times they are anything but model managers of human resources. In some cases they treat their employees shockingly. If that risk is real, and if guarding against it is a proper ground for departing from the principle of economic efficiency, then it must follow that international organizations should fall within some system of employment regulation. Although they purport to regulate the employment relationship by their own rules, and develop their own systems for adjudication of employment disputes, these claims have been exposed as facile, and they are merely illustrations of another failure of self-regulation. The alternative is domestic regulation of employment relationships in the country in which the employee is based. This would hardly be an innovation, given that robust systems of employment regulation exist in almost every seat in which international organizations have their headquarters.^{lxxxviii}

VI. Conclusion

The recent Peer Review Services reforms at the World Bank have resulted in a system that fails to meet the standards for an impartial hearing established in international human rights instruments, especially the right to appeal. The system cannot guarantee independence and impartiality, especially in whistleblower cases. Moreover, many of the "reforms" that were made in 2009 did not comply with the recommendations made by numerous external experts who had previously examined the Bank's Conflict Resolution system.

Before the Bank can have any credibility in promoting judicial reform at a national level, it must reform its own justice system. At a minimum, this would require making extensive reforms to the existing PRS system and procedures. However, even extensive reforms are unlikely to rectify all the impartiality and independence issues that can result from the use of a peer review system to render justice in an organization with wide ranging legal immunities. For this reason, GAP believes that the Bank should: a) create a formal two-tiered justice system modeled after the recommendations made by the UN Redesign Panel; b) offer voluntary access to independent external arbitration, especially in whistleblower and misconduct cases; c) create a unified independent tribunal with jurisdiction over multiple international organizations; or d) waive its immunities in employment cases. Such reforms are necessary for the Bank to avoid the double standard that is inevitably exposed when the Bank advocates impartial and independent judicial systems in borrowing countries through its governance projects, but refuses to implement such a system itself.

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- ^{xx} Ibid, p. 7.
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