The Manager's Duty to Resolve or Report Misconduct: The Example of the International Monetary Fund's Retaliation Policy

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Abstract

This chapter examines the International Monetary Fund's (IMF) retaliation policy, which was substantially updated in February 2019 following an extensive benchmarking exercise against similar policies at comparable international organizations. The chapter discusses the key elements and changes to the policy, with an emphasis on the manager's special duty in preventing and resolving retaliation. It makes the case for the importance of this manager's duty and other key elements of the IMF's updated retaliation policy, for the operation and integrity of the organization's dispute resolution system.

1 Introduction

It is axiomatic that protecting employees from retaliation is good for them and their employer. Anti-retaliation programmes are especially important in safeguarding the rights of international civil servants, who are not protected under national laws, by ensuring access to and the integrity of their dispute resolution systems. An effective anti-retaliation program requires several complementary elements. To be sure, there must be clear and specific policies against retaliation. Legitimate systems are also needed for addressing reports of retaliation. Not least, leadership at senior levels is critical to drive an organizational

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culture of valuing and addressing employee concerns and preventing retaliation for raising such concerns.

This chapter presents a case study based upon an update in 2019 to the retaliation policy at the International Monetary Fund (IMF).¹ It summarizes the rationale for the update, and the key issues that were addressed following an extensive benchmarking exercise. We then turn to one element of the IMF's policy that was not substantively changed but deserves further attention: the manager's special role in preventing retaliation. Our thesis is that, as a core feature of their managerial role and a function of the duty of loyalty to their multilateral employer, managers have—or they ought to have—a special duty to resolve or report policy violations, including ethical violations. The recognition of this duty, and steps to make it effective, are important for an organizational culture that is committed to preventing retaliation.

2 Description of the IMF Retaliation Policy and Key Aspects

The following section will describe the IMF Retaliation Policy at the time of writing, and four key aspects of that policy: (i) definitions of retaliation and protected activities; (ii) the expedited review process to address complaints of retaliation; (iii) higher standards of proof; and (iv) the mandatory duty for managers to resolve or report any ethical concerns.

2.1 *Genesis of the 2019 IMF Retaliation Policy*

The IMF first adopted a stand-alone retaliation policy in May 2011. This policy was substantially updated on February 2019, following an extensive benchmarking exercise that was conducted against policies in place at comparable international organizations (IOs).² In mid-2018, the IMF Ethics Office formed a working group comprised of several offices of the Dispute Resolution System

¹ For background information on the rule of law at the IMF within which this retaliation policy exists, see generally Liu 2019, 61–78.

² Benchmarking exercise included seventeen international organizations: African Development Bank (AfDB) Group; Asian Development Bank (ADB); European Bank for Reconstruction and Development (EBRD); Inter-American Development Bank (IDB); International Fund for Agricultural Development (IFAD); International Labour Organization's (ILO) International Labour Office; International Telecommunication Union (ITU); Islamic Development Bank (IsDB); Pan American Health Organization (PAHO); United Nations Educational, Scientific and Cultural Organization (UNESCO); United Nations Office for Project Services (UNOPS); United Nations Fund for Population Activities (UNFPA); United Nations Relief Work Agency (UNRWA); United Nations Secretariat (UN Secretariat); World Health Organization (WHO); World Intellectual Property Organization (WIPO); World Meteorological Organization (WMO).

(DRS),³ and with the collaboration of the Legal Department and the Human Resources Department, to propose revisions to the retaliation policy.

The IMF working group agreed in the context of its discussions that the previous IMF retaliation policy lacked the detailed information on procedures found in most comparable organizations' policies and that this might be a factor underlying the perceptions sometimes expressed by employees to DRS Officers that use of the DRS might lead to retaliation against them. It was agreed that such perceptions are incompatible with an effective dispute resolution system.

As a result of the IMF's review of its retaliation policy, the framework through which retaliation concerns are addressed was strengthened in four key aspects, notably by (i) introducing a clear and broad definition of retaliation and the protected activities to which it relates; (ii) establishing a framework that includes an expedited review process by the IMF Office of Internal Investigations (OII) to address complaints of retaliation; (iii) establishing higher standards of proof when responding to retaliation allegations and (iv) retaining a mandatory duty for managers to resolve or report any ethical concerns. Each of these key aspects will be explored in the sections below.

2.2 *Definitions of Retaliation and Protected Activity*

The new IMF retaliation policy⁴ introduced comprehensive definitions of retaliation and protected activity with the aim of ensuring that any employee raising a retaliation concern receives the full protection of the policy.⁵ Under the new IMF retaliation policy, retaliation is "any direct or indirect adverse action recommended, threatened, or taken because an individual engaged in a protected activity". These adverse actions include, without limitation, termination of employment, demotion or denial of opportunities for promotion, detrimental reassignment or transfer, unfavorable performance evaluations, removal from a team or project, withholding of funding or other resources for a work project and withdrawing delegated authority.

The IMF's policy defines protected activities more broadly than the policies of most other IOs. In the IMF's review of its retaliation policy, it was observed that for many IOs their anti-retaliation measures only protect 'whistle-blowing' activities. Whistleblowing is generally understood as the "disclosure

3 In addition to the Ethics Office, the DRS Offices at the IMF are the Ombudsperson, the Mediation Office, the Office of Internal Investigations, the Grievance Committee and the Registrar of the Administrative Tribunal.

4 IMF Staff Handbook, Annex 11.01.6: Retaliation Policy (IMF Retaliation Policy), paras 2.1–2.2.

5 The policy defines 'employee' broadly to include staff members, contractual employees, interns and volunteers. Ibid, para 1.1.

of information related to corrupt, illegal, fraudulent or hazardous activities [...] to individuals or entities believed to be able to effect action".⁶

The IMF's definition of a protected activity is broader as it includes not only whistleblowing, but also other specified activities done in good faith: using the IMF dispute resolution mechanisms; participating in any type of related proceeding as a witness; assisting another employee in using those channels; or cooperating in proceedings led by the Office of Internal Audit or the Independent Evaluation Office.⁷ It was considered vital to the effective functioning of the DRS that all employees should feel confident that they will not experience retaliation for participating in the DRS in any capacity. Moreover, because retaliation can suppress the reporting and resolution of all other substantive claims (for example, harassment), it was determined that allegations of retaliation should be given heightened scrutiny and expeditiously addressed.

2.3 *Expedited Review Process to Address Retaliation Complaints*

In the new retaliation policy, the process for correcting the consequences of retaliation is clarified. Moreover, the timeframe for conducting the review of any retaliation allegation was shortened in line with procedures adopted by several other international organizations.⁸ Under the new retaliation policy, a retaliation allegation filed within six months of the allegedly retaliatory action is undertaken by OII against a 45-day timeline. This change was instituted for the purpose of ensuring that timely remedial action would be implemented if retaliation has occurred.

Furthermore, in accordance with best practice for whistleblower protection rights to guarantee comprehensive relief when a whistleblower prevails, the new process provides: (i) whether interim protective measures should be recommended to protect the staff member; and (ii) whether there has been a retaliatory action that should be invalidated. It is worth noting that this process

6 Transparency International, 5 November 2013, 4.

7 IMF Retaliation Policy, para 1.1.

8 See, for examples, other IOs' retaliation policies providing for an expedited review: IFAD Whistleblower Protection Procedures, section 'Reporting retaliation' (ii)(b) ('Normally within 45 days of formal acknowledgement of the complaint, the Ethics Office shall provide the complainant with an indication of the expected period of time it considers reasonable and necessary to undertake the review and shall seek to complete such a review normally within 90 days of the acknowledgement'); ILO Whistleblower Protection Policy, para 9 ('The Ethics Office shall complete the preliminary review within 45 working days of the date of receipt of the complainant of retaliation'), note that ILO has since issued a new version of this rule in November 2019; UNESCO Whistleblower Protection Policy, para 19 ('The Ethics Office will seek to complete its preliminary review within 45 days of receiving the complaint of retaliation').

is separate from any related misconduct investigation that may follow to establish the personal accountability of an employee who has engaged in retaliation. Any related misconduct investigation is handled in accordance with the Fund's general rules on misconduct.

2.4 *Higher Standards of Proof*

The IMF retaliation policy was also amended to reflect best practices in terms of the standards of proof that apply to the initial review of allegations of retaliation. While the standard of review in the disciplinary context has not changed, there is a change in the context of the initial expedited review by OII to determine if corrective measures are needed.

2.4.1 Reversed Burden of Proof

In the context of the initial expedited review by OII, the new policy places the burden of proof on the IMF, consistent with the importance the organization places on considering immediate interim corrective measures. This change is also aligned with the recognized practice in the administrative resolution of retaliation cases implemented by comparable international organizations. For example, the African Development Bank (AfDB) Group, the Asian Development Bank, the Inter-American Development Bank (IDB), the United Nations Office for Project Services and others have followed this standard.⁹

9 See, for examples, other IOs' retaliation policies where the burden of proof rests with the organization: AfDB Group Whistleblowing and Complaints Handling Policy, para 6.6.7 ('Where Bank Personnel can show evidence that prior to the alleged Retaliation, the Bank Personnel had reported or was in the process of reporting an instance of Fraud, Corruption or any other Misconduct to the Hotline, Auditor General or the Division, or pursuant to any other reporting mechanism provided under this Policy, such Bank Personnel shall be deemed to have satisfied the minimal burden of proof. The burden of proof shall then shift to the Bank to prove by clear and convincing evidence that the action taken by the Bank against such Bank Personnel was for separate and legitimate reasons, and not in reprisal or Retaliation for the malpractice reported by the Bank Personnel'); ADB Whistleblower and Witness Protection Policy, para 6.5 ('If OAI determines that there has been Retaliation against a staff for having report a suspected Integrity Violation or Misconduct or for having cooperated with an OAI investigation and that the Staff's action related to the investigation was a contributory factor in the Retaliation, the burden of proof will shift to ADB to show by clear and convincing evidence that the same action would have been taken in the absence of the Staff's report or cooperation'); IDB Whistleblower Reporting and Protection Policy, para 13 'Where an employee has made a prima facie case of Retaliation for having acted as a Whistleblower (i.e., by showing that s/he is a Whistleblower, as defined herein, and that s/he has a reasonable belief that his/her having acted as a Whistleblower was a factor in a subsequent adverse employment action, the burden of proof would then shift to the Bank to show by clear and convincing evidence that the

Under the new IMF retaliation policy, when a staff member complains of alleged retaliation, the organization bears the burden to demonstrate that the same adverse action would have been taken for separate and legitimate reasons.¹⁰ This reversed burden of proof standard makes good practical sense in several ways: (i) it calls the organization to account because the organization has far better access to evidence of the reasons for the action taken, since the evidence is inherently owned and held by the organization and (ii) the negative consequences of not effectively addressing retaliation—discouraging employees from raising concerns and using the DRS—are considered to outweigh the negative consequence of mistake in unwarranted reversal of an administrative action based on an erroneous conclusion it was retaliatory and unjustified.

2.4.2 Standard of Proof: ‘Clear and Convincing Evidence’

In addition to reversing the burden, also a higher standard of proof by “clear and convincing evidence” was adopted for OII’s review of retaliation allegations against the organization (as compared to the preponderance of evidence standard that applies in the disciplinary context at the IMF).¹¹ In accordance with the new IMF retaliation policy,¹² during the expedited review of a retaliation allegation, OII will “consider whether there is clear and convincing evidence” to support a finding “that the same employment action taken by the organization would have been taken, for separate and legitimate reasons, even in the absence of the complainant’s protected activity”. If the standard for clear and convincing evidence has not been met, then it will be concluded that retaliation has occurred, and a recommendation will be made to management for remedial action.

The new wording of the IMF retaliation policy establishes that, when reviewing retaliation allegations as opposed to investigating misconduct, OII will assess evidence in a manner that is much more favorable to the

same employment action would have been taken absent the Whistleblowing’); UNOPS Protection Against Retaliation Policy, para 2.2 (‘The present OI is without prejudice to the legitimate application of regulations, rules and administrative procedures, including those governing evaluation of performance, non-extension or termination of appointment. However, the burden of proof shall rest with UNOPS to demonstrate by clear and convincing evidence that it would have taken the same action absent the protected activity [...] or that the alleged retaliatory action was not taken for the purpose of punishing, intimidating or injuring the individual who engaged in the protected activity’).

10 IMF Retaliation Policy, para 4.3.

11 IMF Staff Handbook, ch 11.02, para 5.9.

12 IMF Retaliation Policy, para 4.3.

complainant. When deciding a dispute over the IMF's response to retaliation allegations as opposed to disciplinary action, the IMF Grievance Committee and Administrative Tribunal will apply their own standards of review. Because the IMF Administrative Tribunal (IMFAT) has not yet had the occasion to examine retaliation cases under the new retaliation policy, there is no guidance available yet on its application of the Fund's retaliation policy and of the standards of proof.

2.5 *Mandatory Duty for Managers to Act upon, Resolve, and/or Report Ethical Concerns*

During the review of the IMF's retaliation policy, a specific duty for managers to "to act upon, resolve, and/or to report ethical concerns" was retained.¹³ While the whistleblower policies of all comparator international organizations benchmarked during this exercise have a duty to report misconduct, there is wide diversity in the scope of this duty. For example, the IDB's whistleblower policy mandates that, "Supervisors, as defined herein, have a duty to report any misconduct, including suspected misconduct reported to them by others".¹⁴ Other comparators have gone even further, placing a duty to report on all employees. This is the case with the United Nations Secretariat's policy, which includes a "duty of staff members to report any breach of the Organization's regulations and rules".¹⁵ Comparable language can be found in the policy of the AfDB Group's, which provides that, "Bank personnel are required to disclose acts related to fraud, corruption, or any other misconduct that come to their attention".¹⁶ The IMF appears to be unique in requiring its managers to both resolve and report wrongdoing. The mandatory duty for managers will be further examined below in Section 4.

3 **The Purpose and Origins of the Manager's Duty to Resolve or Report Misconduct**

The following section will address: (i) the manager's duties of care and loyalty; (ii) the manager's duty to report and/or resolve and (iii) the legal force of the duty to report.

¹³ IMF Staff Handbook, ch 11.01, s 11, para 11.4.

¹⁴ IDB Whistleblower Reporting and Protection Policy, para 4.1 (emphasis added, capitalization of terms omitted).

¹⁵ UN Secretariat Protection Against Retaliation Policy, para 1.1.

¹⁶ AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1 (capitalization of terms omitted).

3.1 *The Manager's Duties of Care and Loyalty*

The duty of IMF managers to resolve or report ethical concerns that come to their attention is grounded in the common law of agency, under which a paid agent is subject to the duty to act with care and to be loyal to the principal.¹⁷ Similar duties of loyalty are implied into employment contracts in certain civil law jurisdictions as well.¹⁸ These duties encompass the corollary duty of an agent to disclose to the principal information that is relevant to the affairs entrusted to the agent.¹⁹ In the employment context, these duties are commonly invoked as prohibiting self-dealing by an employee, but they also require attentive performance on the part of the employee.²⁰

In the United States (US), for example, these duties have been applied to all employees, regardless of whether they play a managerial role.²¹ However, US courts are more likely to apply higher standards of care and loyalty to managers, and especially senior managers, officers and directors, who are in positions of trust and confidence.²² These duties are implied and do not need to be included in written employment contracts. These duties also have an important practical basis. It is beneficial for the employer to require its managers to act in the employer's interest in order to limit its liability because the acts of the managers may be attributed to the employer itself.²³

3.2 *The Manager's Duty to Report and/or Resolve*

The IMF manager's duty to resolve or report wrongdoing is in line with a well-established expectation in various jurisdictions and fora that an employer should take reasonable steps to address or report certain misconduct. For example, in the case of *Mr. "F" v International Monetary Fund*, the IMF was held liable by the IMFAT when supervisors failed to take effective measures to deal

17 American Law Institute (ALI), *Restatement (Second) of Agency* 1957, ss 379 and 387.

18 Global Legal Group, March 2011, 76, 83 and 123.

19 ALI, *Restatement (Second) of Agency* 1957, s 381.

20 See generally, Grebe 2002, 1815–1828.

21 Employees are agents of their employers and owe the traditional fiduciary duties of loyalty and performance (ALI, *Restatement (Third) of Agency* 2006, s 7.07(3)(a); US District Court for the Middle District of Florida, *Aquent LLC v Mary Stapleton and Italent LLC* 2014), 1348–1349.

22 See generally, Cavico and others 2018; US District Court for the Eastern District of Pennsylvania, ED *Numeric Analytics, LLC v McCabe* 2016.

23 ALI, *Restatement (Second) of Agency* 1957, s 219(1) ('A master is subject to liability for the torts of his servants committed while acting in the scope of their employment'); US Supreme Court, *Burlington Indus v Ellerth* 1998, 759 (holding the employer vicariously liable for hostile environment created by a supervisor).

with religious intolerance and harassment in a work unit.²⁴ The manager's duty to address wrongdoing was reiterated in the IMFAT case of Ms. "GG" (No. 2) *v International Monetary Fund*.²⁵ Here, the Applicant's complaint included an allegation that the managers of her former department retaliated against her for reporting misconduct of another staff member. The Administrative Tribunal noted the special responsibilities of managers and "underscore[d] in particular the following propositions: unfair treatment may take the form of inaction as well as action; supervisors carry special responsibilities to ensure fair treatment of staff members [...]"

Likewise, in the US, a key factor in establishing an employer's liability for harassment claims by employees is whether the employer knew or should have known of the harassment but failed to take immediate and appropriate corrective action.²⁶ The US Equal Employment Opportunity Commission (EEOC) is the agency that administers and enforces federal civil rights laws against workplace discrimination. In published guidance to employers, the EEOC emphasizes the employer's responsibility to take immediate and appropriate action:

Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing

24 IMFAT, *Mr. "F" v IMF* 2005, paras 98, 100 and 122.

25 IMFAT, *Ms. "GG" (No. 2) v IMF* 2015, paras 192–195.

26 See, US Court of Appeals for the First Circuit, *Lipsett v University of Puerto Rico* 1988, 901 ('in a Title IX case, an educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it') (emphases added); US District Court for the Eastern District of Wisconsin, *Zabkowicz v West Bend Co.* 1984 (Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct); US Court of Appeals for the Fourth Circuit, *Katz v Dole* 1983, 256 (holding employer liable for hostile environment sexual harassment under Title VII if the 'employer knew or should have known of the harassment, and took no effectual action to correct the situation'); US Court of Appeals for the Seventh Circuit, *Hunter v Allis-Chalmers Corp* 1986, 1421 (holding employer liable for hostile environment racial harassment under section 1981 if management level employees 'knew, or in the exercise of reasonable care should have known, about the campaign of harassment' and failed to take reasonable steps to prevent it).

anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains.²⁷

In advising employers how to appropriately handle harassment in the workplace, the EEOC also recommends that the employer “require managers and other employees with human resources responsibilities to respond appropriately to harassment or to report it to individuals who are authorized to respond”.²⁸

3.3 *The Legal Force of the Duty to Report*

Although the IMF’s retaliation policy as well as the whistleblower policies of several other IOs set forth a duty to report, it is not apparent whether that duty is merely aspirational or intended to give rise to accountability on the part of responsible employees for breach of the duty. That ambiguity may be contrasted with certain other IMF policies, including the harassment policy, which makes clear that a manager’s failure to act as prescribed may be considered a performance matter or even misconduct.²⁹

The failure to state in the policy that a breach of the duty to report may constitute misconduct probably forecloses the use of disciplinary measures to hold employees accountable for breach of the duty. But a manager’s failure to report retaliation could still be dealt with as a performance matter. By specifically articulating the IMF managers’ duty to resolve or report ethical concerns, in the IMF’s retaliation policy, the IMF has indicated the criticality of that duty to the retaliation context. Consistent with the implied duties of care and loyalty, it is reasonable to hold managers accountable through performance management for supporting the rule of law within the institution by resolving or reporting misconduct that drains resources and detracts from the IMF’s mission.

In a 2017 report, the EEOC stressed that a commitment to an inclusive and respectful workplace is not in and of itself enough. Leadership must ensure accountability mechanisms are in place. The report recommends that

27 US Equal Employment Opportunity Commission (EEOC), ‘Harassment’ (emphasis added).

28 EEOC, ‘Tips for Small Businesses’.

29 IMF Staff Handbook, Annex 11.01.2, para 5.2 (‘Failure by a manager to effectively address a situation of potential harassment of which he or she becomes aware can be seen by staff as condoning, or complicity therewith. It may also be considered a performance matter and noted in the manager’s annual performance review. An egregious failure to act, if established following an investigation, may also amount to misconduct warranting disciplinary measures’).

employers make mid-level and front-line managers responsible for their part in monitoring and stopping harassment, “including through the use of metrics and performance reviews”.³⁰ IOs could consider broader use of metrics and performance reviews to add greater force to the duty to report retaliation.

4 Aspects of the Manager's Duty to Resolve or Report Misconduct

The following section will address: (i) the proper subjects of the manager's duty to resolve or report misconduct; (ii) the standard of evidence that triggers the duty; (iii) the action the manager is required to take; and (iv) who is required to act.

4.1 *What are the Proper Subjects of a Manager's Duty to Resolve or Report Misconduct?*

While all the comparator international organizations benchmarked during the exercise to reform the IMF's retaliation policy have a duty to report misconduct included in their whistleblower protection or retaliation policies, the subject of this duty is not always clear and varies across organizations. The IMF's retaliation policy requires IMF managers to resolve or report “ethical concerns that come to their attention”.³¹ It is unclear whether the term ‘ethical concerns’ covers the more common and weighty concepts of ‘breach of rules’ and ‘misconduct’ or is meant to require the reporting or resolution of even mere ‘concerns’. Moreover, this language is sufficiently vague to cover all subject matters, including subjective perceptions of bullying and discriminatory behaviors in any context. Yet, this duty is found only in the IMF's retaliation policy, indicating perhaps that the duty to report and resolve is limited to ‘ethical concerns’ however defined, solely in connection with retaliation.

Several other international organizations' whistleblower policies require reporting of suspicions of wrongdoing and breach of the rules, while still other organizations attempt to specify the precise wrongdoing to be reported, such as fraud or corruption.³² This specificity is also provided in other IMF policies

30 National Sexual Violence Resource Center (NSVRC), 20 October 2017, 8–9.

31 IMF Staff Handbook, ch 11.01, s 11, para 11.4.

32 See, for examples, other IOs' description of reportable subjects: UNESCO Whistleblower Protection Policy, para 2 (‘All staff members have a duty to report any breach of the Organization's regulations and rules to officials whose responsibility it is to take appropriate action’); WHO Whistleblowing and Protection Against Retaliation Policy, para 17 (‘WHO staff members have a duty to report suspicions of wrongdoing. Individuals who report such cases in good faith are entitled to protection against retaliation in accordance with

such as its harassment policy which requires the IMF manager to address or report “complaints of harassment, or harassment of which they otherwise become aware”.³³

Where the universe of matters mentioned to be reported may be vague, managers arguably have an implicit duty to resolve or report anything and everything within their ambit that could harm the employer. Such a broad and persistent duty may be impractical, and risks diluting the duty to report or resolve. Moreover, the consistent performance by managers of such a broad and persistent duty could impact staff morale by creating an informant culture. This in turn could discourage employees from disclosing substantive misconduct that could harm the institution and so undermine the purpose of the duty to report or resolve. It would appear then, that a manager’s duty to report

the provisions of this policy’); ADB Whistleblower and Witness Protection Policy, para 4.1 (‘As provided in AO 2.02, Staff have the duty to report any suspected Integrity Violation or Misconduct to OAI’); AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1:

In line with the Code, Rules, and Code of Conduct, Bank Personnel are required to disclose acts related to Fraud, Corruption, or any other Misconduct that come to their attention. Similarly, in line with the Bank’s Good Governance policy, the Bank requires its Development Partners and Stakeholders to disclose acts of Fraud, Corruption and Misconduct including such acts that involve Bank Personnel and/or Bank Projects as well as actions that undermine operations and mission of the Bank. The typical disclosures thus required of Bank Personnel and concerned Third Parties include, without limitation, the following:

4.1.1 Unlawful acts or orders requiring violation of a law, gross waste, mismanagement, abuse of authority, substantial and specific dangers to public health or safety;

4.1.2 Failures to comply with statutory obligations in host countries, duty stations, or countries of assignment;

4.1.3 Fraud, which means any act or omission, including a misrepresentation, that knowingly and recklessly misleads, or attempts to mislead, a party to obtain financial or other benefit or to avoid an obligation;

4.1.4 Corruption, which means the offering, giving, receiving, or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party;

4.1.5 Misconduct, which means failure by Bank Personnel to observe the Bank’s rules of conduct or standards of behavior;

4.1.6 Coercive practices, which mean impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

4.1.7 Collusive practices, which mean an arrangement between two or more parties designed to achieve an improper purpose, including influencing improperly the actions of another party; and

4.1.8 Any other activity which undermines the Bank’s operations and mission.

33 IMF Staff Handbook, Annex 11.01.2, para 5.2.

should strike a balance by mandating the reporting or resolution of certain substantive kinds of wrongdoing only in order to be effective.

4.2 *What Standard of Evidence Triggers the Duty?*

The effectiveness of the manager's duty to report or resolve rests in part on the standard of evidence that triggers the duty. On the one hand, requiring the manager to have firsthand knowledge or tangible evidence of a wrongdoing could have a cooling effect and discourage the manager from reporting or addressing a legitimate issue that may exist. On the other hand, if the standard of evidence is mere 'suspicion' or 'ethical concerns that come to their attention' the volume of matters reported could be excessive and detract resources from the more significant instances of wrongdoing.

As a practical matter, information concerning employee wrongdoing often comes to the attention of the manager as hearsay rather than from the manager's own observation or other direct evidence.³⁴ As a rule, courts in common law countries typically exclude hearsay evidence because it is potentially unreliable and is not subject to cross-examination.³⁵ As a result, there is a misunderstanding that any hearsay statement is inherently untrustworthy. In fact, many exceptions to the hearsay rule have developed over time in common law legal systems, in cases where the evidence is deemed sufficiently trustworthy.³⁶ By comparison, a less restrictive approach to hearsay evidence is generally taken by civil law legal systems, wherein hearsay is admissible in principle and its origins considered for purposes of attributing its probative weight.³⁷ This tolerance of hearsay evidence may be attributed to the limited reliance on juries in civil law jurisdictions and a high confidence in the ability of professional judges to properly weigh any unreliable or inappropriate evidence.³⁸ Among international courts and tribunals as well, there is generally no prohibition against hearsay evidence.³⁹

In the context of a manager's duty to resolve or report, hearsay evidence is not being used to make a final determination or convict a wrongdoer. Instead,

34 Black's Law Dictionary defines 'Hearsay' as 'testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others'.

35 See generally, Evans 1974, 261–301; Donnelly 1956, 455–483.

36 For exceptions to the hearsay rule in US federal courts, see US Federal Rules of Evidence, rr 801–807.

37 See generally, Maffei 2012; Blumenthal 2001, 93–116.

38 Blumenthal 2001, 99.

39 ILOAT, *Y. G. v FAO* 2009, consid 17; ILOAT, *Italo Danilo Coitinho Fraquelli v UNIDO* 2001, consid 17(d); UNDT, *Applicant v Secretary-General of the UN* 2013, para 43.

it provides information for the manager to further investigate and may lead to other relevant evidence. Furthermore, because determinations about the veracity or credibility of the hearsay evidence can be made in due course, it would be premature to exclude hearsay evidence from the manager's duty to report or resolve.

4.3 *What Action is Required?*

Under the IMF's retaliation policy, the IMF manager is required to take action in connection with ethical concerns by acting upon, resolving or reporting (or a combination of all three) the matter. This includes basics such as asking for clarification and additional information to ensure that the question or concern raised is fully understood, consulting as needed with superiors to address the issues raised, and following up as soon as possible with the employee who raised the concern.⁴⁰

The IMF manager's two-fold duty appears to go further than the comparator international organizations reviewed during the IMF's benchmarking exercise. Where the organization specifically identifies the manager's role in its whistleblower protection or retaliation policy, the requirement is to report only.⁴¹ However, the requirement that the manager act or report misconduct is not uncommon in the private sector workplace.⁴² The duty to act in response to wrongdoing is also recognized by the IMFAT in the case of *Ms. "GG" (No. 2) v International Monetary Fund*, where the tribunal noted that the plaintiff's reporting of wrongdoing was consistent with a manager's "special responsibility to ensure fair the treatment of staff members" and duty under the IMF's Discrimination Policy to "create and maintain a supportive and encouraging work environment for all employees and take all reasonable actions necessary to prevent and address undesirable or inappropriate behavior".⁴³

It may be that organizations that require managers, as well as other employees, to report misconduct through established reporting mechanisms and human resource or ethics officials, have determined that such potentially sensitive matters are best handled by trained professionals. However, this approach arguably disempowers the manager who is closer to the front line where the

40 *EEOC, 'EEOC Enforcement Guidance', 25 August 2016, pt v(B).*

41 IDB Whistleblower Reporting and Protection Policy, para 4.1.

42 See *EEOC, 'EEOC Enforcement Guidance', 25 August 2016, pt v(B)*; and NSVRC, 20 October 2017, 12, for recommendations by the EEOC that managers and supervisors be trained how to effectively respond to harassment and retaliation claims that they observe or that is reported to them, of which they have knowledge or information, or report the matter, even before it reaches a legally actionable level.

43 IMFAT, *Ms. "GG" (No. 2) v IMF* 2015, paras 193 and 195.

matter arose, and who may be more attuned to various imperatives that could facilitate informal resolution. Where the manager is empowered to act to address a wrongdoing, it is critical that the manager be properly trained.⁴⁴ In resolving or reporting the wrongdoing that has come to their attention, IMF managers are also expected to be familiar with the retaliation and other relevant policies, to be vigilant for signs of retaliation against the reporting employee and, subject to their own obligations to report the matter to the designated human resources or ethics officials, they are expected to handle the matter discreetly and maintain its confidentiality.

4.4 *Who Must Act?*

The whistleblower policies of many of the benchmarked IOs contain broad obligations on all employees to report wrongdoing.⁴⁵ The only action required of reporting employees under these policies is participation in investigations or dispute resolution processes as requested. The other international organizations that separately require managers to report do not also require them to act to resolve the matter, as does the IMF. As noted above, the restriction of an employee or manager with knowledge of wrongdoing to reporting only, has the benefit of ensuring that potentially sensitive matters are properly handled by trained professionals.

The approach taken in the IMF's retaliation policy also values this benefit, as indicated by the manager's ability to report the matter to human resource or ethics professionals at any point. It also seeks the advantage of an earlier resolution provided by the managers' ability to themselves address and resolve disputes. In this regard, the managers are the first of three lines of defense in mitigating the risks of employee wrongdoing as they are positioned all across the

44 See note 42, noting that the EEOC advises employers to allocate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment and retaliation complaints.

45 See, for examples, other IOs' retaliation policies containing an obligation on all employees to report wrongdoing: AfDB Group Whistleblowing and Complaints Handling Policy, para 4.1 ('In line with the Code, Rules, and Code of Conduct, Bank Personnel are required to disclose acts related to Fraud, Corruption, or any other Misconduct that come to their attention [...]'); ADB Whistleblower and Witness Protection Policy, para 4.1 ('As provided in AO 2.02, Staff have the duty to report any suspected Integrity Violation or Misconduct to OAI'); UN Secretariat Protection Against Retaliation Policy, para 1.1 ('It is the duty of staff members to report any breach of the Organization's regulations and rules to the officials whose responsibility it is to take appropriate action. An individual who makes such a report in good faith has the right to be protected against retaliation'); WHO Whistleblowing and Protection Against Retaliation Policy, para 17 ('WHO staff members have a duty to report suspicions of wrongdoing').

organization and well placed to serve this role.⁴⁶ The second line of defense is the trained and experienced professionals administering the informal DRS, including the ombudsman and the investigator. The internal audit function and the Administrative Tribunal are the third line of defense. This risk model provides for mutually reinforcing roles within the organization, where each line looks at risk from its unique perspective and the work of each complements and reinforces that of the others.

5 Further Considerations for IOs When Formulating a New or Improving an Existing Retaliation Policy

Each international organization has its own mission, structure and organizational culture. Inevitably, given the diversity of IOs, organizations will resort to different approaches to an effective anti-retaliation program, and it is not the intention of this chapter to advocate for a single 'best' practice. There is a range of best practices.

Some best practice standards for formulating new and improving existing whistleblower protection, as a subset of retaliation policy, have been collected by Transparency International under a list of international recognized principles.⁴⁷ There is a guiding principle for,

protected individuals and disclosures all employees and workers in the public and private sectors need: (i) accessible and reliable channels to report wrongdoing; (ii) robust protection from all forms of retaliation and (iii) mechanisms for disclosures that promote reforms that correct legislative, policy or procedural inadequacies, and prevent future wrongdoing.⁴⁸

In addition to this guiding principle, the following practices are identified by Transparency International: the employer should (i) ensure preservation of confidentiality ("the identity of the whistleblower may not be disclosed

⁴⁶ See generally, The Institute of Internal Auditors (IIA), January 2013: 'The Three Lines of Defense' is an audit risk model that provides a coordinated approach to risk management by organizing the groups responsible for managing the organization's risks and controls into three levels or 'lines of defense'. While it does not map precisely to the IMF anti-retaliation program, the model nonetheless provides a useful framework for identifying the roles and responsibilities of key stakeholders within the program.

⁴⁷ Transparency International, 5 November 2013, 4.

⁴⁸ Ibid.

without the individual's explicit consent"); (ii) have the "burden of proof on the employer"; (iii) guarantee personal protection for whistleblowers "whose lives or safety are in jeopardy"; (iv) maintain "whistleblower regulations and procedures [that are] highly visible and understandable"; (v) ensure "timely and independent investigations of whistleblowers' disclosures"; (vi) provide for a "full range of remedies [covering] all direct, indirect and future consequences of any reprisals, with the aim to make the whistleblower whole" including "interim and injunctive relief; attorney and mediation fees; transfer to a new department or supervisor; compensation for lost past, present and future earnings and status; and compensation for pain and suffering" and (vii) develop and offer comprehensive whistleblower training "for public sector agencies and publicly traded corporations and their management and staff".⁴⁹

Another consideration for IOs, as intergovernmental institutions, are the positions of its member States. For example, international financial institutions know well that the US Treasury is required by law to instruct its Executive Directors of each institution that it is the policy of the US that each institution effectively implement and enforce policies and procedures which reflect best practices for the protection of whistleblowers from retaliation.⁵⁰ Although this advocacy by the US was not the proximate cause of the IMF's own review of its retaliation policy, the US policy informed the process.

Among other things, the US Treasury advocates for "(i) protection against retaliation for internal and lawful public disclosure; (ii) legal burdens of proof, (iii) statutes of limitation for reporting retaliation, (iv) access to independent adjudicative bodies, including external arbitration; and (v) results that eliminate the effects of proven retaliation".⁵¹ With regard to the legal burdens of proof requirement, the US Treasury advocates for a 'clear and convincing' burden on the organization. In particular, if the complainant sufficiently alleges that an adverse action occurred because of lawful whistleblowing, the organization must prove by clear and convincing evidence that it would have taken the same action for independent reasons regardless of the protected activity.

The US policy also requires access to independent adjudicative bodies. This with the aim of guaranteeing an independent due process. Also, the US policy calls for comprehensive relief when a whistleblower prevails; this is also required under the US law. Any retaliation policy should require that the effects of retaliation be eliminated (namely, that the retaliatory action and all its consequences be invalidated). Another requirement under the US standard is that

49 Ibid, 5, 6, 7, 9 and 10.

50 Consolidated Appropriations Act (US), s 7029.

51 Ibid, s 7048(b).

international financial institutions implement a best practice statute of limitations for reporting retaliation. According to best practices for national and international organizations whistleblower policies, six months is the minimum functional statute of limitations for whistleblowers to become aware of or act on their rights. Although, one-year statutes of limitations are consistent with common law rights and may be preferable.

6 Conclusion

An effective anti-retaliation program is crucial for protecting the rights of international civil servants and the operation and integrity of the international organization's dispute resolution system. In the IMF's experience, a key feature of an effective anti-retaliation program is the manager's special duty to resolve or report policy violations. Placing this obligation on the organization's leadership at senior levels best ensures an anti-retaliation organizational culture. This is particularly true where the duty is made effective by properly training managers to respond to retaliation claims or report the matter at the earliest opportunity and holding them accountable in this regard. Still, there are several aspects of this duty that remain to be clarified at the IMF and to be determined by any other IOs intending to adopt this duty, including (i) the precise wrongdoings to be addressed; (ii) the standard of evidence that triggers the duty and (iii) the specific actions required of the manager to resolve or report the wrongdoing. While IOs should tailor their own approaches to prevent and address retaliation given their diverse structures and cultures, the IMF's experience to date indicates that the manager's special duty to resolve or report retaliation is important for an organizational culture that is committed to preventing retaliation.

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