

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 3  
(8 January 1994)

Tay Sin Yan  
v.  
Asian Development Bank

E. Lauterpacht, Chairman  
F.P. Feliciano, Member  
M.D.H. Fernando, Member

## A. Preliminary

1. Mr. Tay Sin Yan (the "Applicant"), Senior Project Engineer, Level 6, Power Division (West), Energy and Industry Department ("EID"), filed on 1 October 1992 an Application against the Asian Development Bank (the "Bank" or the "Respondent") seeking remedies in respect of the wrong which he asserts was committed by the Bank in rejecting his request for correction of certain errors in his performance evaluation records.

## B. Basic facts and contentions

2. The Applicant entered the Bank's employment on 14 August 1980, on a fixed-term contract of three years, as Project Officer (Loan Administration) in the Central Projects Services Office. The appointment of the Applicant was confirmed on 14 August 1981. On 1 August 1982, the Applicant was promoted to Senior Project Engineer, Level 5, and was re-assigned from the Central Projects Services Office to the Industry and Development Banks Department ("IDBD"). The fixed-term appointment of the Applicant was converted into a regular appointment on 14 August 1983. The Applicant was promoted to Senior Project Engineer, Level 6, effective 1 April 1984.

3. In his Application, the Applicant states that the Bank is obliged to maintain "fair, impartial and transparent personnel policies and practices" in general and, in particular, "to correctly administer and implement the performance review and promotion processes as set out in Administrative Order No. 2.11." He claims that the Bank failed "to properly follow the procedure in undertaking the performance review" and also failed to reflect "the correct performance rating for the three years (1987 - 89) in Applicant's personnel record." The relief sought by him consists of (a) setting aright the erroneous record; (b) payment of the due merit increases and associated salary adjustments; as well as (c) compensation for damages suffered. He also asks for "unspecified compensation" for loss of certain opportunities for future career development and consultancies, as well as loss of social standing and esteem among colleagues, friends and relatives, with resulting mental anguish.

4. The Applicant alleges that there was a widespread but unofficial practice of "sharing" the available employee awards in the Bank among as many deserving employees as possible. One such employee award consists of "Distinguished" performance ratings (or "A" ratings), which carry with them a corresponding merit pay increase. Such performance ratings were recommended for some deserving Bank personnel. Because such ratings were strictly rationed by the Bank, a second category of employee awards, namely, recommendations for promotions, especially promotions on a PIO (Present Incumbent Only) basis, from one level to another,

tended to be given to other deserving employees who would otherwise have been given "A" performance ratings.

5. In the course, and as part, of this unofficial sharing of employee awards, which was designed to maintain employee morale by spreading the available awards as broadly as possible, the Applicant was informed by his Division Manager that, for the year 1987, although his performance was considered distinguished or outstanding, he was being recommended not for a "Distinguished" merit pay increase, but rather for "the higher recommendation of promotion from Level 6 to Level 7." The Tribunal notes in passing that the words "higher recommendation" do not reflect any provision in Administrative Order No. 2.04 or any other pertinent Bank regulation but appear to refer to the more desirable nature of a promotion, socially and financially speaking, than a "Distinguished" performance rating.

6. The Applicant states that he was given clearly to understand that for the year 1987 "he was adjudged the most deserving officer in the Division" and was being recommended for promotion on the basis of his "outstanding performance"; that, however, he was advised that it would be "too much" if he got both the promotion and the "Distinguished" performance rating with the associated merit pay increase at the same time; and that it would be "appropriate" for him to "share" the monetary rewards of outstanding performance with other deserving officers in the Division. The Applicant goes on to state that as a trusting and cooperative officer he did not make an issue of the matter. In respect of each of the years 1988, 1989, 1990 and 1991, the Applicant claims that the recommendation for his promotion to Level 7 on a PIO basis was in recognition of his distinguished or outstanding performance. The promotion did not, however, materialize, "staff position constraints" being given each time as the reason.

7. In 1992, upon inquiring why he had not been promoted despite repeated recommendations, the Applicant learned that in his Performance Evaluation Reports ("PER") for each of the years 1987, 1988 and 1989, his final rating given by his Department Head was not a "Distinguished" ("A") performance rating but rather a "Fully Satisfactory" ("B") rating. In his PER for the year 1990 the overall performance rating given to the Applicant by his Department Head was a "Distinguished" ("A") rating and at the same time he was recommended for a PIO promotion. For the year 1991 he was again given by his Department Head a "Distinguished" ("A") performance rating and also a recommendation for a PIO promotion; however, his "A" rating was subsequently downgraded by the Bank's Budget, Personnel and Management Systems Department ("BPMSD") to a "Fully Satisfactory" ("B") rating. The Applicant adds that he was never advised of the final ratings given him by the Department Head until after he had lodged a grievance claim with the Bank on 20 March 1992 and that, before that time, he had not been given access to his personal record in the Bank of which his PERs formed part.

8. The Applicant states his belief that the repeated recommendations for his promotion to Level 7 on a PIO basis were unavailing because the Bank, through BPMSD, had been using the number of "A" performance ratings as the principal or dominant criterion for the grant of promotions on this basis and because his PERs for the years 1987 through 1990 erroneously reflected only one "Distinguished" ("A") performance rating.

9. The Applicant therefore asks for correction of his 1987, 1988 and 1989 PERs where he believes he was underrated in order to allow other deserving officers to get "A" merit pay increases. He contends that his PERs were rated on the basis of "improper motivation", that is, as part and parcel of the unofficial practice of sharing the available employee awards - a practice which worked unfairly and prejudiced him since he wound up without either an "A" merit pay increase or a PIO promotion to Level 7. He also claims that the unofficial sharing practice,

although well-intentioned, constituted an administrative "irregularity" or "abnormality" and a violation of the proper procedure and standards relating to the performance evaluation system which the Bank had set out in its Administrative Order No. 2.04 relating to "Salary Administration" (for the relevant provisions of which, see paragraph 22 below) resulting in "arbitrary and discriminatory action." The Applicant finally contends that the BPMSD was applying as the dominant criterion in the granting of PIO promotions the number of "A" performance ratings secured by a recommended staff member even before the issuance in 1991 of the Bank's Personnel Handbook for Professional Staff. This Handbook, in its Section 5.3.4, sets out as one of the requisites for consideration for PIO promotion, a "Distinguished" performance rating for at least three of the last preceding five years. This requirement, which was stated to take effect only from 1 April 1991, was, in other words, applied secretly in previous years, without disclosure to the Bank's professional staff.

10. The Bank, for its part, stresses that at all material times evaluation of the performance of professional staff was undertaken at both divisional and departmental levels. The Division Manager recommended a performance rating, subject to the approval of the Department Head. The final performance rating was recommended by the Department Head in accordance with the guidelines issued by BPMSD. This recommendation was reviewed by BPMSD and the Vice-President concerned, in consultation with the Department Head, to ensure that it reflected BPMSD guidelines. These guidelines included the quantitative restriction that "[f]or the Bank as a whole, the distribution of distinguished performance citations should not exceed about 15% of staff included in the program."

11. The approval of recommendations for PIO promotion was subject to even more rigorous quantitative limitations. The recommendations for PIO promotion from Level 6 to 7 were ranked. For 1988, the Applicant was ranked fourth of the four recommendees of the IDBD for PIO promotion to Level 7; for 1989, the Applicant was ranked second of the two recommendees of the EID; for 1990, the Tribunal has no information; for 1991, the Applicant was ranked second of the three recommendees of the EID. For 1991, only the first ranked recommendee was approved by the Bank while promotions for the second and third were not.

12. The Bank, in disputing the Applicant's claim that his performance was considered distinguished or outstanding, relies heavily, indeed exclusively, upon the Applicant's PERs. Those records show that for the years 1987, 1988, 1989 and 1990, he was given a "Distinguished" ("A") performance rating only once (for the year 1990) and that for the other years he was rated "Fully Satisfactory" ("B") by his Department Head.

13. The Bank explicitly denies that the approval of recommendations for PIO promotions was based on secret criteria as it does that the new criterion (of least three "Distinguished" performance ratings for the last five years) in the Handbook were in fact applied prior to April 1991. The Bank states that Department Heads had recommended PIO promotions for personnel who did not have three "A" performance ratings and such recommendations had been approved although those recommended did not satisfy the new criterion. The Bank has also expressly denied that lack of three "Distinguished" ratings was the reason why the Applicant was not promoted to the position of Manager, Power Division (East). The Bank maintains that he was not promoted for reasons relating to the ranking which the EID had given him in its list of recommendees for promotion and the tight curtailment of the number of approved PIO promotions.

14. The Bank contends that it cannot change the actual performance ratings given by the Department Head in the Applicant's PERs without compelling proof of improper motivation or

arbitrariness, and that such proof has not been presented by the Applicant in this case. Both his Division Manager and Department Head had recommended him for PIO promotion every year from 1987 through 1991 and no improper motivation, in the sense of mala fides, on the part of his Manager and Department Head had been shown by the Applicant. The Bank also rejects the claim of arbitrariness on the part of its Management in failing to approve the repeated recommendations for the PIO promotion of the Applicant, not only on the basis of strict rationing of those promotions but also on the much broader grounds that, first, the President of the Bank may accept, reject or modify recommendations for promotions and, second, the President may grant promotions to fewer people than deserve it and thereby "keep a hierarchy of staff members within a category." Finally, the Bank submits that the Applicant had no legal right to a promotion, since "promotion is not mandatory, even if warranted."

15. The Tribunal considers that the issues it must resolve may be reduced to the following:

- a. Has the Applicant adequately proved the unofficial practice he asserts was followed concerning the sharing of the available employee awards?
- b. Assuming that the Applicant has proved the existence of that unofficial practice, what, if any, relevant legal consequences follow?

Although the parties have raised other issues, they are not dispositive of this case and the Tribunal need not deal with them.

### **C. The question of proof of the Applicant's basic factual contention**

16. Addressing the first issue, the Tribunal notes that the Applicant has submitted several items to document the asserted existence of the unofficial sharing practice. The first item is a memorandum dated 19 February 1992 written by the Applicant's Supervisor, the Division Manager, EIPW, and addressed to the Division Manager, BPHR. In this memorandum, the Applicant's Division Manager sought to draw attention to "an administrative mix-up" which had resulted in the performance ratings of the Applicant being "recorded wrongly in the last few years." This memorandum should be quoted in extenso:

"2. In the past four performance evaluation exercises (January 1988, January 1989, January 1990 and January 1991), Mr. Tay's performance was rated outstanding each time but, except in the January 1991 exercise, in lieu of a distinguished merit increase, he was given the higher recommendation of promotion from level 6 to 7. In the January 1991 exercise, as a safeguard against the repeated lack of response to the recommendation to promote Mr. Tay from level 6 to 7, he was recommended both for distinguished merit increase as well as for a special effort to be made for his promotion from level 6 to 7 to be acted upon.

3. Until 1991, I have all along been given to understand that staff position constraint was the reason for not allowing the repeated recommendation for Mr. Tay to be promoted from level 6 to 7 to take place. However, the Personnel Handbook for Professional Staff issued in April 1991 indicated, for the first time ever, that for PIO promotion to take place, the candidate must have a distinguished performance rating for at least three of the last five years. Such a requirement was never made known before and it was obvious that Mr. Tay was unwittingly disadvantaged when he was given what was clearly intended as the higher recommendation for promotion from level 6 to 7 in lieu of a distinguished performance rating.

4. It is only fair to Mr. Tay that the record be put straight; and, to avoid jeopardising his chances for consideration for upgrading and promotion, I request that the record be amended to show that he has had a distinguished performance rating in each and every year from 1987 to 1990, both years inclusive." (Emphasis supplied).

17. The second item is another memorandum dated 28 May 1992 addressed by the Applicant's Supervisor, the Division Manager, EIPW, to the Deputy Director, BPMSD, on the subject of: "Performance Ratings - Grievance [of] Mr. Tay Sinyan, Sr. Project Engineer, EIPW." This memorandum explicitly confirms the existence of the unofficial practice that the Applicant has referred to, and also needs to be quoted at length:

"For many years, a procedure has been informally but broadly adopted throughout the Bank which has divided the very few available 'distinguished' ratings and recommendations for promotion between as many staff as possible. Typically those staff recommended for promotion were not simultaneously given 'distinguished' ratings, and vice versa. This was aimed at sharing the awards and improving the morale of as many staff as possible. Prior to each annual performance review, the Director and Deputy Director EID would call a meeting with EID Managers to discuss the recommendations for these awards. This division of awards was freely discussed and fully endorsed by the Director, and I presumed also by BPMSD since to my knowledge no comment was ever received questioning recommendations for promotion without concurrent 'distinguished ratings.'

It is from this procedure that Tay Sinyan's grievance stems. You will note from the accompanying memoranda that in almost all cases his performance has been described as 'outstanding' but he has been denied 'distinguished' rating only since these are strictly rationed such that an individual's share of such ratings depends not on his performance alone but also on how many other competing staff in the division also merit this award in any given year. (For example, an outstanding staff member in a weak division could expect to get a much greater number of 'distinguished ratings' than an equally talented staff member in a strong division).

You will note that in my memorandum of 9 January 1990 (attached), I specifically recommended that Mr. Tay Sinyan be alternatively awarded a 'distinguished rating' if his PIO promotion was not approved. EIPW has been fortunate in having a succession of very strong professional staff (e.g. Tay, [five other names]). If the provisions of Personnel Handbook for Professional Staff, para. 5.3.4 requiring 'distinguished' performance for at least three of the last five years had been followed in the case of Tay Sinyan, this biased award of distinguished ratings would have deprived others unfairly with a seriously negative effect on morale. In any event, this policy was not made known to Managers until 1 April 1991 when the ADB Personnel Handbook was issued." (Emphasis supplied).

18. The third item presented by the Applicant consists of the statement made by the same Manager, EIPW, in the Applicant's PER for the period from April 1991 to April 1992, under the heading "Additional Comments":

"The ratee's performance has consistently been rated 'distinguished' in the past five years. However in the years of evaluation between 1988 and 1990, he was accorded in lieu of a distinguished merit increase, the higher recommendation for promotion from level 6 to 7.

Mr. Tay Sin Yan is again strongly recommended for promotion to Level 7. His overall performance is rated as 'exceptional.' " (Emphasis supplied).

This recommendation was concurred in by the Deputy Director, EID, who may have been acting in lieu of the Department Head.

19. The fourth item consists of the statement made by the Deputy Director, EID, then acting as the Department Head, in the Applicant's PER for the year 1989. This statement follows:

"Part 4: Overall Performance Rating and Comments of Department/ Office Head.

	Distinguished	x	<b>Fully Satisfactory</b>		Marginal		Unsatisfactory
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I fully endorse the evaluation of the rater. It is strongly recommended that Mr. Tay be promoted to Level 7 on a PIO basis in view of his excellent performance during the past seven years as Sr. Project Engineer (Level 6) and his capacity to assume managerial functions in the absence of the Manager. (Emphasis supplied).

The Tribunal observes that the reference made by the Deputy Director, EID, to the Applicant's "excellent performance during the past seven years as Sr. Project Engineer (Level 6)" was made notwithstanding the "Fully Satisfactory" performance rating given to the Applicant in his PERs for 1987, 1988 and 1989. The Tribunal finds it difficult to reconcile the Deputy Director's description of the Applicant's performance as being "excellent" for the past seven years with the simultaneous identification of that same performance, by the "X" in the box on the same page, as being merely "Fully Satisfactory", unless such identification is viewed as part of the unofficial practice of distributing employee awards among as many as possible.

20. Having regard in particular to the above four items submitted by the Applicant to prove the factual basis of his claim, and to the detailed statements made by him in his Application and Reply, the Tribunal believes that the Applicant has made out a prima facie showing of the existence of the unofficial practice of sharing available employee awards as broadly as possible, suggesting that the Bank is in some relevant way at fault (see the quotation below from de Raet). This prima facie case serves to shift to the Bank the burden of proving that the claimed unofficial practice did not in fact exist and that the "B" performance ratings actually given by the Department Head in the Applicant's PERs for the years 1987, 1988 and 1989 must be given exclusive and literal effect. As explained by the World Bank Administrative Tribunal in de Raet:

"(3) The third point is that, despite the assertion of the Applicant to the contrary, it is not the obligation of the Bank to demonstrate that there has been no discrimination or abuse of power - not, that is, until an Applicant has made out a prima facie case or has pointed to facts that suggest that the Bank is in some relevant way at fault. Then, of course, the burden shifts to the Bank to disprove the facts or to explain its conduct in some legally acceptable manner." (WBAT Reports 1989, Decision No. 85, para. 57).

21. The Tribunal is compelled to note, however, that the Bank has not submitted any proof to the contrary and indeed has not expressly denied the existence of the unofficial practice the Applicant has referred to, at any rate not its existence in the EID of which the Applicant was and remains part. Instead, the Bank has chosen to rely simply upon the actual ratings given by the Department Head in the PERs of the Applicant for the years 1987, 1988 and 1989. Those performance ratings actually set out in the relevant PERs are insufficient successfully to

discharge the burden of disproving the unofficial practice of sharing as prima facie demonstrated by the Applicant. The Tribunal believes that if the Bank had had evidence other than the PERs themselves that no unofficial practice of rationing and sharing awards had existed, it would have placed such evidence before the Tribunal. The Applicant does not, of course, deny the "Fully Satisfactory" performance ratings given to him in those PERs; what the Applicant claims is that those performance ratings were in fact understated in the context of the unofficial sharing practice followed in the EID. The Tribunal has, in other words, reached much the same conclusion as did the World Bank Administrative Tribunal in the Bertrand case:

"16. The question in this case is whether there is evidence of the operation of any of these vitiating factors. There is evidence that the Applicant and his director disagreed strongly over certain substantive policy issues and that the Applicant sharply criticized his director, just as his director in turn sharply criticized him. There is also evidence that the director on occasion praised the Applicant.

.....

20. The Tribunal concludes, in light of all these factors, including the detailed allegations and factual support presented by the Applicant in his pleas, that his case should properly be treated as one in which the burden of proof moved to the Respondent to show that Bank management acted fairly to the Applicant, rather than resting upon the Applicant the burden to show that the Bank acted unfairly. In the typical case in which the Applicant points to specific reasons for casting serious doubt upon the fairness of the Bank's selection process, it is for the Bank to dissipate this doubt by providing the facts that are readily available to it in order to show no more than that its discretion has been fairly exercised. The Bank has not attempted to discharge this burden, other than with conclusory statements relating to the content and manner of assertion of the Applicant's policy views, and the perceived superiority of other candidates for managerial positions. The Tribunal believes that these statements are insufficiently detailed to discharge the Respondent's burden of demonstrating that its decision-making process was based upon giving no more than their due weight to legitimate factors." (WBAT Reports 1989, Decision No. 81).

#### **D. Consideration of the legal consequences**

22. Having reached an affirmative answer to the first principal question, the Tribunal turns to the second issue relating to the legal consequences, if any, flowing from that conclusion. In this connection, the Tribunal observes that Administrative Order No. 2.04, which was the pertinent directive in force during the years here relevant, sets out as a "general principle" the following:

"3.3 Individual staff members will be rewarded according to the responsibility they carry, the contribution they make and the performance they demonstrate. Subject to reasonable variations that recognize difference in previous experience, length of service in the Bank, quality of performance and relevant factors, equal compensation will be provided to staff members performing comparable work.

.....

3.6 Promotion will be based on merit and capacity to assume increased responsibilities, taking into account as well length of service in the Bank." (Emphasis supplied).

The same Administrative Order, in elaborating on the performance review process, provides:

"5.1 The main basis for salary advance and promotion is on-the-job performance. A salary increase due to performance is granted selectively according to merit as demonstrated by continued satisfactory or better service to the Bank. Length of service by itself does not automatically entitle a staff member to a salary increase.

. . . .

5.3 Performance reports will be reviewed at different levels to ensure consistency, objectivity and fair assessment. Performance will be rated and reviewed on a number of factors to determine how staff members fit in certain categories of performance."  
(Emphasis supplied).

23. The manner of awarding the "Distinguished" ("A") ratings was set out in the Guidelines and Procedures for performance evaluation issued for each of the years 1987, 1988 and 1989:

"Staff whose performance has been exceptional during [the year under review] should be identified in preliminary discussions between the Department/Office Heads and the Division Managers/other Supervisors. Distinguished performance citations should relate to work involvement, contributions and achievements during [the year under review] particularly. Care should be taken to differentiate between staff who distinguished themselves and those who generally produce high standards of performance/outputs but did not necessarily distinguish themselves specifically during the year under review."  
(Emphasis supplied).

24. It is scarcely necessary to stress that the above-quoted provisions are founded on the assumption that performance evaluation must accurately reflect the staff member's level of contribution and achievement. This fundamental requirement forms part not only of the conditions of employment of all staff members of the Bank but also of fair and reasonable procedure. Any other view would render artificial and misleading the Bank's basic undertaking that salary advance and promotion shall be based on performance.

25. The Applicant, like all staff members of the Bank, is entitled to be considered for merit pay increases and for promotions, whether normal or PIO, on the basis of PERs which faithfully reflect the real or intended evaluation of the staff member concerned and which are disclosed to him (see Lindsey, ADBAT Decision No. 1 [1992], para. 38). The PERs of the Applicant for the years 1987, 1988 and 1989, however, reflect not the actual level of the Applicant's contribution and achievement but rather the informal practice of distributing employee awards as widely as possible.

26. Accordingly, the Tribunal must hold that the PERs of the Applicant for the years 1987, 1988 and 1989 should be corrected to reflect the intended final rating by the Department Head of "Distinguished" or "A" performance.

27. Administrative Order No. 2.04, as it existed during the years here relevant, as well as the annual guidelines issued by BPMSD for performance evaluation, required an objective examination of the work involvement, contributions and achievements of each professional staff member. If a staff member satisfied the criteria laid down for a "Distinguished" ("A")



performance rating, he was entitled to receive that rating. The Tribunal observes that neither Administrative Order No. 2.04 (in its successive versions) nor Administrative Order No. 2.11 (issued in April 1991) authorized the withholding of that rating on the basis of a fixed quota, whether applicable to the Bank as a whole or to each of the individual Divisions and Departments. The Applicant has not challenged the imposition by the BPMSD guidelines of the 15% quota for the Bank as a whole and the Tribunal sees no need to rule on that matter.

28. However, the Bank went beyond the express terms of that guideline and, as it admits, required the application of that quota to each Department or Office. Moreover, it appears that the quota was also applied to each Division within each Department or Office. The restriction in this way of the award of "Distinguished" ratings, outside the terms of the relevant guideline prescribing the quota for the Bank as a whole, necessarily led to arbitrary and discriminatory results tending to defeat the very purpose of objective and fair performance evaluation within each Division of the Bank. As the Division Manager, EIPW, admitted in his memorandum of 28 May 1992, such an application of the quota made it more difficult for an outstanding performer in a "strong" Division (i.e., one with several outstanding performers) to obtain a "Distinguished" rating than for an outstanding performer in a "weak" Division to do so. That this was not a merely theoretical possibility is borne out by that memorandum as well as by the Bank's pleadings. The application of the 15% quota to each Department and Division obviously encouraged and supported the development of the unofficial practice of "sharing" employee awards.

#### **E. Relief**

29. It is clear to the Tribunal that the decisions taken by the Bank to withhold from the Applicant a "Distinguished" merit pay increase and a PIO promotion for the years 1987, 1988 and 1989 were based upon, or influenced by, his "underrated" and therefore substantially inaccurate or flawed PERs. It follows that those decisions were ill-founded and constituted a misuse of discretion which had arbitrary and discriminatory effects upon the Applicant. Consequently, they should be set aside (see Suntharalingam, WBAT Reports 1982, Decision No. 6, para. 27; Saberi, WBAT Reports 1982, Decision No. 5, para. 24; Mr. X, WBAT Reports 1984, Decision No. 16, para. 39; Pinto, WBAT Reports 1988, Decision No. 56, paras. 35-36; Sebastian (No. 2), WBAT Reports 1988, Decision No. 57, paras. 21-22).

30. Although the Tribunal sets aside the above-mentioned decisions, it is not entitled to direct the Bank simply to grant a performance rating, merit pay increase or PIO promotion to the Applicant. Such a direction would constitute an affirmative exercise by the Tribunal of a discretionary power belonging to the Bank and a substitution of the Tribunal's own judgment for that of the Bank. In Lindsay, the World Bank Administrative Tribunal said:

"That the PTCO position was tailored for the Applicant is admitted by the Bank. But this fact does not by itself mean that the position was wrongly graded. The grading of positions is a matter of Bank management in which the Bank exercises a discretion. The Tribunal will review such matters only for the purpose of ensuring that the Administration has behaved in a procedurally correct way and that it has not reached a substantive conclusion that is not reasonably sustainable. It is not the task of the Tribunal to substitute its own assessment for that of the Bank." (WBAT Reports 1990, Decision No. 92, para. 29).

Moreover, the record before the Tribunal does not indicate what the final performance rating of the Applicant would have been for 1987, 1988 and 1989 if the PERs for these years had correctly reflected the Applicant's level of contribution and achievement and the real or intended evaluation by his Department Head. Nor can it be known what would have been the relevant decision after review of the corrected PERs by BPMSD and the Vice-President concerned and after any possible further review by the Bank's three Vice-Presidents in the event of disagreement at the penultimate level.

31. The Tribunal considers, therefore, that the appropriate course is to direct the Bank to consider once again the recommendations for performance rating and merit pay increase for the years 1987, 1988 and 1989, as well as PIO promotion of the Applicant for each of the subsequent years, this time on the basis of his corrected PERs. An indication that this is the proper course to follow is to be found in *Apkarian* where the World Bank Administrative Tribunal said:

"Even if the Tribunal were to conclude that there had been an abuse of discretion or a violation of the Applicant's procedural rights in the classification decision, the Tribunal should not substitute its judgment for that of the Respondent's management by directing that the Applicant's position be graded at level 17. At most, the case might be remanded for classification according to the new criteria to be promulgated." (WBAT Reports 1988, Decision No. 58, para. 35) (Emphasis supplied).

32. At the same time, it cannot be gainsaid that, even if the Bank takes corrective action now, the Applicant's right to consideration, from as far back as 1988, for "Distinguished" performance ratings leading to merit pay increases and promotion on the basis of accurate and objective performance records disclosed to him was a substantive right which the Bank failed to accord to him. Having regard to all the circumstances bearing upon this case, including the fact that the Applicant will reach the normal age of retirement in April 1994 (although it may turn out that he does not in fact retire then), the Applicant is entitled to compensation for the denial of this right. The Tribunal will equitably assess the amount of this compensation.

## **F. Costs**

33. The Applicant asks the Tribunal to grant him compensation for the cost of preparation of this case. He has not provided any details of the expenses incurred by him in this connection. The Tribunal observes that the Applicant has expended considerable effort in preparing his case. Despite the fact that the Applicant has not given details of his costs in his Reply, as should normally be done, the Tribunal has taken the Applicant's claim for costs into account in fixing the amount of the equitable compensation.

## **Decision:**

For these reasons the Tribunal unanimously decides that:

- a. in view of the fact that the recommended performance ratings recorded in the Applicant's PER for each of the years 1987, 1988 and 1989, did not accurately reflect the intentions of the Applicant's Division Manager and Department Head, those recommendations were flawed and should not have been taken into account by the Bank in exercising its discretion in relation to the determination of the Applicant's appropriate final performance rating, associated merit pay increase and PIO promotion for the year following each of the above-mentioned years;

- b. the Respondent shall correct those PERs by reflecting therein the intended recommendations of the Applicant's Division Manager and Department Head for a "Distinguished" performance rating for each of the above-mentioned years;
- c. the decisions of the Bank to which those incorrect PERs were relevant, namely, the decisions to withhold from the Applicant a "Distinguished" performance rating and the associated merit pay increase, and not to grant him a PIO promotion, are ill-founded and a misuse of discretion. Those decisions are, therefore, invalid and null;
- d. the Bank shall pay the Applicant equitable compensation in the sum of US\$40,000;
- e. on the basis of the Applicant's corrected PERs, the Bank shall also re-open the consideration of his position (a) in respect of performance rating and associated merit pay increase for each of the years 1987, 1988 and 1989 and (b) in respect of PIO promotion for those and subsequent years;
- f. if, as a result of such consideration, the Bank does not, by 28 February 1994, make any change in the Applicant's position in relation to any of the aforesaid years resulting in a payment to him, the Bank shall thereupon pay the Applicant the whole of the equitable compensation stated in operative paragraph 4 hereof; and
- g. if, as a result of any such consideration, the Bank retroactively makes a change in the position of the Applicant involving any payment to him, the equitable compensation payable to the Applicant under operative paragraph 4 above shall be reduced by the amount of such payment.