

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 15
(13 August 1996)**

**Mohandas K. Samuel
v.
Asian Development Bank
(No. 2)**

**Mark Fernando, President
R. Gorman, Vice-President
T. Sawada
L.M. Singhvi
B. Stern**

Facts

1. The Applicant, Mr. M.K. Samuel, was first employed by the Bank on 29 December 1970. He was given a regular appointment in 1971, and rose to the post of Senior Economist (Level P-5) in the Economics and Development Resource Center of the Bank.

2. By a letter dated 25 January 1994, the Director of the Bank's Budget, Personnel and Management Systems Department (BPMSD) formally advised the Applicant that in view of Section 10 of the Bank's Staff Regulations (SR 10), which concerns the retirement of staff from the Bank, the Bank had decided that his retirement from the service of the Bank would take effect on 18 January 1995, his 60th birthday.

3. By his letter of 21 July 1994, the Applicant asked on what grounds the Bank had decided to retire him. The Officer-in-Charge, BPMSD, informed him by a memorandum dated 4 August 1994 that:

The Bank, as a general principle, will not opt to continue with the services of a staff member upon that staff member attaining age 60, other than in exceptional cases where the operational needs of the Bank warrant. Such extraordinary circumstances do not exist in this case. Accordingly, the Bank has opted not to retain your services past 60 years.

4. After exhausting his internal remedies and within the prescribed time limit, the Applicant filed this Application, challenging the two decisions of 25 January 1994 and 4 August 1994. He claims that the "normal" age of retirement was sixty-five, that the Bank did not have the right to retire him at the age of sixty, and that the two impugned decisions were null and void, as being an abuse of power and made without affording him due process:

The termination of the service of the Applicant, who had a regular appointment and whose work performance was satisfactory, from the moment and for the sole reason that Applicant has attained the age of sixty, for no good cause, with no due process and on the basis of a general principle, is an abuse of power, absolute and arbitrary, which is repugnant to the constituent treaty of the Bank, to its fundamental objectives, to its own operating principles and rules and to common law. Such an impugned decision should be summarily rejected and rescinded and its deleterious effects adequately compensated for.

He asks for five years' salary (inclusive of all benefits) as compensation, an award of exemplary and punitive damages, and repatriation and legal costs.

General Legal Considerations

5. In Lindsey, Decision No. 1 [1992], the Tribunal indicated the principal rules of law within the framework of which the facts must be considered:

In addition to the constituent instruments of the Bank and of the Tribunal, as well as general principles of law, these rules are to be derived from the contract between the Bank and the staff member, the Staff Rules and Regulations of the Bank, the Personnel Handbooks for professional and support staff, and Administrative Orders and Circulars, as promulgated and applied from time to time, subject to the recognition and protection of any acquired right of the staff, and, by analogy, from the staff practices of international organizations generally, including the decisions of international administrative tribunals dealing with comparable situations. There is, in this sphere, a large measure of "common" law of international organizations to which, according to the circumstances, the Tribunal will give due weight.

6. The Applicant's contract of employment has not been produced, and it is common ground that the terms and conditions of his employment, pertaining to retirement, have to be determined by reference to other documents.

7. In their pleadings and submissions in this case, the parties have referred to the documents and provisions which are set out in the succeeding paragraphs 8 to 22.

The Charter of the Bank

8. Article 28 of the Charter establishing the Bank vested all the powers of the Bank in the Board of Governors, and authorised the Board of Governors to delegate to the Board of Directors any or all of its powers. It further provided:

Article 31: The Board of Directors shall be responsible for the direction of the general operations of the Bank and, for this purpose, shall, in addition to the powers assigned to it expressly by this Agreement, exercise all the powers delegated to it by the Board of Governors....

Article 34(5): The President shall be chief of the staff of the bank and shall conduct, under the direction of the Board of Directors, the current business of the Bank. He shall be responsible for the organization, appointment and dismissal of the officers and staff in accordance with regulations adopted by the Board of Directors.

Article 34(6): In appointing the officers and staff, the President shall, subject to the paramount importance of securing the highest standards of efficiency and technical competence pay due regard to the recruitment of personnel on as wide a regional geographical basis as possible.

The By-Laws of the Bank

9. Consistently with Article 28 of the Charter, Section 11 of the By-laws of the Bank, adopted by the Board of Governors, provided that:

The Board of Directors is authorized by the Board of Governors to adopt such rules and regulations, including financial regulations, as are necessary or appropriate to the direction of the business of the Bank. Any rules and regulations so adopted, and any amendments thereto, shall be subject to review by the Board of Governors at its next annual meeting.

The Staff Regulations

10. On 21 December 1966 the Board of Directors approved the Staff Regulations of the Bank. They were reviewed by the Board of Governors in 1967. They have never been amended. The provisions relevant to this case are the following:

Chapter II. Appointment and Termination

Section 9: The employment, promotion, and assignment of personnel in the Bank shall be made without discrimination against any person because of sex, race or creed.

Section 10: (1) At any time after any staff member attains the age of sixty, the Bank, and such staff member, shall have the option of terminating his service in the Bank on the payment of such appropriate pension or other retirement benefit as shall be provided in the staff retirement benefit scheme; when such option is not exercised by either the Bank or the staff member, the age of retirement will be sixty-five years.

(2) Without prejudice to the foregoing, the President, in exceptional circumstances and in the interest of the Bank, may extend, for specific periods, the employment of a staff member beyond the age of sixty-five years.

Section 11: The President may terminate the appointment of a staff member:

- a. the necessities of the service require reduction of the staff; or
- b. if the services of the individual concerned prove unsatisfactory; or
- c. if such action would be in the interest of the good administration of the Bank; or
- d. for such other justifiable causes as may be specified in the Administrative Orders to be issued by the President.

Section 12: If the President terminates an appointment, the staff member shall be given such notice and such reasonable termination payment as may be applicable under the Administrative Orders to be issued by the President.

Chapter III. Salaries and Allowances

Section 13: Salaries of staff members shall be decided by the President in accordance with the nature of the duties and responsibilities required and the guiding policies to be adopted by the Board of Directors.

Section 14: Staff members may be entitled to dependency allowance and education grants in accordance with the Administrative Orders to be issued by the President.

Section 15: Staff members may be entitled to medical facilities in accordance with the Administrative Orders to be issued by the President.

Section 16: The President shall establish an appropriate retirement benefits scheme for staff members in accordance with the policy to be adopted by the Board of Directors.

Administrative Order - "Separation Policy"

11. As chief of the staff of the Bank, the President approved the issue of various Administrative Orders setting out the principles, policies and standards governing and regulating the organization and administrative activities of the Bank. Administrative Order No. 17 of 14 December 1967 dealt with "Separation Policy." Paragraph 3(g) described "Types of Separation" as including:

Expiration of Appointment - Termination of a staff member's appointment (i) in accordance with the specific terms of his letter of appointment, or (ii) upon his attaining the age of normal retirement, or (iii) upon his death.

There was no definition of the "normal" retirement age. Paragraph 5.2 dealing with "Termination Provisions", provided that upon termination "in the interest of the good administration of the Bank", a staff member would be granted a "termination payment" equivalent to one-half of a month's salary for each year of continuous service, up to and including twelve years. Paragraph 6 dealt with "Resettlement Provisions", and made no provision for severance pay.

12. That was amended by Administrative Order 2.08 of 20 April 1987. Section 3.7 provided:

Expiration of Appointment - Termination of a staff member's appointment (a) in accordance with the specific terms of his letter of appointment, or (b) when his retirement is determined upon his attaining the age of 60 years or any later date, or (c) upon his death.

Paragraph 4.2(b), dealing with "Termination Procedures and Payments", provided for a "termination payment" upon termination "in the interest of good administration", equivalent to one month's salary for each year of continuous service, up to a maximum of twelve months' salary. Paragraph 5 dealt with "Resettlement, Travel and Severance Pay Provisions", and Paragraph 5.3 introduced for "severance pay" for all staff upon separation in respect of continuous service after 1 May 1982, equivalent to two weeks' final net salary for each year of eligible service up to a maximum of one year's net salary for 26 years of service after 1 May 1982, if the staff member resettles outside the duty station country upon separation (and two-thirds of that amount if he resettles within the duty station country).

13. Similar provision was made in subsequent Administrative Orders (No 2.05 of 1 November 1993, revised on 1 March 1994 and 1 June 1995):

3.7 Expiration of Appointment - Termination of a staff member's appointment (a) in accordance with the specific terms of the appointment (including non-confirmation of appointment), or (b) when the retirement is determined upon attaining the age of 60 years or any later date, or (c) upon the death of the staff member.

Paragraphs 4.2(b) and 5.3 remained unchanged in all relevant respects.

14. Although the requirement of severance pay was not included in the Bank's Administrative Orders until 20 April 1987 (in Paragraph 5.3 of Administrative Order 2.08), in fact the Bank had provided for such payment, on the very same basis, five years earlier, by a Circular dated 18 April 1982.

The Staff Retirement Plan

15. In terms of Section 16, the Staff Regulations, on 10 December 1968 the Board of Directors approved the Staff Retirement Plan, effective from 24 November 1966, which contained the following provisions:

Section 1.1(i) - "Normal Retirement Date" of a participant means the first day of the calendar month next following the 60th anniversary of his birth or the date of such anniversary if it shall fall on the first day of a calendar month, except as otherwise provided in Section 2.5.

Section 2.5(a) - Participation after Attaining Age 60 - No person shall be a participant after the first day of the calendar month next following the 60th anniversary of his birth, or the date of that anniversary if it falls on the first day of a calendar month, except as provided in sub-section (b) and (c) of this Section.

Section 3.1 - Normal Retirement - (a) Upon reaching his normal retirement date, a participant shall be retired under the Plan on a normal pension equal to 1.82% of his highest average remuneration

16. As amended, that Plan now provides:

Section 1.1(h) - "Normal Retirement Date" of a Participant or a former Participant means the date of the 60th anniversary of his birth.

Section 3.1 - Normal Retirement - (a) On a Participant leaving service at Normal Retirement Date, he shall be entitled to a pension (herein referred to as the "Normal Retirement Pension") payable from the date of leaving Service.

The BPMSD Memorandum of 18 March 1982

17. Reference has also been made to the following memorandum dated 18 March 1982 issued by the Director, BPMSD, by which he purported to clarify that the "normal retirement age" was sixty:

2. Some questions have recently been raised about the arrangements applicable to cases of termination of the appointment of a staff member reaching the age of 60. It has been considered necessary, therefore, to clarify such arrangements within the terms of the Staff Regulations, the Staff Retirement Plan and Administrative Order No. 2.08.

3. According to Section 10(1) of the Staff Regulations, the Bank and the concerned staff member have the option to terminate his service for retirement at the age of 60 and, if such option is not exercised by either party at that age, his service may be extended up to the age of 65. The intent behind this provision is that in principle the staff retirement

age is 60, but that if the need arises, the Bank may extend the services of staff up to the age of 65 with the agreement of the staff concerned. Under section 10(1) of the Staff Regulations, therefore, the age of 60 may be considered as the normal retirement age.

4. The concept of the normal retirement age, as described in the Staff Regulations, is confirmed by the Staff Retirement Plan. According to Sections 1.1(i) and 2.5 of the Plan, the "normal retirement date" of a participant means the 60th anniversary of his birth in the case of a staff member whose service is terminated at the age of 60; and the date as of which he ceases to be in participating service in the case of a staff member who continues in the employ of the Bank after having attained the age of 60.

The Discussions of the Board of Directors

18. The Board of Directors of the Bank had discussed the draft Staff Regulations on 20 and 21 December 1966. Extracts from those discussions, pertaining to SR 10, which resulted in certain amendments, have been referred to in the order of the Appeals Committee and in an Opinion by the Office of the General Counsel of the Bank. Upon an application by the Applicant in another case (Mr. Duleep Singh), the relevant parts of the verbatim record of those discussions were produced confidentially by the Bank, for perusal by the Tribunal only. The Tribunal directed the Bank formally to produce the same document in this case, on the same basis.

19. If it had appeared to the Tribunal that the verbatim record was relevant to the interpretation of SR 10, the Tribunal would then have considered whether to make that document available to the Applicant and to call for his submissions thereon.

20. However, that proved unnecessary because the Tribunal found that SR 10 is clear and unambiguous, and that resort to the antecedent discussions was not justified. Further, even if it had become necessary to take those discussions into account, the Tribunal is of the view that they would not have been of assistance because there appear to have been significant differences of opinion as to what the age of retirement should have been.

21. Accordingly, the Tribunal has refrained from taking those discussions into consideration.

22. Since SR 10 is unambiguous, the Tribunal finds it unnecessary to consider the rules and regulations of the International Bank for Reconstruction and Development and the practices and pronouncements of its officials, which, as a contextual guide to interpretation, are more remote even than the verbatim record.

The Practice of the Bank

23. The crucial question for determination is the true meaning of SR 10, as enacted in 1967: whether the Bank was entitled, unilaterally, to retire the Applicant at the age of sixty, or whether the Applicant's age of retirement was sixty-five, with the consequence that the Bank's decision was a nullity which should be quashed or for which compensation should be awarded. However, as the Applicant has referred to it, it has become necessary to mention the practice of the Bank in regard to the age at which staff members have been required to retire, and to certain payments made to staff members at the time of separation.

24. During the thirty-year period from 1966 to 1995, 105 professional staff members holding regular appointments reached the age of sixty while in the service of the Bank; twelve of them

continued even thereafter; but not one continued until the age of sixty-five. This period can be broken up into four:

- a. During the first period, up to July 1977, no staff member reached the age of sixty while in the service of the Bank;
- b. Between August 1977 and December 1981, six staff members reached the age of sixty; one did not continue in service thereafter; the other five continued for varying periods, and each of them received a "termination payment" of one-half of a month's salary for each year of service;
- c. Between January 1982 and October 1987, 28 staff members reached the age of sixty; twenty-one did not continue in service, while seven continued for varying periods, but did not receive a "termination payment"; and
- d. After October 1987, none of the seventy-one staff members who reached the age of sixty continued in service thereafter.

25. None of the twelve staff members who continued after the age of sixty remained in service until the age of sixty-five. One continued for four years and one month; four continued for between two and three years; one for a year and seven months; and the remaining six for less than a year.

26. It would also seem that in making termination payments to the five staff members who reached the age of sixty between 1977 and 1981, the Bank treated them as if they had been terminated in the interest of the good administration of the Bank, within the meaning of Paragraph 4.2(b) of Administrative Order No. 17 of 14 December 1967. The last of these payments was made in August 1982 to a staff member who reached the age of sixty in July 1978 and left the Bank in August 1982. It is in reliance upon these five payments that the Applicant contends that the recipients were not "retired" under SR 10 but terminated under SR 11(iii).

27. It must also be noted that the "practice" in relation to those five staff members was, in three instances, ambiguous. Thus it was said in respect of one that "the President is acting under Section 10(1) ... in arranging for [his] retirement"; in respect of another, that he was "not intending to retire voluntarily before he reached compulsory retirement age of 65"; and in the case of a third, that he would be "reaching the normal retirement age of 60 on 16 December 1981."

Section 10 of the Staff Regulations

28. The Tribunal now turns to the interpretation of SR 10. SR 10 makes three distinct provisions:

- a. At any time after a staff member attains the age of sixty, the Bank and such staff member have each the option of terminating his service in the Bank (on the payment of pension and other retirement benefits as provided in the "staff retirement benefit scheme").
- b. When (and therefore only when) that option is not exercised, the age of retirement shall be sixty-five.

- c. However, the President may (exceptionally) extend the employment of a staff member beyond the age of sixty-five.

29. There was no "staff retirement benefit scheme" in existence in 1966; and the Staff Retirement Plan was adopted only on 10 December 1968 (although with retrospective effect from 24 November 1966). The first limb of SR 10 contemplated not a "termination payment" (cf. SR 12) of some sort but a retirement benefit - viz, a pension or some other retirement benefit. This is one indication that the exercise of the option under that limb resulted in a retirement.

30. It is also relevant that SR 10, 11 and 12 occur in a Chapter dealing with "Appointment and Termination." Appointment is dealt with only in SR 9. SR 11 deals with one species of termination, viz, termination for one of several specified reasons, or causes, relating either to the staff member or to the Bank; and SR 11(iv) emphasizes this by empowering the President to specify other justifiable "causes." SR 11 characterizes such a termination as "a termination of the appointment" of a staff member. By contrast, SR 10 deals with termination on account of age - not for "cause" of the kind specified in SR 11, but lapse of time; and characterizes such a termination as a "termination of the service" of a staff member.

31. It may well be that this distinction between termination of "appointment", and termination of "service" is not maintained in other regulations, orders or circulations. However, Chapter II of the Staff Regulation does make that distinction, and in interpreting the provisions of that Chapter the Tribunal must assume, if there is no contrary indication, that this difference in language was intentional. That this distinction was intentional is confirmed upon a scrutiny of SR 12, which is the only other provision of Chapter II. SR 12 provides for a "reasonable termination payment", upon termination of appointment.

32. Thus Chapter II provides for two distinct types of termination, in distinct situations, and with distinct consequences as to financial entitlements. SR 10 provides, upon termination of service, on account of age, for the payment of a "retirement benefit" (whether by way of pension or otherwise), while SR 12 provides, upon termination of appointment, for cause, for a "termination payment." That these payments were intended to be distinct is confirmed by yet another feature: the former was to be laid down in the staff retirement benefit scheme, and the latter in Administrative Orders.

33. Thus at the time, and in the context in which, the Staff Regulations were adopted, the plain meaning of SR 10 was that:

- a. if the option was exercised, by either party, the age of retirement was that age (more than sixty, but less than sixty-five) at which the option was exercised;
- b. if (and only if) the option was not exercised, the age of retirement was sixty-five; and
- c. by way of exception to (b), the age of retirement would be more than sixty-five, if the President extended the employment of a staff member.

The language of Chapter II does not permit a retirement, viz, a termination of service under SR 10(1), to be deemed to be also a termination of appointment under SR 11.

34. The provision in (c) above was clearly no more than an exception to the provision in (b). But it is plain that the provisions of (a) and (b) contained two distinct rules, and neither was

subordinate to the other. There were thus two rules in regard to the age of retirement: optional retirement, at any time between sixty and sixty-five, and compulsory retirement at sixty-five (subject to an exception). The Tribunal observes that SR 10 made no reference, let alone defined, any "normal" retirement age or date. Accordingly, when the Staff Regulations were first adopted the power of the Bank to retire a staff member after the age of sixty did not depend on what the Bank considered to be the "normal retirement age."

35. From the fact that SR 10(2) empowered the President, in exceptional circumstances, to extend the employment of a staff member, it could not have been presumed that therefore it was "normal" to remain in service until sixty-five. While such an inference might have been possible if there had been only one rule and one exception, it was plainly not possible where there were two rules. Thus if SR 10 had provided that -

- a. A staff member shall retire upon completing 25 years of service, or upon previously attaining the age of sixty,
- b. Without prejudice to the foregoing, the President may in exceptional circumstances extend the employment of a staff member beyond the age of sixty,

it could not have been argued, from the exception, that "normally" retirement was at the age of sixty.

36. In the same way, SR 10 contained two distinct rules. The fact that the second rule was subject to an exception did not make it the "normal" rule.

37. That was the plain meaning of SR 10, and SR 10 was not amended thereafter. In view of that conclusion it is strictly unnecessary to consider the Applicant's contention, relying on other subsequent documents and matters, that the "normal" age of retirement was sixty-five. However, as extensive submissions have been made in that respect, the Tribunal will deal with them briefly.

38. The Applicant contends that Administrative Order No. 17 of 14 December 1967 referred to "the age of normal retirement"; that the Bank acted on the basis that this was sixty-five; that the practice of the Bank, when a staff member was separated from service prior to that age, was to give him a termination payment, which showed that it was a termination in the interest of good administration of the Bank (under SR 11(iii)), and not a retirement; and that practice continued until 1982, when it was unlawfully changed by BPMSD, by its memorandum of 18 March 1982.

39. Administrative Order No. 17 was issued after the Staff Regulations were adopted, and cannot alter the plain meaning of those Regulations - particularly as the former was issued by the President, while the latter were adopted by the Board of Directors, and were subject to review by the Board of Governors. But leaving that aside, although the Administrative Order refers to the age of "normal" retirement, it did not define that term. The earliest definition of that term occurs in the Staff Retirement Plan, and that not only referred to "normal retirement date", but also defined that expression by reference to the age of sixty. That Plan was approved by the Board of Directors, pursuant to SR 16, and, in the hierarchy of norms, it must take precedence over Administrative Order No. 17. Apart from any question of precedence, the proper place in which to find a definition of the "normal age of retirement" is the document dealing specifically with the subject of retirement, and the omission of a definition in Administrative Order No. 17 is consistent with an intention to adopt the definition in the Staff Retirement Plan. What is more, the Staff Retirement Plan was adopted in December 1968, effective November 1966, and was

thus virtually a contemporaneous instrument whose provisions are completely consistent with the Tribunal's interpretation of SR 10. If, therefore, there is a "normal" retirement age for any purpose, both documents are consistent with that being sixty; and neither document, even by implication, suggests that it was sixty-five. It is also relevant that Section 3.2 of the Staff Retirement Plan, consistently with "normal" or optional retirement being between sixty and sixty-five, provided for "early" retirement at or after the age of fifty-five.

40. The BPMSD Memorandum of 18 March 1982 states that under SR 10(1) the "age of 60 may be considered as the normal retirement age", and cites Sections 1.1(i) and 2.5 of the Staff Retirement Plan as confirmation. However, it also states, incorrectly, that if the option under SR 10 is not exercised by either party at that age "his service may be extended up to the age of 65 . . . with the agreement of the staff concerned." In so far as this suggests that the Bank had to take a positive step to extend the employment of a staff member, this was incorrect because, if the option is not exercised (at 60 or thereafter) the staff member is entitled, as of right, to continue in service until he reaches the age of sixty-five. However, that ambiguity does not affect the plain meaning of SR 10. The Tribunal rejects the contention that sixty was first made the age of retirement (or a "normal" retirement) by that Memorandum, and thereafter confirmed by Administrative Order No. 2.08 of 20 April 1987.

41. Further, the Applicant's contention depends heavily on an alleged practice of the Bank. But on examination it turns out that that "practice" was only in respect of five staff members; that even in regard to them it was ambiguous; that it prevailed only during a period of less than five years; and that period ended fifteen years ago. Clearly, Administrative Order No. 17 did not require a termination payment in the case of a retirement, and the payments made by the Bank were inconsistent with retirement. However, that "practice" ceased in 1982. Thereafter staff members whose services were terminated in terms of SR 10 did not receive a "termination payment", but "severance pay" (see paragraphs 12 and 14 above) at an equivalent rate. Thus all staff members who were separated from service at the age of sixty, whether before or after 1982, were similarly treated as to the quantum of benefits, receiving retirement benefits as well as one-half of a month's salary for each year of service (the only difference being that after 1982 they received severance pay which was subject to a higher maximum of one year's salary). Finally it must be emphasized that this "practice" relied on by the Applicant in support of a "normal" retirement age of sixty-five did not result in even one staff member continuing in service until that "normal" retirement age. In these circumstances, the Tribunal holds that this "practice" was quite insufficient to displace the plain meaning of SR 10.

42. The Tribunal therefore concludes that SR 10 does not prescribe a "normal" retirement age (whether sixty-five as contended by the Applicant, or any other age); that SR 10 prescribes two distinct rules, one as to optional retirement between sixty and sixty-five, and the other as to compulsory retirement at sixty-five (and, exceptionally, even after sixty-five); that the exercise of the option results in a retirement (i.e., a termination of service) and not a termination (of appointment) under SR 11; and that upon such a retirement, no termination payment is due.

Other Matters

43. The Applicant contends that the exercise by the Bank of the option under SR 10 was wrongful for several other reasons which the Tribunal will now consider.

44. The Applicant contends that the Bank could not unilaterally terminate his service at the age of sixty and that its option was exercisable only by mutual consent. The Tribunal rejects this contention as it is clearly contrary to the plain language of SR 10.

45. It has also been submitted that the exercise of the option by the Bank was in derogation of the Applicant's right to security of tenure and due process. The Applicant's expectation of security of tenure was not indefinite but only in accordance with the terms of his appointment of which SR 10 formed part, and SR 10 gave the Bank an option to retire him. Accordingly, the exercise of that option did not violate his right to security of tenure. Further, as that option was exercised in accordance with applicable rules, regulations and principles as to notice, payment of benefits and the like, there was no denial of due process.

46. The Applicant further contends that the Bank had no legal authority to decide on the retirement of a staff member, and that the only source of legal authority for all matters connected with the retirement of Bank staff is the Staff Retirement Plan. This contention is plainly contrary to SR 10 which gives the Bank the option to retire a staff member, and nowhere does the Staff Retirement Plan purport to authorize any other the person or body to decide upon such retirement.

47. Finally, it is argued that the Bank's practice of exercising its option as a matter of routine, or on the basis of a general principle, is an abuse of power and/or is arbitrary and unreasonable. SR 10 does not impose any limitations on the exercise of the Bank's option. That does not mean, however, that the Bank can exercise that option in an arbitrary, unreasonable or discriminatory manner. Here, the Bank has adopted a coherent policy of exercising that option uniformly, and without discrimination, but not inflexibly - thus leaving it open to make an exception where the operational needs of the Bank warrant it (as stated in the BPMSD memorandum of 4 August 1994). The Bank may well be justified in adopting such a policy on account of considerations such as the need to improve the promotional prospects of existing staff, to attract new and younger staff, and the like. It is not for the Tribunal to review such questions of policy.

48. The Bank requested the consolidation of the three Applications filed by Messrs. Samuel, Singh and Viswanathan, claiming that because the Applications were "of a like nature and involve common questions of law and fact, a joint consideration of the Applications by the Tribunal would avoid unnecessary delay and needless repetition of response by the Respondent."

49. By its Order of 16 August 1995, the Tribunal refused consolidation because although one issue seemed to arise in all these cases, there were other issues as well, and it appeared that the Tribunal would not be able to dispose of all three Applications in a single decision. The Bank was directed to file a separate Answer in each case.

50. However, the Tribunal decided that all three cases would be considered successively by a panel consisting of all its Members at the same Session.

51. Having considered all three cases during the Sixth Session (held in January 1996), the Tribunal ruled on Mr. Viswanathan's Application, and decided to defer its decision in the other two cases until the Seventh Session.

52. Rule 18 of the Tribunal's Rules provides:

Any person to whom the Tribunal is open under Article II, para. 2 of the Statute may apply to intervene in a case at any stage thereof on the ground that he or she has a right which may be affected by the judgment to be given by the Tribunal. Such person shall

for that purpose draw up and file an application in the form of Annex II for intervention in accordance with the conditions laid down in this rule.

53. On 27 March 1996, Mr. Latif M. Chaudhry filed an application for intervention (the Intervention) requesting the Tribunal to grant him the same relief as may be granted to the Applicant. While associating himself with the submissions and statements of the Applicants, he stated that he did not wish to participate actively in the proceedings. He averred that he had been advised by the Bank by letter dated 8 May 1995 that his retirement from the service of the Bank would take effect on 5 June 1996, his 60th birthday.

54. The Bank has objected to the admissibility of the Intervention on two grounds:

- a. That in view of the Tribunal's Order of 16 August 1995 in the Applications made by Messrs. Duleep Singh, Narayanaswami Viswanathan and Mohandas Samuel, refusing the consolidation of those Applications, the Intervention is inadmissible because that Order is "res judicata with respect to the matter of joinder relating to all these three cases", including the Intervention; and
- b. That the Intervention was inadmissible because this [Mr. Samuel's] Application "has been listed for decision and considered by the Tribunal during its Sixth Plenary Session," (which was held in January 1996).

55. Any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case upon satisfying the condition stated in Rule 18. The right claimed by the Intervenor is identical to that claimed by the Applicant, and is therefore one which might have been affected by the judgment of the Tribunal, and so that condition is satisfied. The refusal to consolidate the applications of Messrs. Singh, Viswanathan and Samuel was precisely because they did not raise the identical issue, and so the Order of 16 August 1995 is of no relevance. As for the times at which intervention was sought, Rule 18 expressly permits an application for intervention to be made "at any stage."

56. The Intervention is therefore receivable.

57. Since the Application fails on the merits, so does the Intervention.

Decision:

For the above reasons, the Tribunal decides to dismiss the Application and the Intervention.

Dissenting Opinion

1. This case concerns a crucial issue which is the normal retirement age provided in the Staff Regulations for staff members employed in the Asian Development Bank (the Bank), and the manner in which such an essential element of the terms and conditions of employment can be modified by the Bank. After having examined the facts of the case, the practice of the Bank from its inception, as well as the implications of the outcome of the case, I regret that I cannot concur with the Tribunal's decision. Considering the importance of the questions raised and of the principles involved, I feel compelled, as a matter of conscience, to explain my understanding and analysis of the case in a dissenting opinion.

I. The applicable law

2. There is no disagreement on the fact that the pertinent regulations and rules that are to be taken into account by the Tribunal, - which have been thoroughly enumerated in the first decision of the Tribunal, Lindsey, Decision No. 1 [1992] -, apply in a hierarchical order.

3. Both parties agree that the memorandum of the Director, Budget, Personnel and Management Systems Department (BPMSD), dated 18 March 1982, purporting to give an authorized interpretation of the existing rules, must be in accordance with the Staff Regulations, as stated in the decision of 14 November 1994 of the Appeals Committee. The same holds naturally true for Administrative Order No. 2.08 of 20 April 1987 (or A.O. No. 2.08 of 1987), which modifies Administrative Order No. 2.08 of 14 December 1967 (or A.O. No. 2.08 of 1967, referred to in the Tribunal's decision as Administrative Order No. 17) and which incorporates the interpretation of the Staff Regulations given by the BPMSD Director's memorandum.

II. The meaning of the text of Section 10

4. In order to interpret an international rule, the text of the provision in dispute has to be analyzed first. To ascertain what was considered as the normal retirement age in 1966, when the Staff Regulations were enacted, it must be emphasized that the wording of Section 10(2) refers to an extension beyond the age of 65, in exceptional circumstances. It is obvious that if it is only exceptional to work after the age of 65, it must be inferred that it is normal to work until the age of 65. A grammatical and literal exegesis of the plain wording of Section 10 tends to bring credit to the thesis of the Applicant, according to which the normal retirement age was 65 years, while in the present practice of the Bank, it is normal to work only until the age of 60.

5. If there is a termination of the employment contract before the staff member reaches the age of 65, the basic principles governing termination payment were stated in paragraph 2 of A.O. No. 2.08 of 1967: if the termination is at the initiative of the Bank, for reasons of its own and with no fault or shortcomings of the staff member, then he is entitled to termination money; if the termination is at the initiative of the Bank, as a result of shortcomings of the staff member, or at the initiative of the staff member, then he is not entitled to any termination payment.

6. In fact, A.O. No. 2.08 of 1967 dealt with seven different types of separation:

- Redundancy
- In the interest of the good administration of the Bank
- Prolonged illness
- Unsatisfactory service
- Misconduct
- Voluntary resignation, including early retirement
- Expiration of appointment.

7. The provision concerning the last type of separation has to be quoted here:

Expiration of Appointment - Termination of a staff member's appointment (i) in accordance with the specific terms of his letter of appointment, or (ii) upon his attaining the age of normal retirement, or (iii) upon his death.

8. "Expiration of appointment" covered three cases, which had all in common to appear through the mere lapse of time, without any specific decision to be taken either by the Bank or the individual; they were events that by themselves, through either their forecasted or unforeseeable occurrence, ended the appointment without any further notice, namely: when the ending date fixed in the letter of appointment arrived; when the staff member attained the age of normal retirement; or when the staff member died.

9. It is clear that this category covered only the normal retirement at the age of 65. This conclusion is unavoidably drawn from the fact that in the cases covered by the general expression "expiration of appointment", no notice was to be given. If, at the time of the enactment of A.O. No. 2.08 in 1967, it was meant that "expiration of appointment" could cover the case when the Bank or the individual decides to end the contract between the age of 60 and 65, it would have been necessary to provide for a notice, and a time-limit in which such notice was to be given.

10. Moreover, I cannot accept the Tribunal's reasoning according to which the normal retirement age is 60, under the "interpretation" of the Staff Regulations based on the Bank's Staff Retirement Plan, adopted in 1968, which defines the "Normal Retirement Date" of a participant as the date of the 60th anniversary of the participant's birth. It is well known that the Staff Regulations and the rules governing retirement on the one hand, and the Staff Retirement Plan on the other, are two different things.

III. The context in which Section 10 was adopted

11. The context in which the Staff Regulations were adopted also tends to support the view that 65 was the normal retirement age. It has never been denied by the Respondent that from the inception of the Bank, the International Bank for Reconstruction and Development (IBRD) was its principal comparator institution for the purpose of maintaining a comparable benefits structure.

12. At the time the Bank was created, and the Staff Regulations were enacted, the retirement age at the World Bank was 65 years. It might be interesting to refer here to a statement made by Mr. Mc Namara, the President of the World Bank, on his 64th birthday:

As you know, my current term as President of the World Bank runs to April 1, 1983. Today however is my 64th birthday and I want to inform the Board now that one year hence, that is effective June 30 1981, when I shall have reached the traditional retirement age of 65, I propose to retire from my present position. (declaration made on 9 June 1980) (emphasis added)

Therefore, it is quite clear that this was also the normal retirement age that the drafters of the Staff Regulations had in mind.

13. All the elements of interpretation tend to the inescapable conclusion that the Staff Regulations provided for a normal retirement at 65 years.

IV. The analysis of the Appeals Committee

14. This conclusion is further sustained by the analysis of the Appeals Committee in its decision of 10 March 1995:

The Committee agrees with the Appellant's contention, which is supported by the cited statement of President Watanabe, that age 65 is to be considered as the "normal" retirement age, since that is the age stated in Section 10 as the applicable retirement age, if no specific action is taken by either the Bank or the staff member which would result in retirement at a different age. In the Committee's opinion, however, the relevant issue is not the terminology used to describe the continuation or otherwise of the service in the Bank of a staff member who turns 60, nor whether the "normal" retirement age is 65 or otherwise. The relevant issue is whether or not Section 10 allows for deviations from the basic rule that the retirement age is 65. (emphasis added)

15. Therefore, the Appeals Committee, although it declined jurisdiction, has clearly stated, in 1995, that, in its opinion, the basic rule is that the retirement age is 65.

V. Some recent statements of the Respondent

16. This analysis finds support in various statements by the Respondent, for instance in a memorandum clarifying some points concerning the payment of severance pay addressed by the Director, BPMSD, on May 13 1994, to Mr. Viswanathan, Chief, OAS. It could well be that, because the issue there was not the age of retirement, the Bank was not engaged in justifying its change of policy in that respect, and was probably more ingenuous in its presentation. The Bank itself recognized in 1994 that the normal retirement age was 65 in the early eighties, before the change of 1982:

At the time there was an expectation that staff could continue their service with the Bank until age 65 unless either the Bank or the staff member concerned exercised the option, at 60 years, to terminate his service under the Staff Regulations. Staff who continued past age 60, but subsequently left the Bank prior to reaching age 65, were therefore considered to have left upon the Bank's initiative and were paid a termination payment. (emphasis added)

17. A reference to that practice was also made in a paragraph of the Bank's Answers in the Viswanathan (Decision No.12 [1996]) and Singh (Decision No.16 [1996]) cases, which has been omitted in the Answer in the present case, but I think fit to quote it, as the Tribunal has decided to consider the three cases in connection with each other:

[I]n the earlier years of the Bank, several staff members whose service in the Bank was terminated after they had attained the age of 60 received a termination payment upon their separation from the Bank. According to Bank records, four professional staff members of the Bank received termination payments upon their separation from the Bank after attaining the age of 60, in 1977, 1978, 1981 and 1982, respectively.... The amounts of these termination payments were calculated in accordance with the provisions of Administrative Order No. 2.08 (the precursor to present Administrative Order No. 2.05) in respect of termination of appointment "in the interest of the good administration of the Bank."

18. In fact, as results from a letter dated 15 December 1995, accompanying the Respondent's production of documents requested by the Tribunal in its Order of 8 December 1995, the Respondent has since then corrected this information, and written that the quoted paragraph "should make reference to five rather than four professional staff members of the Bank who received a termination payment upon their separation from the Bank after attaining the age of 60. The Respondent regrets the oversight." In other words, the Respondent admits that 5 staff members received termination money, before the year 1982. What the Bank does not say is that the five professional staff members concerned were at least five out of the 6 staff members who were retired before the age of 65, which means more than 80% of the cases -- and possibly 100% as one case is not clear. These staff members received termination payment equivalent to one-half of a month's salary for each year of continuous service in the Bank, up to and including 12 years. This is exactly the termination payment formula provided by A.O. No. 2.08 of 1967, in case of termination in the interest of the good administration of the Bank.

VI. The Bank's unambiguous practice until the 1982 memorandum

19. In its decision, the Tribunal refers to four different periods in the practice of the Bank. I consider that three of them are irrelevant, because either there was no practice at all, or the practice followed the impugned memorandum. I shall therefore concentrate my remarks only on the period from 1977 to 1982.

20. In this connection, the information furnished by the documents produced on the Tribunal's request are of utmost importance: the picture given of the Bank's practice before the impugned memorandum of 1982 is quite conclusive.

21. The Advice of Personnel Action (APA) of staff member A (as designated in Annex 3 to the Respondent's Answer) sets the Bank's interpretation of what is due to a staff member who is retired between 60 and 65, as it is accompanied by a request from the Deputy Director of Administration asking the President to confirm the interpretation of the financial consequences of the Bank's use of its option of Section 10.

22. It results clearly from the analysis of the Bank itself, that it never imagined to make the distinction presented by the Tribunal between a termination of appointment that could give rise to termination payment and a termination of service that could not. The precise terms of this memorandum dated 26 July 1977, written on the occasion of the first retirement of a staff before his reaching the age of 65, are worth citing:

We are now processing the various formalities relating to A's termination of appointment and determining the various payments to which he will be entitled. It is understood that the President is acting under Section 10 (1) of the Staff Regulations of the Bank in arranging for the retirement of A. The only corresponding provision in Administrative Order No. 2.08 on "Separation Policy" is item (b) in para. 3 which reads as follows:

"In the interest of the good administration of the Bank - Termination of appointment initiated by the Bank because such action would be in the interest of the good administration of the Bank."

We have reached this conclusion since, by a process of elimination, all other types of separation listed in para. 3 of that Administrative Order are patently inapplicable.

So that there should be no misunderstanding whatsoever adverse to the staff member concerned, the application of para. 3b refers to the application, as a general principle, of Section 10 (1) of the Staff Regulations and bears no implication adverse to the staff member.

Staff members whose appointments are terminated in the interest of the good administration of the Bank are, in accordance with the relevant paras. of Administrative Order No. 2.08, entitled to termination payments amounting to one-half of a month's salary for each year of continuous service up to and including 12 years.

It would be appreciated if the President would kindly confirm that our understanding is correct so that the APA may be properly drafted and the payments due to A correctly determined.

23. The President must have endorsed this unambiguous interpretation of the Bank, -which is completely in line with the Applicant's analysis -, as in the APA of staff member A, this interpretation is translated into action, as results from the following remarks written on the APA:

Entitled to termination payment equivalent to one-half of a month's salary for each year of continuous service. Benefits as are admissible under the Staff Retirement Plan.

24. This policy has been explicitly enforced for all the staff members retired between the ages of 60 and 65 (but possibly one), before the 18 May 1982 memorandum.

25. The APA of staff member B (as designated in Annex 3 to the Respondent's Answer) brings also some interesting insights on the Bank's position before the 18 May 1982 memorandum. In a letter sent by the Officer in Charge to the President, on 10 January 1978, it is stated:

It was learned during the discussion that B was not intending to retire voluntarily before he reached the compulsory retirement age of 65.... (emphasis added)

There seems to be no question that the Bank admitted at that time that the normal retirement age was 65.

26. Some more relevant information results from the statements made by the Bank in the letter sent to staff member B' (designated as such for this purpose, as he should have been mentioned in the list in Annex 3 to the Respondent's Answer, between staff member B and C):

As you know, under the provisions of Section 10 (1) of the Staff Regulations, from the time the staff member attains the age of 60, both the Bank and he have the option of terminating his service, and it is the normal practice of the Bank to exercise its option at that time. (emphasis added)

27. However, even considering that the normal practice of the Bank at that time - at the end of 1980 - was to retire all staff members on their reaching the age of 60, the Bank still considered that it was under a duty to pay termination money while implementing this practice. Thus, on the APA of staff member B', we find the same formula as the one mentioned for staff member A:

Entitled to termination payment equivalent to one-half of a month's salary for each year of continuous service. Benefits as are admissible under the Staff Retirement Plan.

28. Finally, the situation of staff member E (as designated in Annex 3 to the Respondent's Answer) throws also some light on the present case. Staff member E reached the age of 60 on 21 July 1978. The date of termination of his services appears from the file to be in 1982. If the Respondent's present contentions were correct, it would mean that in 1978 when E was reaching what the Respondent claims to be the normal retirement age, he should have been advised that his contract was extended; on the contrary, - and in conformity with the wording of Section 10 and the Applicant's analysis - his contract went on normally, as no specific action to terminate him was undertaken by the Bank on his reaching the age of 60, until he received a letter dated 24 February 1982 in which the Bank advised him that it will only retain his services until 31 July 1982, and confirmed that he was entitled to termination money.

29. Two last remarks can be made here: before 1982, it is noticeable that, whatever the language used, never has the Bank utilized the expression "termination of service" and whatever the language used, the benefits granted were identical. Indeed, in the 6 relevant APAs, under the heading "Nature of action", different expressions can be found:

Staff Member	"Nature of Action"	Effective Date
A	Termination of appointment	31 August 1977
B	Termination of appointment	31 December 1978
B'	Termination	8 December 1980
C	Termination	26 November 1981
D	Termination of appointment	16 May 1982
E	Retirement	31 December 1982

It is clear that a change of vocabulary appears after the memorandum of 18 May 1982, although it is remarkable that staff member E has still received termination money.

30. In conclusion, all the documents handed to the Tribunal in December 1995 clearly indicate that until 1982, it was the Bank's interpretation that it could terminate the appointment of a staff member between the age of 60 and 65, with the payment of termination money in addition to pension benefits. It is clear that until 1982, the "termination for retirement" was considered both as a termination and as a retirement.

31. This granting of termination money resulted neither from an "error" of the Bank, nor from an "ex gratia" payment. This termination money was paid on the understanding by the Bank that it was so obliged according to the relevant rules: this interpretation has been adopted after thorough reasoning, as is shown by the explanations found for example in the memorandum of 26 July 1977, extensively cited in paragraph 22 above.

VII. The change of policy in 1982

32. Then a change of policy occurred, which the Bank purported to enact through an internal memorandum, and a modification of A.O. No. 2.08 of 1967, but without any modification of the Staff Regulations, which remained as they were.

33. A.O. No. 2.08 of 20 April 1987 changed the paragraph concerning "Expiration of appointment" in the following manner:

Expiration of Appointment - Termination of a staff member's appointment (a) in accordance with the specific terms of his appointment, or (b) when his retirement is

determined upon his attaining the age of 60 years or any later date, or (c) upon his death.

34. The only change concerns expiration of appointment for retirement. However, it must be underlined that the amendment has been unsatisfactorily made, as no corresponding change has been made to the requirement of a notice, which of course is necessary in order to announce the Bank's decision, - or the staff member's decision, - as is evidenced by the practice of the Bank sending letters to inform its staff members of its decisions to retire them on their reaching 60 years.

35. The question then is raised whether the modifications introduced informally in 1982 and formally in 1987 are compatible with the general rules as set forth in the Staff Regulations.

36. It must be recalled that a modification, whether express or implied, has to be in accordance with the prevailing rules, as emphasized in another context:

[A]n attempt through regulation or otherwise to make staff members pay taxes, even indirectly, except within the limits of Article VII... would be regarded as a violation of that Article and of the rights of the staff members. (1 C.F. Amerasinghe, *The Law of the International Civil Service* 139) (2nd ed. 1994) (emphasis added)

37. In order to decide whether the change introduced in 1982 is incompatible with the Staff Regulations, the extent of this change introduced must be precisely ascertained. Beginning 1982, some staff members sought clarification of the Bank's separation policy, particularly with respect to the age of retirement and the applicability of a termination payment upon retirement. It is in this context, that the Director, BPMSD, issued the memorandum to the staff on 18 March 1982, which was supposedly to clarify the existing rules, but which in fact, in my opinion, modified completely the presumptions at the root of these rules.

38. It is interesting to note that the Bank tried to hide the tremendous change in approach that occurred, through a very subtle use of language, mixing the "opt in" and "opt out" possibilities, so to speak. While the Staff Regulations granted to the Bank "the option of terminating" - which means that unless the option is activated, the normal course of events is the continuation of the contract of employment -, the language in the letter of 4 August 1994 sent to the Applicant shows a complete reversal of presumption: the letter says that "(t)he Bank, as a general principle, will not opt to continue", which implies that in the absence of such an option, the normal course of events is the termination of the contract of employment at the age of 60. This, of course, is in complete contradiction with the implications of Section 10 of the Staff Regulations. The option to terminate has been transformed in an option to continue: the consequence being that the normal retirement age of 65 stated in the Staff Regulations has been changed through administrative interpretation to 60 years.

39. The new "interpretation" of the Staff Regulations given in the memorandum of 18 April 1982, was enforced from the end of 1982 on and formally embodied in A.O. No. 2.08 of 20 April 1987.

40. It is therefore imperative to ascertain whether this complete modification of approach is reconcilable with the Staff Regulations. This is even more so important in the present case, as it cannot be denied that the Bank's action was very ingenious. But it seems to me that it is precisely against such type of subtle infringements of their rights that the staff members are helpless unless the Tribunal insists on the strict respect of procedural legality.

VIII. The illegality of the changes in the payments made by the Respondent

41. One is compelled to ask whether the Bank had the power to enact such a new policy. To answer this question, some distinctions must be drawn. It is clear that the Bank through the enactment of its new policy has changed two things: first, it has transformed an option into a rule; second, it has changed the normal retirement age from 65 to 60 years.

42. To begin with, it must be underlined that it is quite difficult to assume, as does the Respondent, that the Board of Directors has informally accepted the new practice of the Bank, and even more has accepted that this practice changes the written rule on retirement age. Besides the fact that such informal amendment of essential rules whose purpose is to guarantee security of tenure and due process to staff members is highly questionable, it is far from clear that there was a consensus on this question among the members of the Board of Directors. For example, when the "Special Separation Program for Staff" was presented, a Director asked for clarification "as to how 'the mandatory' age of retirement of a staff member of the Bank has been assumed to be 60 years" and added that he fears that "unless there is a sound legal basis for enforcing the retirement age of 60 years, this practice can, at any time, be successfully challenged by a staff member before the Administrative Tribunal" (emphasis added).

1. The transformation of the option into a rule is not illegal.

43. The first question is whether the systematic way in which the Bank exercised its Section 10 option must be considered to be illegal.

44. An option means a free choice. Section 10 establishes no limitation on the Bank's right to exercise its option, and does not state any specific circumstances in which, or specified reasons for which, such a decision can be taken. In other words, the Bank has a discretionary option to terminate a staff member's employment on his attaining the age of 60.

45. The Bank's decision - as well as the staff member's decision - is discretionary. However, the fact that the Bank has discretionary power, does not mean that the Tribunal cannot review its decisions. Appropriate safeguards have been built in - including administrative tribunals - in international organizations and among them in the Bank's structures, in order to ensure that the discretionary power available in the interest of good administration does not degenerate into absolute and arbitrary power.

46. This has been stated repeatedly by the administrative tribunals: the World Bank Administrative Tribunal has stated: "Discretionary power is not absolute power" (de Merode, WBAT Reports 1981, Decision No. 1, para. 45); the ILO Administrative Tribunal used a very comparable language, when it stated: "Discretionary power must not... be confused with arbitrary power" (Ballo, ILOAT Judgment No. 191 (1972)).

47. It is only if the practice of the Bank in enforcing a separation policy was arbitrary, discriminatory, unreasonable or adopted without due process that the Tribunal could consider it illegal. For example, if the Bank had decided to terminate all men with blue eyes at 60 and all women with brown eyes at 63, no doubt that such a use of the option would have been found arbitrary.

48. Can it be said that the fact of systematically using an option following a coherent policy is arbitrary? The answer is no. While it is true that the option was meant to be used exceptionally,

such a departure from the initial intent does not seem to justify a ruling that the Bank could not implement such a coherent policy. To exercise the Section 10 option to terminate staff members systematically at the age of 60, - which means that it is not discriminatory - does not seem to me to go beyond the margin of discretion that the Bank enjoys in the framing of its general personnel policy.

49. The Bank can legally determine that its operational needs warrant its exercise of its Section 10 option in respect of virtually all staff members who reach the age of 60: but this possibility for the Bank to set a personnel policy does not however entail the right to change the age of retirement, without going through the needed procedures.

2. The change of the normal retirement age from 65 to 60 through administrative practice is illegal.

50. The analysis, in my view, is different, if one considers the second question of the purported change of the retirement age brought about by the enactment of the Bank's policy. The Bank itself recognized in its pleadings that this age has been changed:

The effect of the Bank's standard practice of exercising its Section 10 option in respect of virtually all staff attaining the age of 60 has been to establish 60 as the age of "normal" retirement in the Bank.

51. While it is true that the question of the appropriate retirement age of its staff is one for the Bank to determine, it is also true that such a basic rule as the rule concerning retirement age can only be amended through the required legal procedures. As emphasized by M.B. Akehurst, an international administrative tribunal has the duty "to protect officials, not only against an incorrect application of the rules, but also against abusive amendments to those rules (Unilateral Amendment of Conditions of Employment in International Organizations, 40 Brit. Y.B. Int'l L. 286 (1964)).

52. There is an abusive amendment of the rules in this case: the exercise of administrative power to enact a termination policy in order to bring about a new retirement policy, with the consequence that no termination payment is made at the time of "retirement", is an abuse of power, more precisely a "détournement de procédure" which is a specific category of the more general category of "détournement de pouvoir":

Basically, *détournement de pouvoir* occurs when discretionary powers are exercised for purposes or objects other than those for which such powers have been explicitly or implicitly granted or are not exercised for the objects underlying the grant of such powers. (1 C.F. Amerasinghe, *The Law of the International Civil Service* 277) (2nd ed. 1994) (emphasis added)

53. A change of retirement age, through an administrative "interpretation" of the Bank, which emptied the initial rule of its meaning, is illegal. No legislative power rests with the administrative authorities to unilaterally amend decisions made by the Board of Directors on such an important issue as the mandatory age of retirement.

54. The change of the normal retirement age could only have been enacted through a modification of the Staff Regulations, with the reservation of possible acquired rights, whose existence was not to be determined in the present instance.

55. For example, when the retirement age was modified in the United Nations (from 60 to 62), this modification was done through Resolution 44/199 of the General Assembly, adopted 21 December 1989.

56. The consequence of the finding that the Bank's interpretation since 1982 was illegal, is that the individual decision to retire the Applicant with no termination payment, on the basis of the general policy to consider the normal retirement age as being 60, is itself invalid; the Bank was only empowered to terminate for retirement, as it did before 1982, with the payment of termination money and pension benefits.

57. Finally, a last important statement has to be made: it cannot be admitted that just because an illegal practice has been followed since 1982, it has thereby become a legal practice, especially as there existed no Tribunal before 1991.

58. In summary, it is my opinion that:

- it was in the Bank's discretion, and in accordance with the Staff Regulations, to enforce a policy of uniform utilization of the option to terminate the employment of a staff member on his reaching the age of 60;
- it was not in the Bank's power to use the enforcement of such a policy on termination to bring about an administrative change of the normal retirement age, in order to avoid granting termination payment, that was actually given in the early years; and
- the Bank should therefore have been asked to pay suitable remedies.