

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 18
(13 August 1996)

Ferdinand P. Mesch and Robert Y. Siy
v.
Asian Development Bank
(No. 3)

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

1. In this Application the Applicants claim that the decision of the Bank not to reimburse national taxes paid by them on their salaries and emoluments received on and after 6 October 1994 is in violation of the fundamental and essential terms and conditions of their employment.

2. In a previous Application to the Tribunal, the Applicants contended that the terms and conditions of their employment required the Bank to reimburse income tax levied on their salaries by the member States of which they were nationals, and claimed reimbursement of taxes paid for several years, up to and including 1991.

3. The Tribunal held in that case, Mesch and Siy, Decision No. 2 [1994], that:

- a. In principle, the terms and conditions of employment of the Applicant entitle them to reimbursement of income tax levied and paid on their salaries;
- b. The Bank shall reimburse the Applicant the income tax levied and paid on their salaries beginning with the year 1990 together with interest at 5% per annum from 10 February 1992 in respect of the years 1990 and 1991.

4. The Tribunal clarified the circumstances in which that obligation arose as well as the extent of that obligation, thus

Moreover the Bank's obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax.

[T]he concept of "tax reimbursement" means reimbursement only for income tax actually payable and paid in respect of salaries received from the Bank. Each Applicant's entitlement to such reimbursement in each case must be restricted to the amount of income tax payable and paid by him on the assumption that the salary received from the Bank constituted his total income. Further, in determining the reimbursable amount of income tax paid by each Applicant, any tax credits or benefits to which he is entitled under his national tax system must be applied first in respect of his salary from the Bank (paragraphs 22-23).

5. By a memorandum dated 9 August 1994, the Applicants complained to the Tribunal that although seven months had elapsed after Decision No. 2, the Bank had arrived at an interpretation which might frustrate the intent and spirit of that Decision. Accordingly they requested the Tribunal to interpret or clarify certain aspects of the case, particularly whether the

Bank could unilaterally amend its compensation policies so as to exclude the principle of equal pay for comparable work.

6. Before the Tribunal could rule upon that complaint, the Board of Directors, on 6 October 1994, resolved that:

WHEREAS the Bank has never reimbursed for the income tax levied and paid by its staff members; it has been the Bank's choice actually made and consistently enforced; however, in its judgement on Ferdinand P. Mesch and Robert Y. Siy v. the Bank the Tribunal has found "an ambiguity or uncertainty" in the Bank's pronouncements and has stated that the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could have excluded the need for tax reimbursement;

NOW THEREFORE the Board of Directors hereby RESOLVES:

I.

That the Bank shall discharge its obligations under the Statute of the [Tribunal] in connection with Decision No. 2 and reimburse the income tax levied and paid by staff members as follows:

(a) with respect to the [Applicants] the Bank shall make tax reimbursement as instructed by the Decision;

That the Bank shall hereby reaffirm its long-standing practice of no reimbursement of taxes and, except as otherwise provided in Part I of this Resolution, the Bank shall not reimburse the taxes paid by any Governor, any Director, any Alternate, the President, any Vice President and any staff member of the Bank for the taxes paid by them on their salaries and emoluments paid by the Bank, effective upon the date of this Resolution.

That for the purpose of the preceding paragraph, the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally shall be construed to be applied before the imposition of any tax, and any policy pronouncements, administrative regulations, orders and circulars not consistent with the provisions of this Resolution shall be deemed to have been amended by this Resolution.

7. By circular dated 10 October 1994, all professional staff of the Bank were notified of the Board Resolution of 6 October 1994 (the Resolution). The Applicants submitted a memorandum dated 29 November 1994 to the Director, Budget, Personnel and Management Systems Department (BPMSD), stating that:

1. This memorandum is to serve notice that we will be submitting respective claims for reimbursement of taxes paid or to be paid for salary (and benefits) received from the Bank in 1994. Under the principle of non-retroactivity and given the obligation of employers to pay for services already rendered, the Bank is required to reimburse taxes for 1994 salaries. Such obligation exists despite the 6 October 1994 Board Resolution which resolved to prohibit tax reimbursement from 1 January 1995.

2. In Decision No. 2, the Tribunal held that the Applicants (and, accordingly, similarly situated staff) have a right to tax reimbursement as a part of their compensation; otherwise, they would not receive equal pay for comparable work. Tax reimbursement therefore constitutes an integral and essential part of compensation for staff subject to national taxes. This has been the clear understanding of all staff from the time Decision No. 2 was announced, and was never disputed by the Bank, until the date of the questionable Board Resolution.

. . . .

4. We therefore request that the Bank announce, at the earliest possible time, that claims for reimbursement of taxes on 1994 salaries will be entertained and processed by the BPCB.

8. On 8 December 1994, Mr. Mesch forwarded to the Manager, Compensation and Benefits Division (BPCB), a claim for reimbursement of the amount paid by his wife and himself as "estimated total 1994 taxes."

9. The Applicants submitted a further memorandum dated 13 December 1994 reiterating that:

[T]he Bank is required to reimburse taxes paid on 1994 salaries. This obligation of the Bank exists and remains regardless of the outcome of the Tribunal's action on the pending motion for interpretation of Decision No. 2.

10. The Director, BPMSD, replied on 16 December 1994:

In accordance with the Board resolution . . . the Bank will accordingly reimburse taxes paid by you on your salaries for 1994, up to 5 October 1994. The reason for the cut-off date being established as 5 October 1994 is that the resolution was adopted with immediate effect on 6 October 1994. No taxes paid on income received after 6 October 1994 will be reimbursed.

11. On 31 March 1995, the Tribunal made the following Order in respect of the complaint, regarding the non-implementation of Decision No. 2:

13. The question whether the Bank can unilaterally amend the term or condition as to tax reimbursement insofar as it arises between the Applicants and the Bank, is not a matter of interpretation or clarification of the Decision but a separate issue which arises from the preparatory steps which the Bank then took with a view to adopting the Resolution of 6 October 1994. Any grievance which the Applicants may have in that respect cannot be decided by the Tribunal in this case.

12. On 12 April 1995, Mr. Siy made a claim for reimbursement of taxes paid on his salary and benefits for 1994; Mr. Mesch made a similar claim on 4 July 1995. The Manager, BPCB, replied to them on 26 June and 5 July 1995, respectively, that:

As stated in the 16 December 1994 memorandum to you from Director, BPMSD, reimbursement will be only for taxes paid on income derived from the Bank for the 1994

tax year up to 5 October 1994. The reason for the cut-off date being established as 5 October is that the Resolution was adopted with immediate effect [from] 6 October 1994.

13. Mr. Siy requested the President, on 28 June 1995, for permission to submit the issue of the denial of "full reimbursement of 1994 taxes on Bank salary and benefits" for resolution directly to the Tribunal under Article II, Section 3(a), of the Tribunal's Statute, because "given the history of this issue, it appears unlikely that the Management would now consider a reversal of the above decision." Mr. Mesch associated himself with this request by his memorandum of 7 July 1995, and the Applicants made a further joint request on 23 August 1995.

14. The Director, BPMSD, informed the Applicants on 31 August 1995 that the President had refused permission for direct submission because:

3. Unlike the first tax reimbursement case, your present complaint is based on an entirely new development created by the adoption of the no tax reimbursement resolution by the Board of Directors. After Decision I was handed down in January 1994, Management and the Board of Directors spent a considerable time examining the implication of Decision I and an appropriate course of action to be taken by the Bank. The no tax reimbursement resolution was a result of such extensive consultation with the authorities of the Bank's member countries. . . .

4. Given these circumstances, the President does not share your views that your present complaint is 'not a new issue before the Bank.' Rather, he believes that you will come to view your present complaint in an entirely different perspective when you go through the internally available processes as you will become aware of the background and determination of the authorities of the Bank's member countries. It is also noted that you have separately requested the Tribunal to permit direct submission under the "exceptional circumstances" clause referred to in paragraph 3 of Article III of the Statute of the Tribunal. It is our view that such "exceptional circumstances" do not exist when there are internal processes to exhaust.

15. The Applicants filed this Application with the Tribunal on 1 September 1995, pleading that the denial of reimbursement of taxes paid on income received after 5 October 1994 constituted an impermissible, improper and arbitrary amendment of fundamental and essential conditions of employment regarding tax reimbursement, competitive pay and equitable remuneration for similar responsibilities internally and externally. In their Reply they pleaded that their grievance "arose only when the respective claims presented by [them] for full reimbursement of 1994 taxes on Bank salaries were denied."

16. The Bank took the following objections to jurisdiction, in accordance with Rule 7, paragraph 6, of the Tribunal's Rules of Procedure:

- a. The Tribunal lacks jurisdiction to hear the Application as it does not possess powers of judicial review or appeal of decisions taken by the Board of Governors or the Board of Directors;
- b. Even if the subject-matter of the Application is within the jurisdiction of the Tribunal, the Application is time-barred and inadmissible because the Applicants have failed to exhaust available internal processes; and

- c. In no event do "exceptional circumstances" exist which would justify a direct submission of the Application to the Tribunal.

17. The Applicants' position is as follows:

- a. Lack of jurisdiction: "Recourse to the Administrative Tribunal is guaranteed by the Tribunal's Statute . . . The Statute . . . does not state that decisions of the Board of Directors are outside the jurisdiction of the Tribunal . . . A Board with absolute power over employment matters is inconsistent with the Bank's Personnel Policy Statement, the Tribunal's Statute, related Bank policies and general principles of law which require independent, judicial resolution of grievances....";
- b. Timeliness: "[A]s stated in . . . Decision No. 2 . . . the Bank's obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax. Therefore the grievance in this case arose only when the respective claims presented by the Applicants for full reimbursement of 1994 taxes on Bank salaries were denied by Manager, BPCB, [on June and 5 July 1995]. At that point, it became possible to show that staff rights had been adversely affected and there was real and direct injury to staff. At that point, the claims of the Applicants became 'ripe and judiciable'."
- c. Non-exhaustion of internal remedies: "[T]he long history of the tax reimbursement issue will show that the Bank's position is intractable, and that the Applicants have no other recourse except to the Administrative Tribunal It is clear that (i) the Bank's views on tax reimbursement are firm and inexorable, (ii) there is no longer any possibility of an amicable settlement of the differences, (iii) the positions of both parties on the issue have been discussed thoroughly and are well known, and (iv) there are, effectively no further internal remedies to exhaust"; and "there appears to be an implied exception . . . when [the] pursuit [of internal remedies] has been shown to be futile or illusory";
- d. Exceptional circumstances: "[T]he Respondent claims that an exception to the rule may only be granted where an applicant may suffer irreparable injury if made to further exhaust internal processes . . . [but for this] it has not cited any legal basis . . . [A]s a result of the uncertainty regarding our future compensation, we are compelled to forego certain . . . options which affect the welfare of our families and which will no longer be available in the future . . . In this sense, we suffer an 'irreparable injury.' And of course, there is the continuing anxiety and apprehension about our diminished financial circumstances."

Jurisdiction

18. The Bank submits that, in terms of Article II(1) of the Statute of the Tribunal, the Tribunal can only "hear and pass judgment upon any application by which [a staff member] alleges non-observance of the contract of employment or terms of appointment of such staff member"; that jurisdiction is restricted by the provision in Article XIII of the Statute that "nothing in this statute shall be deemed or construed to limit or modify the powers conferred on the Board of Governors or the Board of Directors under the Agreement Establishing the Asian Development Bank"; therefore the Tribunal "cannot exercise power - whether to determine its jurisdiction or in the context of a determination of the merits of a particular case - in a manner which would either (i) circumscribe or restrain or confine or (ii) qualify or change or amend the existing powers of the

Board of Governors or the Board of Directors . . . [and] the Tribunal has no competence to limit or modify - and certainly not to nullify or revoke - any Board resolution."

19. In Lindsey, Decision No. 1 [1992], the Tribunal identified the principal rules of law within the framework of which the facts of a case 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 of any acquired right of the staff, and, by analogy, from the staff practices of international organisations 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 organisations to which, according to the circumstances, the Tribunal will give due weight.

20. The issue that needs to be considered is not that formulated by the Bank, but a much narrower issue: namely, whether the Tribunal lacks competence to examine, review and invalidate, a decision of the Board of Directors which purports unilaterally to amend the contract of employment or terms of appointment of a staff member, even if that decision prejudicially affects a fundamental and essential term or condition of employment of a staff member, without the staff member's consent, thereby violating his acquired rights.

21. The power of an organization to amend the contract of employment or terms of appointment has been lucidly set out in de Merode, WBAT Reports 1981, Decision No. 1:

35. [T]he Bank has the power unilaterally to change conditions of employment of the staff. At the same time, significant limitations exist upon the exercise of such power.

. . . .

40. . . . The Tribunal notes that [the distinction between unilateral amendments which are permissible and those which are not] cannot rest on the extent to which a staff member accepted such power of amendment in his letter of appointment. Even if no reservation of the power of amendment were expressly included in the letters of appointment, such a power would be implied from the internal law of the Bank. Likewise, even if those cases where a power of amendment is reserved in terms which impose no limitation upon its exercise, this cannot be construed to accord to the organization an unrestricted power of amendment. The scope of the words as used in the exchange of letters must be read against the background of the Bank's internal law, and it is not on the strength and extent of any individual's acceptance that the power of amendment and its limitations may be defined.

. . . .

42. . . . Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to [certain] limits and conditions

44. . . . The Tribunal prefers not to invoke the phrase "acquired rights" in order to describe essential rights. . . . It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls "the doctrine of acquired rights" does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment.

22. Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. Without deciding whether that principle could have been excluded by the provisions of the Charter of the Bank, it suffices to note that the Charter does not do so, and therefore the powers of the Board of Governors and of the Board of Directors of the Bank are subject to that limitation. However, when the Bank was founded there was no institution which was empowered to compel the Bank to comply with that principle. And when the Statute of the Tribunal was adopted, that limitation already existed: it was not one imposed or deemed to have been imposed by the Statute. The Tribunal was given jurisdiction in respect of complaints by staff members alleging non-observance of their contracts of employment and terms of appointment. That Statute does not prescribe any pertinent exception or qualification in respect of the jurisdiction of the Tribunal, and so that jurisdiction extends to non-observance of contractual terms resulting from the infringement of that principle.

23. Non-compliance with that principle was, and is, wrongful. However, before the Tribunal was established there was no remedy for that wrong. By establishing the Tribunal the Bank did not introduce that principle: it merely provided a judicial remedy for its infringement, and did not impose any restrictions thereon. Article XIII of the Statute of the Tribunal only precludes the Statute being read so as to limit or modify the powers of the Board of Directors; it does not exclude the limitations imposed on those powers otherwise than by the Statute.

24. The Tribunal holds that it has competence to consider whether a decision of the Bank embodied in a Resolution of the Board of Directors is a nullity because it purports unilaterally to amend a fundamental and essential term or condition of employment.

Admissibility

25. Article II(3) of the Statute provides that an Application is not admissible (apart from exceptional circumstances as decided by the Tribunal), unless the Applicant has exhausted internal remedies, except where the parties have agreed to direct submission to the Tribunal, and such application is filed within ninety days after the event giving rise to the application, or receipt of notice after exhaustion of internal remedies that the relief asked for will not be granted, whichever is later.

26. There are three decisions of the Bank which may conceivably be regarded as open to challenge, namely:

- a. The Resolution of 6 October 1994;
- b. The statement made by the Bank on 16 December 1994 that no taxes paid on salaries received after 6 October 1994 would be reimbursed; and
- c. The Bank's refusal, on 26 June and 5 July 1995, of the Applicants' claim for reimbursement of taxes actually paid on their salaries for 1994.

27. By the Resolution of 6 October 1994, the Bank not only decided that national taxes levied on salaries and emoluments would not be reimbursed, but announced also that any policy pronouncements, administrative regulations, orders and circulars not consistent with that Resolution shall be deemed to have been amended thereby. If the Applicants wished to challenge that Resolution as being a unilateral, and therefore wrongful, decision by the Bank, altering a fundamental term or condition of their employment they should have had recourse to internal remedies, if available (Article II(3)(a)); and if no internal remedies were available, they should have applied to the Tribunal, within ninety days of 10 October 1994, when that Resolution was communicated to the Applicants (Article II(3)(b)(i)). The Applicants took no such timely action.

28. When in response to the Applicants' memorandum of 29 November 1994, the Bank stated on 16 December 1994 that taxes would not be reimbursed, that amounted to a refusal to comply with the term or condition of employment relied on by the Applicants. If the Applicants wished to challenge that decision, Administrative Order 2.06 required them to have recourse to internal remedies within six months of that decision, but they did not do so.

29. However, the Applicants urge that the events giving rise to this Application occurred on 26 June and 5 July 1995, when their claims for full reimbursement of the taxes actually paid on their salaries for 1994 were refused. They cite the observations of the Tribunal in Mesch and Siy, Decision No. 2 [1994], para. 22, that the "Bank's obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax." If they wished to challenge that decision, they were obliged to have recourse to internal remedies, but failed to do so.

30. The Tribunal therefore concludes that, whichever of these three decisions be regarded as being impugned by the Applicants, the Application is inadmissible.

Exceptional circumstances

31. The Applicants seek exemption from the need to exhaust internal remedies on the ground of exceptional circumstances. This plea must be considered in the light of the purpose of internal remedies. Internal remedies enable each party to better appreciate the position of the other; they provide the administration with an opportunity to ascertain the causes of an alleged grievance and to arrive at a settlement; and internal appeal bodies which are generally more familiar with organizational factors may also elicit material evidence which might not otherwise be available to the Tribunal. There must be cogent reasons for dispensing with internal remedies.

32. Exceptional circumstances would include those which prevent compliance with the requirements as to time and internal remedies; for instance, where the internal appeal machinery is not functioning; where the internal appeals body refuses to take a decision, or

where by its statements or conduct it manifests an intention not to take a decision within a reasonable time; or where the Applicant is prevented from filing such an internal appeal due to illness, or an act of God. It has been held that exceptional circumstances do not include those relating to the "extraordinary nature of the grievance" (Nelson, Decision No. 7 [1995]).

33. The Applicants allege that the continuing uncertainty, anxiety and apprehension regarding their diminished financial circumstances, which their options for their families, caused by the amendment of their conditions of employment are exceptional circumstances justifying the submission of the Application to the Tribunal by the most direct route permitted by the Statute. However, the gravity of the injury per se is not an exceptional circumstance.

34. The Applicants urge that there were in effect, no further internal remedies to exhaust, given the long history of the dispute. However, when they applied to the President for permission to submit this Application directly to the Tribunal, they acknowledged that:

the Bank's Grievance and Appeal Procedures required that [they] go through the process of requesting a review and reconsideration of this negative decision. . . . Given the history of this issue, it appears unlikely that [the Bank] would now consider a reversal of the above decision. . . .

Thus they knew that there were internal remedies which they had to exhaust, and that they could not apply directly to the Tribunal without the concurrence of the President. The Applicants are not justified in asserting that the Bank's position was "intractable" without having recourse to their internal remedies.

35. The Applicants also seek to justify the direct submission of the Application to the Tribunal on the ground that the pursuit of internal remedies has been shown to be "futile and illusory", especially because they claim that neither the management nor the internal appeals bodies could overrule a Resolution of the Board of Directors. Administrative Order 2.06 does not exempt from review by them a decision of the Board of Directors unilaterally amending a fundamental or essential term of employment, and the Applicants are therefore not entitled to assume that the pursuit of internal remedies would be futile and illusory.

36. The Tribunal holds therefore that there were no exceptional circumstances which justified direct submission of the Applicants' grievance to this Tribunal.

37. The Applicants seek in this Application to impugn the Bank's decision rejecting their claims for full reimbursement of the taxes actually paid by them on their salaries for 1994. That Application is being dismissed on procedural grounds. The Tribunal does not purport to rule on any other claims for reimbursement which they might make for any other period.

Interventions

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

Any person to whom the Tribunal is open under Article II, paragraph 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.

39. Messrs. Richard Bradley, Latif Chaudhry, Richard Wada, Paul McCabe, Felipe Fajardo and Isidoro David (the Intervenors) filed applications for intervention (the Interventions) requesting the Tribunal to grant them the same relief as may be granted to the Applicants. While associating themselves with the submissions and statements of the Applicants, they stated that they did not wish to participate actively in the proceedings. They averred that they had asked for full reimbursement of the taxes paid by them upon their salaries and benefits for 1994, but had been informed that they would only receive partial reimbursement.

40. The Bank has objected to the admissibility of the Interventions on two grounds:

- a. That the Intervenors have failed to lodge their grievances within the six-month period stipulated in A.O. 2.06 paragraph 4.1; and
- b. That the Interventions are inadmissible at the preliminary stage dealing with jurisdiction and admissibility.

41. 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 Intervenors is identical to that claimed by the Applicants, and is therefore one which might have been affected by the judgment of the Tribunal, and so that condition is satisfied. Neither paragraph 2(d) of Article II of the Statute nor Rule 18 imposes a further condition of compliance with paragraph 3 of Article II of the Statute. As for the time at which intervention was sought, Rule 18 expressly permits an application for intervention to be made "at any stage."

42. The Interventions are therefore receivable.

43. Since the principal Application fails, so do the Interventions. But as the Tribunal has not ruled on the merits, the dismissal of the Application will not affect the substantive rights of the Intervenors.

Decision:

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