

## ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 112**  
(28 February 2018)

Perrin *et al.*  
v.  
Asian Development Bank  
(No. 2)

**Lakshmi Swaminathan, President**  
**Gillian Triggs, Vice-President**  
**Shin-ichi Ago**  
**Anne Trebilcock**  
**Chris de Cooker**

1. This is a *Further Application* submitted initially on behalf of 106<sup>1</sup> international staff members (Perrin *et al.*) seeking relief from the effect of changes to the Asian Development Bank’s (“ADB” or “the Bank”) education assistance (“EA”) benefits provided to its international staff. The *Further Application* was lodged following Decision No. 109 (6 May 2017) that the ADB Administrative Tribunal (“Tribunal”) had rendered concerning an Application filed by 122 Applicants. The EA changes were part of a broader revision of ADB’s compensation and benefits package that was applicable to international staff, national staff, and administrative staff at all duty stations including Headquarters. These changes were implemented in the context of the Respondent’s 2020 Strategy. After an almost year-long consultation period, these final changes were notified to staff on 16 December 2015 and introduced effective 1 January 2016 by Administrative Order (“AO”) No. 3.06.

### I. THE FACTS

#### *Changes to the EA*

2. Following the *Further Application*, the Respondent submitted its *Preliminary Objections to the Jurisdiction of the Tribunal* (see paragraphs 17-28 below) in accordance with Rule 7 (6), of the Tribunal’s Rules of Procedure (“the Tribunal’s Rules”). In their *Further Application*, and in their *Observations on ADB’s Preliminary*

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<sup>1</sup> Later reduced to 96 Applicants. See, *infra*, paragraph 37.

*Objections*, the Applicants state that they do not seek to repeat the facts and the law already extensively pleaded. The Respondent also did not produce further background elements in its *Preliminary Objections to the Jurisdiction of the Tribunal*. Reference can thus be made to the facts given in Decision No. 109. It is appropriate, however, to give a summary below.

3. The EA is one element, and an important element, of the remuneration package of international staff. The provision of EA is based on the underlying premise of cost-sharing, so that the assistance provides a percentage (not the full amount) of the costs, with a cap on the grant.<sup>2</sup>

4. The grant consists of several elements, such as tuition fees, board and lodging, and travel, to each of which caps are applied. The EA package is regularly reviewed. The impugned measures, for example, took effect on 1 January 2016 and are laid down in AO No. 3.06. They replaced an earlier version of this AO that entered into force from the 2007/08 academic year. This latter version replaced one that was issued on 1 January 2002.

5. The EA changes were introduced following a regular quinquennial review of ADB's compensation and benefits package, which took place in the context of the ADB's 2020 Strategy and the related "Our People Strategy", which emphasized the need to provide remuneration and benefits that are competitive in the international marketplace and in each location where the Bank operates.<sup>3</sup>

6. The objectives of the 2015 Comprehensive Review were explained to staff to include: (i) assessment of the competitiveness of the Bank's compensation and benefits policies with reference to global or local employment markets from which the Bank recruits its staff; (ii) assessment of sustainability and cost efficiency of ADB's compensation and benefits policies and its effectiveness in supporting talent

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<sup>2</sup> An early policy ADB Board Paper from 1968 noted, "It is intended that Education Grants will offset, to a reasonable extent, the additional educational costs which a professional staff member incurs as a result of his assuming duty away from the home country and not being in a position to continue educating his child in his homeland or in the same household."

<sup>3</sup> This is also in accordance with paragraph 3.2 of AO No. 3.01 (on Salary Administration), which provides that ADB's salaries are maintained at levels competitive with those in comparator organizations and with due regard to the duty station concerned.

acquisition, staff development and retention; and (iii) identification of areas where changes in the staffing, compensation and benefits policies are required to support the Bank's business needs and changing workforce demographics.

7. The main findings of the 2015 Comprehensive Review in relation to international staff were that (i) the compensation was "on par or above comparators" and (ii) the benefits (including the Bank's education assistance policy) were "above the median and average of the comparators".

8. A great number of proposals for changes to salaries and benefits were made. They were subject to extensive consultations, including at town-hall meetings, and the proposals were, as a consequence, substantially modified. The final changes to the EA for international staff members towards costs of educating their dependent children that were ultimately retained can be found in AO 3.06, effective from 1 January 2016. The major changes are the following:

1. a dependent child of an eligible international staff (with a regular or fixed-term appointment) must be between 3 and 23 years of age on the date of commencement of school classes during the EA year;
2. the ADB will under certain conditions provide EA for pre-school, primary, secondary, and post-secondary education;
3. regarding post-secondary education, the ADB will henceforth provide a maximum of four years of assistance to any eligible dependent child with a transition period so that EA beyond four years of post-secondary education would be discontinued starting 2020;
4. the Flat Rate Allowance for non-tuition expenses (FRA) benchmark reference changes to the World Bank Group Subsistence Grant for Room and Board; and
5. a number of changes to the calculation of the amount of tuition allowance.

For staff in post on 31 December 2015, the negative effects of some parts of the new EA were phased in by applying a transition factor going down by twenty percentage points every year over four years.

*Tribunal Decision No. 109*

9. In the original *Application*, the Respondent agreed that Applicants could apply directly to the Tribunal pursuant to Article II(3)(a) of the Statute and Rule 6(8) of the Rules, and that it would not object to international staff joining the Application. After receiving the *Application* that provided simply the names of 122 Applicants, the Tribunal directed Applicants to submit additional documents and supporting data. The Tribunal subsequently received the names and birthdates of children for 105 of the 122 Applicants. The Respondent raised the issue of *locus standi* for nine Applicants who did not have children but otherwise did not raise preliminary objections to the admissibility of the cases or to the jurisdiction of the Tribunal. The case was considered by the Tribunal on 6 May 2017 in its Decision No. 109.

10. In Decision No. 109 the Tribunal held that:

- 1) it had its own responsibility in jurisdiction and admissibility matters, and that it may and, when necessary, must deal with them *sua sponte*, i.e. on its own motion;
- 2) there must be a specific administrative decision that directly and adversely affects an applicant in order to trigger jurisdiction, and that an application challenging a general rule is inadmissible. In other words, promulgation of a rule does not automatically affect the personal interests of staff. This is only the case when the new provision has been applied in a concrete manner. The Tribunal cannot deal with potential and hypothetical cases<sup>4</sup>; and then concluded that
- 3) the Applicants had failed to substantiate to what extent the new rules had adversely affected them when implemented and applied to them.<sup>5</sup> The Tribunal recalled that it is the responsibility of Applicants, at the moment of lodging an application, to substantiate their claims and to provide complete,

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<sup>4</sup> Decision No. 109, paragraph 51.

<sup>5</sup> *Idem*, paragraph 56.

adequate and convincing evidence in support of such claims.<sup>6</sup> They had in the present cases failed to do so, including after a request was made by the Tribunal in that respect.

11. Although the Tribunal held that the original Application was inadmissible<sup>7</sup>, it understood the need for a determination in law regarding the question whether the EA changes adopted by the Bank violate fundamental and essential rights of its employees under their employment contracts. It held that it was now open to Applicants, if they chose, to make a further application to the Tribunal that met the requirements for admissibility as set out in its Decision and in the Statute and Rules of the Tribunal. Only then could the Tribunal make a determination in law on the requests before it.<sup>8</sup> It is in this context that the *Further Application* has been submitted.

## II. PROCEEDINGS

### *Further Application*

12. On 8 September 2017, 106 Applicants submitted their *Further Application*, advising that 16 Applicants had formally withdrawn from the original *Application*. In its Decision No. 109 the Tribunal had observed, as did the Respondent, that nine Applicants did not, or did not yet, have children when lodging the *Application*. All nine are part of this group of 16 that withdrew. Seven Applicants were put forward as “representative examples”.

13. In their *Further Application*, Applicants continued to request the Bank’s cooperation in providing relevant calculations of loss and a detailed breakdown of the educational benefits that each Applicant received from the Bank for each child for the academic year 2016/17, together with a comparison of how much they would have received under the old scheme.

14. The Applicants made it clear that they would not seek to repeat the facts and the

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<sup>6</sup> *Idem*, paragraph 45.

<sup>7</sup> *Idem*, paragraph 57.

<sup>8</sup> *Idem*, paragraph 61.

law already extensively pleaded in both the 16 June 2016 *Application* and the 30 September 2016 *Reply*.

15. Applicants also observed that the issue of joinder was for the Tribunal to decide, and submitted that jurisdiction *ratione temporis* had been satisfied for all Applicants.

16. Applicants requested the Tribunal to:

- (i) rescind the EA changes made (pursuant to Article X(1) and Rule 6(3)(b));
- (ii) compensate for any losses suffered following the introduction of the EA changes, thereby putting Applicants back in the position they would have been in had the unlawful changes not been implemented by the Bank (pursuant to Article X(1)); and
- (iii) award reasonable legal costs incurred by Applicants in the case, taking into account the nature and complexity of the case and the nature and quality of the work performed, pursuant to Article X(2).

#### *Preliminary Objections to the Jurisdiction of the Tribunal*

17. On 7 November 2017, the Respondent submitted its *Preliminary Objections to the Jurisdiction of the Tribunal*. It divided the Applicants into four categories and agreed that four Applicants' cases were admissible in relation to Education Assistance Year ("EAY") 2016/17 but objected, at that time, to all other Applicants, including the alleged future claims of the four Applicants, on the basis of no jurisdiction *ratione personae*.

18. Category A, at that time, consisted of four Applicants who had in the *Further Application* submitted financial substantiation concerning their claim of actual financial losses for the EAY 2016/17. They, however, were also seeking relief for alleged future losses.

19. The Respondent accepted, at that early stage, all four Applicants who had submitted financial calculations for EAY 2016/17 (although the Bank corrected the financial calculations for two of those four). However, the Respondent did not accept,

at that stage, the alleged financial harm submitted by Category A Applicants for EAY 2017/18 because none of them had completed the internal administrative verification steps required by the Respondent to verify their actual education grants for that school year.

20. Moreover, the Respondent did not accept, at that stage, the alleged financial harm for the four Category A Applicants beyond EAY 2017/18 because it was hypothetical, the School Country Limit and FRA having not yet been determined. The Respondent added that neither the Applicants nor the Respondent could accurately determine the exact level of education grants for each dependent child, or whether an Applicant would even be a staff member at the relevant time.

21. Category B consisted, at that stage, of 39 Applicants who were affected by the changes in the EA. Two of them had submitted estimates of their losses but had not yet provided evidence of reimbursable expenditure during the 2016/17 school year in order to allow the final calculation of the EA. As a consequence, the Respondent could not verify the veracity of their claims.

22. Category C consisted, at that stage, of 55 Applicants. These were staff who had eligible dependants but were not directly affected by the changes for a variety of reasons: (i) They continue to receive the same EA as before (their dependants study at primary and/or secondary schools either within or outside the duty station); (ii) The alleged adverse impact of the changes in the EA is hypothetical; (iii) The children are not yet of school-going age or are not attending school; (iv) Applicant's spouse, who is also employed by ADB, is receiving the EA; or (v) Applicants are on special leave without pay.

23. Category D consisted of six Applicants who had separated from ADB since the *Application* was filed and had in their separation arrangements agreed to waive any and all claims they may have had arising from their employment.

24. The Respondent thus objected, at that stage, to the continued participation of 102 Applicants in the *Further Application* on the basis that they had failed to substantiate to what extent the EA changes had adversely affected them.

25. The Respondent further argued that the Applicants' provision of 'representative examples' of the harm suffered by Applicants was not consistent with the requirements described by the Tribunal in Decision No. 109.

26. The Respondent also reserved its position on the joinder of Applications, subject to the potential substantiation of agreed facts and evidence.

27. Lastly, the Respondent, in noting that the Applicants' counsel had signed on behalf of the 106 Applicants that included Category D Applicants, questioned whether Rule 6 (7), of the Tribunal's Rules had been observed – specifically whether counsel had the authority to submit the *Further Application* on behalf of all 106 Applicants. The Respondent requested that all Applicants who had admissible claims update a notification of designated representative to the Executive Secretary.

28. The Respondent requested the Tribunal to:

- (i) find that the *Further Application* is admissible only for the four Applicants in Category A in so far as it relates to harm relating to EAY 2016/17;
- (ii) find that the *Further Application* is not admissible for all Applicants in Category A for EAY 2017/18 unless and until they complete the internal administrative verification steps and substantiate the extent to which the EA changes have adversely affected them when implemented and applied to them;
- (iii) find that the *Further Application* is not admissible for all Applicants in Category A for any period beyond 2017/18;
- (iv) find that the *Further Application* is not admissible for all Applicants in Category B, unless and until they complete the internal administrative verification and substantiate the extent to which the EA changes have adversely affected them when implemented and applied to them;
- (v) find that the *Further Application* is not admissible for all Applicants in Category C, because they have not and cannot (at this time) substantiate the extent to which the EA changes have adversely affected them; and
- (vi) find that the *Further Application* is not admissible for all Applicants in



Category D, because they have released and waived all their claims they may have had arising from the terms and conditions of their employment, including the current Application.

*Applicants' Observations on the Respondent's Preliminary Objections to the Jurisdiction of the Tribunal*

29. By e-mail dated 24 November 2017, the Applicants' counsel requested from the Tribunal a 60-day extension (until 6 February 2018) to the original 8 December 2017 deadline for its *Observations on the Respondent's Preliminary Objections to the Jurisdiction of the Tribunal*, mentioning that the Bank supported the request for an extension. On 30 November 2017, the Tribunal agreed to a 30-day extension with Applicants' Observations due on 31 December 2017.

30. On 27 December 2017, the Tribunal received Applicants' written *Observations on ADB's Preliminary Objections*, but further to Rule 6 (9) of the Tribunal's Rules, they were returned for procedural non-compliance with the request that they be corrected on or before 8 January 2018. The Tribunal was notified on 16 January 2018 that the corrected *Written Observations* had been dispatched on the due date. The Respondent was then given 15 days to respond.

31. Ninety-eight Applicants submitted their *Observations on ADB's Preliminary Objections* ("*Observations*"), eight Applicants having withdrawn. These eight included one Category B, one Category C, and (all) six Category D Applicants who had since separated and waived their claims arising from their employment.

32. The Applicants maintained their view that the *Further Application* was consistent with the requirements described in Decision No. 109, i.e. the provision of representative examples. The Applicants were seeking to narrow the issues between the parties by clarifying which of the Applicants had an admissible grievance as agreed by both parties. The Applicants then emphasized their understanding that the Tribunal would examine the merits for those of them with an admissible grievance as agreed by both parties.

33. The Applicants provided details of seven Category B Applicants whose “agreed facts” (financial summaries for EAY 2016/2017 and internal verification steps) had been confirmed. The Applicants also noted that they expected that by the end of January 2018, the Tribunal should have received all sets of “agreed facts” and confirmation of all Applicants for whom the Bank no longer disputed the admissibility of their claims. For the remaining Applicants, i.e. Category C Applicants, they observed that the Bank argued that the *Further Application* was inadmissible because they had not been adversely affected by the EA changes. They considered this argument one of jurisdiction *ratione personae* and not *ratione temporis*. They concluded from this that they could challenge the decision at a later stage as and when the EA changes affected them adversely.

*Respondent’s Response to Applicants’ Observations*

34. On 1 February 2018, the Respondent submitted its *Response to Applicants’ Observations to the Jurisdiction of the Tribunal* (the “*Response*”). The Respondent agreed to admissibility regarding 38 of the 98 Applicants, including the admissibility for all four “original” Category A Applicants, since their alleged financial losses for EAY’s 2016/17 and 2017/18 had been substantiated and verified. The Respondent also provided financial data for 27 Category B Applicants (including some originally identified in Category C), in addition to the seven provided by the Applicants in their *Observations*. These Applicants had substantiated their alleged financial losses for EAY’s 2016/17 and 2017/18. Both the Applicants and the Respondent agreed to the admissibility of the applications of 34 Applicants who had been in Category B and fell now within Category A.

35. The Respondent maintained its objection with respect to the claims of the remaining 60 Applicants who all fell in Category C (including some previously belonging to Category B). The Respondent argued that the Applications in Category C should be declared inadmissible and as such should not be joined in the *Further Application*.

36. The Respondent disagreed with the Applicants’ “representative examples” as neither appropriate nor an accurate basis for determining admissibility and harm across

all Applicants. It noted that the Applicants were not similarly situated and that the EA changes would apply differently to each individual staff member.

#### *Applicants' Comments on the Respondent's Response*

37. On 15 February 2018, the Applicants submitted their *Comments on ADB's Response on the Jurisdiction of the Tribunal*. They advised that two Applicants, one in Category B and one in Category C, had formally withdrawn, reducing the number of Applicants to 96. The Applicants raised no new issues. The Applicants asked that, for clarity, the Tribunal confirm the Applicants' alternative argument that those Applications deemed inadmissible, at this stage, would retain the right to come back to the Tribunal at a later stage.

#### *Joint Submission of Agreed Facts*

38. By letter dated 15 February 2018 received by the Tribunal on 20 February 2018, the Applicants and Respondent jointly resubmitted all previously submitted agreed facts. Agreed facts for "38 Applicants" were submitted, but as noted in the Applicants' *Comments on ADB's Response on the Jurisdiction of the Tribunal*, one of the Category B Applicants had since withdrawn his application.

### **III. FINDINGS**

#### *Admissibility*

39. The Tribunal reaffirms that it is within its exclusive powers to rule on its jurisdiction, as well as on the admissibility of an application, either *ratione personae* or *ratione temporis*. In other words, it is not for the parties to agree which grievances are admissible, or to conclude that the Tribunal will examine them on the merits.

40. The Respondent has, with specific reference to Rule 7 (6) of the Tribunal's Rules, raised preliminary objections to the Tribunal's jurisdiction. Rule 7 (6) provides:

*Any objection by the Bank to the jurisdiction of the Tribunal upon which the Bank wishes to obtain a decision before filing its Answer shall be made in writing within the limit fixed for the filing of the Answer. ....*

41. The Tribunal recalls that in Decision No. 109, paragraph 42, it held:

*The Tribunal, first of all, notes that Respondent had agreed that the Applicants could apply directly to the Tribunal pursuant to Article II(3)(a) of the Statute and Rule 6(8) of the ADBAT Rules and that it would not object to IS joining the Application (instead of submitting individual grievances). Respondent has indeed not raised preliminary objections to the admissibility of the cases or to the jurisdiction of the Tribunal, other than regarding the locus standi of those Applicants who did not have children at the moment the Application was lodged. It is true that both parties have agreed to submit the cases directly to the Tribunal. It may thus be argued that Respondent has waived its rights to raise preliminary objections.*

42. The Tribunal then made its own assessment on the admissibility of the *Application*. It held that the original *Application* was inadmissible for reasons summarized in paragraphs 55-57 of Decision No. 109.

43. The Tribunal, however, as noted in paragraph 11 above, left it “open to the Applicants, if they choose, to make a further Application to the Tribunal that meets the requirements for admissibility”, and suggested that the parties “cooperate by agreeing upon relevant facts and evidence” and “provide representative examples that demonstrate the impact of the respective EA changes.” This *Further Application* is now to be considered by the Tribunal.

44. The parties have cooperated and submitted agreed facts concerning a number of Applicants.

45. In view of the parties’ wishes to obtain an early adjudication on the legality of the EA changes, the Tribunal considers the Respondent’s filing of preliminary objections to its jurisdiction at this stage of the proceedings as a complication in

expediting proceedings. In particular, the second sentence of Rule 7 (6) of the Tribunal's Rules provides:

*Upon the filing of such objection, the proceedings on the merits shall be suspended.*

For this reason, the Tribunal must suspend consideration of the merits at this stage.

46. In accordance with the last sentence of Rule 7 (6) of the Tribunal's Rules:

*"... the Tribunal shall either uphold the objection, reject it, or declare that it shall be joined to the merits of the case and shall, if appropriate, fix a date for the Bank to file its Answer."*

47. In light of this, the Tribunal is satisfied that the following 37 Applicants have provided verified evidence of the extent to which the new rules have adversely affected them in the relevant EAYs: Farzana Ahmed; Asad Alamgir; Syarifah Aman-Wooster; Gambhir Bhatta; Arup Chatterjee; Asif Cheema; Sean Crowley; Graham Dwyer; David Garrigos-Soliva; Colin Gin; Matthew Hodge; Lesley Lahm; Giuseppe Maggiore; Cynthia Malvicini; Nicholas Moller; Christopher Morris; Cuong Minh Nguyen; Tariq Niazi; Andrew Perrin; Frank Radstake; James Roop; Shane Rosenthal; George Rublee; Jouko Sarvi; Kanya Satyani Sasradipoera; Anna Charlotte Schou-Zibell; Gerard Servais; Akmal Siddiq; Ayun Sundari; Ryutaro Takaku; Deepak Taneja; Stella Tansengco-Schapero; Elaine Thomas; Chimi Thonden; Paulus Van Klaveren; Won-Mo Yang; and Liping Zheng. The Bank's endorsement of the agreed facts implicitly withdraws its preliminary objection in respect of these 37 Applicants. Their Applications are admissible to the extent of the agreed facts.

48. The Tribunal has verified letters of authorization for the Applicants' counsel in relation to each of the 37 Applicants and does not require updates to these notifications of designated representatives.

49. The Tribunal, with reference to paragraph 45 of its Decision No. 109, is further satisfied that these 37 cases are sufficiently identical and raise the same issues that they

may be joined. They are herewith joined, taking into account the need for efficient, cost effective conduct of the proceedings in accordance with Article VII of the Tribunal's Statute.

50. In relation to the remaining claims, the Tribunal has observed in Decision No. 109 that it cannot deal with potential and hypothetical situations. And although it is possible that certain of the impugned measures may have an adverse effect on some or many Applicants in the near future, and for some others in the not so near future, this is not sufficient reason to deal with their Applications here. There are just too many uncertainties about the future in a staff member's professional or private life, or in that of their children, that the Tribunal cannot share Applicants' conclusion that the measures will inevitably impact all of them adversely. For these reasons, all 59 Applications are inadmissible and the Bank's preliminary objections, as amended during the proceedings, in their cases are upheld.

51. Having decided on the objection to jurisdiction, the Tribunal, in accordance with Rule 7 (6) of the Tribunal's Rules, directs the parties to resume the written procedure on the merits and fixes a date for the Bank to file its Answer. In consideration of the parties' wishes to have an early resolution and of the fact that arguments have already been submitted, the Tribunal has decided to fix relatively short intervals for the respective submissions.

## **DECISION**

For the above reasons, the Tribunal unanimously decides to:

1. Note the Bank's implicit withdrawal of its preliminary objection to jurisdiction for 37 Applicants as specified in paragraph 47 of this Decision;
2. Order joining of those 37 Applications;
3. Direct:
  - a. the Respondent to file an Answer on the merits within 15 days of receipt of this Decision;
  - b. Applicants to file a Reply within 15 days of receipt of Respondent's Answer; and

- c. the Respondent may, within 15 days of the date on which the Reply is transmitted, file a written Rejoinder;
4. Defer the matter related to costs until resolution on the merits; and
5. Uphold the Bank's preliminary objection to jurisdiction concerning the remaining 59 Applicants.

Lakshmi Swaminathan

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/s/  
President

Gillian Triggs

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/s/  
Vice President

Shin-ichi Ago

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/s/  
Member

Anne Trebilcock

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/s/  
Member

Chris de Cooker

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/s/  
Member

Attest:

Cesar L. Villanueva

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/s/  
Executive Secretary

At Asian Development Bank Headquarters, 28 February 2018