

## ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 113**  
(21 July 2018)

Perrin, *et al.*  
v.  
Asian Development Bank  
(No. 3)

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

1. This is the Decision on the merits of the *Further Application* submitted initially on behalf of 106<sup>1</sup> International Staff (*Perrin, et al.*, ADBAT Decision No. 109 (6 May 2017)) seeking relief from the effect of changes to the Asian Development Bank’s (“the Respondent”, “the ADB” or “the Bank”) education assistance (“EA”) benefits provided to its International Staff. Proceedings on the merits had been suspended while objections to jurisdiction were considered in *Perrin, et al.* (No. 2), ADBAT Decision No. 112 (28 February 2018). In Decision No. 112 the Tribunal upheld the Bank’s preliminary objections for 59 Applications while joining the remaining 37 Applications it considered admissible.

2. 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 (“Education Assistance”).

3. The Applicants contend that the right to receive the EA is a fundamental and essential term of their employment contract and, as such, cannot be unilaterally altered by the Respondent.

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<sup>1</sup> Later reduced to 96 Applicants.

## I. THE FACTS

### *Changes to the EA*

4. Reference can be made to the facts given in Decision No. 109 and Decision No. 112. It is appropriate, however, to give a summary below.

5. The EA is one element, and an important element, of the remuneration package of International Staff. The stated purpose of the EA is to provide education assistance to International Staff towards costs of educating their dependent children. The provision of EA is based on the underlying premise of cost-sharing between the Bank and eligible International Staff, so that the assistance provides a percentage (not the full amount) of the costs, with a cap on the grant.<sup>2</sup> The challenged changes both expanded and adjusted different components of those benefits. Two key revisions introduced were the level of tuition subsidy and a new methodology to determine the flat rate allowance that helped meet non-tuition related costs of pursuing education outside the duty station.

6. The grant consists of several elements, covering 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.

7. 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

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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."

benefits that are competitive in the international marketplace and in each location where the Bank operates.<sup>3</sup>

8. 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 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.

9. 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) were "above the median and average of the comparators".

10. The President also explained that the Bank was proposing the changes as:

- (a) "our compensation and benefits should be consistent with our mission of eradicating poverty in the region";
- (b) "we need to pay attention to greater equity between different personal circumstances of our individual staff members" [noting an overemphasis on benefits for international staff with children in higher education]; and
- (c) "we compared our system carefully with other international financial institutions, and found some benefits go beyond what our comparators offer [and] .... there is room for improving some other benefits."

11. 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 changes both expanded and adjusted various component parts of the education grants and allowances program. The major changes are the following:

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<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.

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 a percentage of the World Bank Group Subsistence Grant for Room and Board; and
5. changes to the calculation of the tuition allowance (from 75% of the school country limit (“SCL”) for primary and secondary and 55% of the SCL for post-secondary with a cap of a specific USD amount, revised annually, to 75% of actual tuition and other expenses capped at 65% of the SCL).

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.

## II. PROCEEDINGS

### *Original Application and Decision No. 109*

12. On 16 June 2016 the original *Application* was, with the Respondent’s agreement, submitted directly to the Tribunal pursuant to Article II(3)(a) of the Asian Development Bank Administrative Tribunal’s Statute (“ADBAT Statute”) and Rule 6(8) of its Rules of Procedure (“the Tribunal’s Rules”). The *Application* had provided simply the names of 122 Applicants without any supporting data, and so the Tribunal directed the Applicants to submit additional documents. The Tribunal subsequently received the names and birthdates of children for 106 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.

13. In Decision No. 109, the Tribunal dealt with the matter of admissibility *sua sponte* and held that the original *Application* was inadmissible as the Applicants had failed to substantiate how the rules had adversely affected them on an individual basis. However, the Tribunal noted the need for a determination in law regarding the question whether the EA changes adopted by the Bank violated fundamental and essential rights of its employees under their employment contracts and invited the Applicants, if they chose, to submit a further application that met the requirements for admissibility as set out in its Decision.

*Further Application and Decision No. 112*

14. On 8 September 2017, 106 Applicants (16 Applicants having formally withdrawn) submitted their *Further Application*. The Applicants chose not to seek to repeat the facts and the law that they had already pleaded as part of their original *Application* and 30 September 2016 *Reply*. The Applicants asserted that jurisdiction *ratione temporis* had been satisfied and that the issue of joinder of the Applicants was for the Tribunal to decide. The *Further Application* put forward seven Applicants as “representative examples” but otherwise continued to rely on the Bank’s cooperation in providing relevant calculations of loss for each Applicant.

15. On 7 November 2017, the Respondent submitted its *Preliminary Objections to the Jurisdiction* of the Tribunal in accordance with Rule 7 (6), of the Tribunal’s Rules. The Respondent did not produce further background elements in its *Preliminary Objections to the Jurisdiction* of the Tribunal and it reserved its position on the joinder of Applications. It agreed that four Applicants’ cases were admissible in relation to Education Assistance Year (“EAY”) 2016/17 but objected, at that time, to the remaining 102 Applicants in the *Further Application* on the basis that they had either failed to substantiate to what extent the EA changes had adversely affected them or had signed separation arrangements agreeing to waive any and all claims arising from their employment.

16. On the same basis, the Respondent noted its willingness to find the *Further Application* admissible for those Applicants once they had completed an internal administrative verification and substantiated the extent to which the EA changes had adversely affected them when implemented and applied to them. In later stages this was completed with “agreed facts” between the parties submitted for 37 Applicants of the 96<sup>4</sup> Applicants who remained a part of the *Further Application*.

17. Pursuant to Rule 7 (6) of the Tribunal’s Rules, upon receiving the Respondent’s *Preliminary Objections to the Tribunal’s Jurisdiction*, proceedings on the merits were suspended while the Tribunal considered the issue of admissibility. In Decision No. 112, the Tribunal ruled that 37 of the 96 Applications were admissible, joined those cases, and ordered recommencement of consideration of the issues. The Tribunal deferred the matter related to costs until resolution on the merits.

#### *Proceedings since Decision No. 112*

18. In accordance with Decision No. 112, the Respondent submitted its *Further Answer* to Applicants’ *Further Application* on 26 March 2018. On 9 April 2018 the Applicants submitted their *Further Reply* on behalf of the 37 Applicants and thereafter, on 17 April 2018, a Costs Schedule. On 25 April 2018 the Respondent submitted its *Further Rejoinder*.

19. In their *Further Reply*, the Applicants agreed with the Respondent in its *Further Answer* that the written submissions already before the Tribunal addressed the relevant facts and applicable legal framework. As such, the Tribunal was requested to read the *Further Reply* as a companion to the Applicants’ original *Application*, *Reply* and *Further Application*. The Applicants requested an award of reasonable legal costs incurred since the issuance of Decision No. 109. One Applicant requested anonymity pursuant to Tribunal Practice Direction No. 3 and asked that his name be redacted from Decision No. 112 at para. 47.

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<sup>4</sup> Ninety-eight Applicants submitted their *Observations on ADB’s Preliminary Objections*, eight Applicants having withdrawn. Subsequent to that, two further Applicants withdrew.

20. On 21 May 2018 the Tribunal requested, pursuant to Rule 10 of the ADBAT Rules of Procedure, the Respondent to submit additional written statements of the annual gross salaries, allowances and deductions for years 2015, 2016 and 2017 for each of the Applicants. This was provided on 1 June 2018 along with a request to ensure each statement was shared only with the Applicant named therein due to its sensitivity.

21. On 30 May 2018, the Applicants' Counsel informed the Tribunal secretariat by email that (a) one Applicant had withdrawn from the case (leaving 36 Applicants to whom the *Further Application* applied); and (b) the remaining Applicants requested that their names be redacted from Decision No. 112 and "anonymized" from the present judgment. The email noted that "a number of Applicants have expressed concerns that the mere presence of their names is likely to be seriously prejudicial to them." It also noted that although Decision No. 112 had been "out for some months" this had "no effect on the Applicants' request for anonymity, because what they seek is to avoid any issues further down the line."

22. On 31 May 2018 the Executive Secretary of the Tribunal acknowledged the requests in the email while at the same time asking the Applicants to "formalize the request through a pleading filed directly with the Tribunal ... since reliefs sought under the Rules of Procedure must always be contained in formal pleadings filed with the Tribunal so that they become part of the records of the case." The request was formalized by a pleading dated 27 June 2018.

### *Relief Sought*

23. The 36 Applicants request 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).

24. The Respondent submits that the Applicants' consent was not required to alter the education benefits in the manner revised by the EA Changes, and that the EA Changes were introduced in a manner consistent with Respondent's legal authority. Respondent requests the Tribunal dismiss the Applicants' *Further Application* in its entirety.

### III. FINDINGS

#### Preliminary Matters

##### *Confidentiality and En Banc*

25. Under Practice Direction No. 3 of the Tribunal's Rules of Procedure the Applicants have requested that the details (*i.e.*, the names) of the Applicants be redacted from this judgment. They also requested that the Tribunal "anonymize" in Decision No. 112 the 37 names that are listed at paragraph 47 of that judgment, a request that was not made before that Decision was issued. The Applicants submit that the fact that this second judgment has been out for some months would not have an effect on the Applicants' request for anonymity, because what they were seeking was to avoid any issues further down the line, so they asked for the current version of the published judgment to be taken down and replaced with a properly anonymized version. The Applicants submit that it is of critical importance that ordinary staff members perceive that the options for vindicating their rights are devoid of any opportunity for intimidation or retaliation. They added, to be clear, that they were not alleging that there have been instances of intimidation or retaliation, but they felt that there might be risks in the future. "At its lowest", they felt that the inclusion of their names on the judgment(s) might result in prejudice to them. Given that redaction would not disadvantage the Bank in any way, they considered their request both reasonable and proper. Lastly, the administrative burden of redacting paragraph 47 of Decision No. 112 would be slight.

26. The Tribunal cannot agree with the reasoning behind the request. It, first of all, considers that anonymity only has an impact for the public at large, and not for the Respondent who anyway knows who the Applicants are. Second, this reasoning would mean that it would have to be applied

to each and every appeal. The Applicants concede that there have not been instances of intimidation or retaliation, but they feel that there are risks in the future. This is a serious, and unsubstantiated, insinuation of a real risk of retaliation, which the Tribunal may consider only if it is corroborated by facts and convincing arguments, and which would anyway not disappear by simply “anonymizing” Applicants’ names. The Applicants have failed to provide any convincing element in support of their submission. Nor does the Tribunal itself have any indication whatsoever of a current or future risk of retaliation, which would indeed be a major violation of basic principles underlying the judicial process. In any event, according to Article IX, paragraph 1 of the Tribunal’s Statute, “[all] decisions of the Tribunal ... shall be final and binding,” and therefore a request for anonymity cannot be granted retroactively concerning an earlier Decision that is final and published. The present proceedings cannot be used to correct an omission in the past. As a consequence, the requests as presented cannot be granted.

27. On the other hand, the main purpose of the present proceedings is to establish the legality of the changes in the EA. Both parties have agreed to submit directly to the Tribunal a matter that is of interest to a great number of present and future staff. The purpose is not to identify individual staff members and their private situations, and the Tribunal will maintain this approach throughout this Decision.

28. In view of the complexity of the legal issues raised in the case, and in accordance with Article V(5) of the Tribunal’s Statute read with Rule 5A of its Rules, the Tribunal deems it appropriate to consider the case *en banc*.

#### *Admissibility*

29. In its Decision No. 109 the Tribunal recalled that it has the power to rule only upon a staff member’s claim that the Bank has rendered a decision that violates that staff member’s employment contract and that has directly and adversely affected him or her. (Decision No. 109, para. 47 citing *Canlas*, Decision No. 56 [2003] ADBAT Reports VI, 41 para. 20).

30. In its Decision No. 112 the Tribunal found that 37 Applicants had submitted financial substantiation concerning their claims of alleged actual financial losses for the EAY 2016/17. Following the withdrawal by one Applicant, currently 36 Applicants are subject to the present Decision.

31. Further analysis of the data provided, however, shows that a number of the Applicants have not been adversely affected by the new system and, in fact, received more or the same EA in EAY 2016/17 than under the previous EA scheme. This is, for example, the case with Applicants who have received tuition subsidy for pre-primary education, which did not exist before. Since they were not adversely affected their claims are therefore inadmissible.

32. Equally, claims from Applicants who saw an increase of their EA in EAY 2016/2017 because of the application of the 80% phasing out scheme, or because of higher FRA, and of those who did not see a change in their EA amounts, are inadmissible.

33. In so far as their claims relate to the future, these are also inadmissible, since the Tribunal, as it held in Decision No. 109, cannot deal with potential or hypothetical cases.

### **The Merits**

34. Analysis of the cases that are retained as admissible shows that the actual alleged losses are limited to the FRA for non-tuition costs, such as board and lodging. Two changes were introduced in this respect: (1) The allowance would no longer be calculated on the basis of a percentage of the school country limit but was set at 75% of the respective World Bank subsistence grant for room and board, and (2) It would no longer be paid regarding dependants who live with relatives; this is on the presumption that there are no, or substantially lower, non-tuition costs involved.

35. Four Applicants have, or had, one or more dependants living with relatives. The Tribunal observes that neither the *Application* nor the *Further Application*, however, specifically challenges

the legality of this particular measure to abolish assistance for this category, nor have the Applicants concerned provided proof of financial harm.

*A) The Bank's power to make unilateral changes to terms and conditions*

36. It is a well-established legal principle that the power to make rules implies in principle the right to amend them unilaterally. This power flows from the responsibilities of the competent authorities of the Bank.<sup>5</sup> ADB staff accept this principle when they sign the *Affirmation upon Appointment*. It is equally well established that there are limits to this power and that any changes must be reasonable and must respect the essential and acquired rights of staff.<sup>6</sup>

37. It is in this respect recalled that in *Mesch and Siy (No. 3)*, Decision No. 18 [1996] II ADBAT Reports, the Tribunal referred to its first Decision (*Lindsey* Decision No. 1 [1991] I ADBAT Reports 5), where it outlined the principal rules of law within the framework of which the facts must be considered:

...

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.

38. Regarding the power to amend the terms of employment the Tribunal observed:

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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:

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<sup>5</sup> Cf. *de Merode*, WBAT Reports 1981, Decision No. 1, paragraph 31.

<sup>6</sup> Cf. *Idem*, paragraph 35.

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...

The Tribunal concluded that it had competence to consider whether a decision of the Bank is a nullity because it purports to amend unilaterally a fundamental and essential term or condition of employment.

39. And in *Suzuki*, Decision No. 82 [2008] VIII ADBAT Reports 59, the Tribunal held:

26. ... The Bank clearly advised employees of the transitory nature of benefits and the potential for such change with the following provision in its handbook: “There is no difference in the coverage and the benefits provided by the GMIP and PRGMIP *in the present plan.*” (emphasis supplied).

27. That reservation of the right to amend from time to time the terms of insurance for Bank employees is consistent with rulings of other tribunals in other international agencies. The ILOAT in *Dekker (No 3)* ILOAT Judgment No. 1917 (3 February 2000) in para. 7 decided that “the complainant has no specific claim to a specific system of health insurance” noting that changes made did not violate any acquired right. Thus we find that the details of coverage, charges and fees of the healthcare benefit under GMIP and PRGMIP in effect at any particular time are elements of a benefit which themselves are subject to change, and that employees were advised of that prospect when the economics of the program so justified. We must conclude that the ADB did not breach any obligation incurred by the Bank to Mr. Suzuki at the time of his hire when it later extended that healthcare program to pensioners with the potential for subsequent adjustment to retired employees and their dependents.

...

32. In examining changes ... it is essential to assure that (i) the objective of such change is rational and legitimate, (ii) there is evidence to support the different treatment of various member groups, (iii) there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification, and (iv) the differential treatment is proportionate to the objective of the change.” (see *Mr R v IMF*, Judgment No. 2002-1 [5 March, 2002])

...

38. In this case we find that the Bank’s action is in conformity also with standards prescribed in *De Merode*, WBAT Decision No. 1 [1981], para. 88 where it showed that “this was not a hastily adopted reform but a change studied at length and most carefully prepared.” The Bank after its earlier efforts in developing Decisions 1 and 2, investigated the issues further and undertook consultation with staff and pensioners prior to the issuance of Decision 3. Although the pensioners as a group did not endorse the changes, we are satisfied that the Bank enhanced the contributory role of those affected by the changes and that the changes set forth benefited from such consultation.

40. It is opportune to quote another paragraph of *de Merode* here:

41. Nor can the distinction between what is permissible and what is impermissible rest on the state of mind or the intentions of staff members at the time of taking their employment, on their “expectations” or “reliance” or on the motivating factors which might have induced them to accept or remain in employment with the Bank. Subjective considerations are at best difficult to identify and the difficulty increases with time. The possibility exists that

different considerations may prevail with different individuals, thus occasioning a diversity of governing rules where uniformity is necessary. Moreover, there are at least two subjective intentions in any contract. There is no more reason to attach greater weight to the intention of the staff member than to that of the Bank. Furthermore, staff members are entitled to the observance of their conditions of employment as they may exist from time to time, and not only of those terms of appointment which induced them to accept service with the Bank and on the maintenance of which they have placed their “expectations” and their “reliance”. In entering the service of the Bank, the staff member expects, or should expect, that these elements may be altered in the future to take account of changing circumstances.

41. The Tribunal will in the present case maintain this approach and reasoning.

*B) Did the Bank breach a fundamental and essential term of contract by introducing the EA changes?*

42. The Applicants argue that the right to receive the EA is a fundamental and essential term of contract and, as such, cannot be unilaterally altered by the Bank. They submit that this is the case because the EA was included as a well-defined undertaking when the Applicants accepted their posts with the ADB. They contend that the EA changes made on 1 January 2016 without the Applicants’ consent abolished “a substantial portion of the Applicants’ fundamental and essential rights” and is contrary to international administrative law.

43. They submit that the EA has the quality of being “essential” because it was included as a specific and well-defined undertaking when the Applicants accepted their post, induced staff into employment, and was relied on when staff made the decision to join. They allege that prospective staff were clearly told by BPMSD that the ADB’s benefits were the real long-term benefit of joining ADB and, in many cases, this was followed up with written information confirming the benefits available.

44. The Applicants also contend that the EA changes, such as limiting tertiary education benefits to four years post-secondary compared to when the dependant turns 24 years old, and reducing the FRA, involve the elimination or abolition of substantial chunks of the EA. They allege potential social hardship as well as negative financial impact.

45. The Applicants submit that they had a legitimate expectation that the EA would continue unchanged. They argue that such an expectation may arise, even where the Staff Rules and Regulations explicitly reserve a right of change. Accordingly, the doctrine of “*promissory estoppel*” should apply and the ADB should be estopped from applying changes that would be inconsistent with the Applicants’ legitimate expectation that the EA would continue to be operated on the basis of the EA with an income equivalent to what they signed up for.

46. In Reply to the Respondent’s arguments that the implementation of the benefits was not fundamental, the Applicants argue that changing the very components that make up a fundamental and essential term goes beyond a change in its implementation.

47. The Respondent submits that (1) the EA changes did not alter any “fundamental and essential” term(s) of the Applicants’ employment; and (2) the Respondent had the legal authority to exercise its discretion to unilaterally revise the implementation of the education grant policy that resulted in the EA changes, and did so in a manner consistent with limitations comprising the *de Merode* criteria.

48. The Respondent contends that the provision of education grants to International Staff is fundamental and essential in principle but not in implementation and that it has legal authority and discretion to revise the terms and conditions of staff benefits from time to time without the Applicants’ consent. It submits that the Application invites the Tribunal to depart from well-established jurisprudence regarding the judicial deference to the authority of an international organization to amend the terms and conditions of employment.

49. As the Tribunal mentioned *supra*, reasonable education assistance is an important and essential part of the compensation package for International Staff. Abolition of it, for example, would touch on an essential right and would, most likely, require consent of the staff member concerned. But that is not the case here. The EA has not been abolished; it has been reviewed, as it has been several times before, which in itself constitutes a significant precedent showing that the

assistance package was not sacrosanct and could be modified from time to time.<sup>7</sup> Moreover, the employment contracts specify that staff are expected to comply with present and future regulations. Regulations in force at the moment of recruitment were attached to the contract.

50. A new balance was struck in 2015 in the overall compensation package for all staff, including the EA package for International Staff, in order to meet the Bank's stated objectives while keeping the compensation package attractive for recruitment and retention of highly qualified staff.

51. The Bank's International Staff was, and remains, entitled to education assistance. While the EA may be a fundamental and essential element of the Applicants' terms of appointment, the same can, however, not be said concerning the details thereof.<sup>8</sup> The employment contracts do not specify any details of the EA and staff concerned thus do not have a claim to specific details of this assistance. The normative texts in this respect are formulated in general terms. Section 14 of the Staff Regulations provides that

“Staff members may be entitled to dependency allowance and education grants in accordance with the Administrative Orders ...”

and AO 3.06 paragraph 1, states:

“It is the policy of ADB to provide education assistance to international staff members ... towards costs of educating their dependent children....” (Emphasis added).

They do not guarantee specific amounts or a particular level of assistance, nor do they state that these cannot be subject to any change.

52. The details of the EA are therefore not part of those fundamental elements of the Applicants' conditions of employment that require consent of the staff for changes thereto.<sup>9</sup>

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<sup>7</sup> Cf. *Idem*, note 5, paragraph 78.

<sup>8</sup> Cf. *Idem*, paragraph 77.

<sup>9</sup> Cf. *In Re Andres (No. 2)*, ILOAT Judgment No. 726 (1986), paragraph 15:

[t]hough the staff member may have an acquired right to an allowance, he will not necessarily have an acquired right to the method of reckoning it or to the actual amount.

See. also *In re Settino*, ILOAT Judgment No. 426 (1980), consideration 7:

The right to salary and to the well-established allowances, such as those for dependants, is essentially a fundamental

53. As a consequence, the Tribunal concludes that there was no violation of essential rights requiring the explicit consent of the staff concerned.

*C) Did the Bank amend the EA in a manner inconsistent with its legal obligations or did the Bank abuse its powers?*

54. Having arrived at the conclusion that the EA changes did not violate essential rights, the Tribunal now needs to verify whether the EA changes violate any other rights of the Applicants, such as acquired rights that are not essential rights, or violate any other legal obligations of the Bank. This Tribunal considers it not necessary to enter into a semantic discussion concerning essential rights or acquired rights, or other rights, when reviewing the present case. The Tribunal deems it useful to recall fundamental jurisprudence in this respect. Besides, parties have used these respective notions throughout the pleadings.

55. In addition, the Tribunal must review whether the procedures leading to the changes have been correctly followed or whether the EA changes were made in a manner inconsistent with the Bank's legal obligations. It will, in line with *Suzuki*, in particular need to review whether (i) the objective of the changes is rational and legitimate, (ii) there is evidence to support the different treatment of various member groups, (iii) there is a rational nexus between the classification of persons subject to the differential treatment and the objective of the classification, and (iv) the differential treatment is proportionate to the objective of the change. See *Suzuki*, Decision No. 82 [2008] VIII ADBAT Reports 59, para. 32.

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right. But this does not mean that every item making up the salary or allowance and every detail of the process by which it is calculated are to be deemed inviolate...

And *In re Elsen and Elsen-Drouot*, ILOAT Judgment No. 368 (1979), consideration 7:

It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an international organisation. The question therefore arises whether the outright abolition of such allowances would in principle violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty. Hence the reduction in the expatriation allowance paid to the complainants does not infringe any right which was of decisive importance to them in accepting appointment and which may be regarded as acquired. Moreover, there is no clause in their contract which even tacitly guaranteed them any such right. The plea that acquired rights were infringed therefore fails.

56. The Applicants argue that even if the Tribunal finds that the EA does not amount to an essential and fundamental right, the ADB did not amend it in a manner consistent with its legal obligations, which are that the changes must (1) not be retroactive; (2) be based on a proper consideration of the relevant facts; (3) be reasonably related to the underlying objective for the change; (4) be proposed in good faith and not prompted by improper motive; (5) not discriminate in an unjustifiable manner; and (6) be proposed in a reasonable manner to avoid excessive and unnecessary harm. The Tribunal will also take these elements, which are in fact similar to those mentioned in the previous paragraph, into account when reviewing the impugned decision.

57. Lastly, the Applicants submit that the ADB did not carry out meaningful consultations with its employees and that instead the process was artificial and feigned.

58. The Respondent notes that this Tribunal has clearly recognized an international organization's authority to alter unilaterally the "non-fundamental and non-essential" terms of employment, even in cases where such revision leads to a reduction in entitlements. It contends that after the EA changes were introduced, the Bank has continued to provide a reasonable level of education grants to its eligible International Staff, consistent with their fundamental and essential terms of employment. It concludes that the changes are not retroactive, are based on the proper consideration of the relevant facts, are reasonably related to the objective they were intended to achieve, were determined in good faith and not prompted by improper motives, do not discriminate, and were proposed in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff.

*(i) "Acquired" Rights*

59. International administrative tribunals regularly refer to the principle of "acquired rights". It is also a notion that has evolved over time.

60. The International Labour Organization Administrative Tribunal (ILOAT), for example,

gave precisions on its approach in its Judgment No. 832<sup>10</sup>:

13. In Judgment 61 (in *re Lindsey*) the Tribunal held that the amendment of a rule to an official's detriment and without his consent amounts to breach of an acquired right when the structure of the contract of appointment is disturbed or there is impairment of any fundamental term of appointment in consideration of which the official accepted appointment.

...

So before ruling on the plea the Tribunal must in each case determine whether the altered term is fundamental and essential.

14. There are three tests it will apply.

The first is the nature of the altered term. It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.

The second test is the reason for the change. It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.

The third test is the consequence of allowing or disallowing an acquired right. What effect will the change have on staff pay and benefits? And how do those who plead an acquired right fare as against others?

61. The ILOAT reconfirmed its approach recently in Judgment No. 3909<sup>11</sup> as follows:

12. As the Tribunal pointed out in Judgment 3876, consideration 7, international organisations' staff members are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered during or after an employment relationship as a result of amendments to those provisions, irrespective of whether the staff member's appointment is permanent or temporary, as in the complainant's case.

The Tribunal has consistently held that the position is of course different if, having regard to the nature and importance of the provision in question, the complainant has an acquired right to its continued application. However, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters

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<sup>10</sup> *In re Ayoub, Lucal, Monat, Perret-Nguyen and Samson*, ILOAT Judgment No. 832 (1987).

<sup>11</sup> *d.O.M v. OTIF*, ILOAT Judgment No. 3909 (2018).

fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must therefore relate to a fundamental and essential term of employment within the meaning of Judgment 832 (see, for example, Judgments 2089, 2682, 2986 or 3135).

62. The distinction between essential and non-essential rights, fundamental and non-fundamental rights, or between acquired rights and other rights, or what upsets the balance of the contract and what does not, does not depend on staff members' subjective expectations or on factors that might have induced them to accept or remain in employment with the Bank. This is even more pertinent for staff who have fixed-term contracts or who started employment with the Bank when they did not, or did not yet, have children.

*(ii) The Tribunal's scope of review with regard to managerial decisions in general*

63. It is appropriate in this context to, first of all, recall that "the Tribunal cannot say that the substance of a policy decision is sound or unsound. It can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed". See Decision No. 1, *Lindsey*, [1991], I ADBAT Reports 5, paragraph 12. But the Tribunal must first review whether the changes were made according to the principles raised in paras. 55-57 as discussed below.

*(iii) Is the objective of the changes rational and legitimate and are the EA changes reasonably related to the underlying objective for the change?*

64. As was mentioned *supra*, 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", and which emphasized the need to provide a package of remuneration and benefits that are competitive in the international marketplace and in each location where the Bank operates.

65. The objectives of the 2015 Comprehensive Review were explained to staff to include,

amongst others: (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 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.

66. The Bank was also seeking to ensure that the compensation and benefits were consistent with the Bank's mission of eradicating poverty and supporting poor people in the region; to pay attention to greater equity amongst staff so as not to overemphasize benefits of IS with children in higher education; and to bring the benefits more in line with its comparators such as other International Financial Institutions.

67. The Applicants contend that the underlying objective for the EA changes, i.e. to reduce the previous EA benefits to a level more appropriate for a development bank, and to "share out" the benefits more equitably among staff including those without children, is not valid. They submit that neither of these reasons comprises a valid objective for making the EA changes without staff's consent.

68. The Tribunal considers the stated objectives appropriate and valid. They are rational and legitimate. It is recalled that the overall compensation package was reviewed, resulting in some negative and positive changes in the EA for some staff, but a salary increase for all staff.

69. The Tribunal does not see any evidence that by adopting the package as it did, the Bank abused any of the discretionary powers or violated any of its responsibilities and obligations vis-à-vis the staff.

*(iv) Are the changes based on proper consideration of the relevant facts?*

70. The Applicants submit that the EA changes do not appear to have been subject to any proper consideration by Management. They note, amongst others, that BPMSD refused to disclose

any reports justifying the EA Changes based on factual evidence. They also claim that no evidence was provided to staff to demonstrate the following: (a) that the level of EA had ceased to reflect the costs of educating children at secondary or tertiary level; (b) that the SCL was not appropriate; (c) that the revised limits for tuition or flat rate allowance were appropriate; (d) that the ADB has a firm understanding of what goes into the factors which constitute the SCL or the World Bank Group Subsistence Grant for Room and Board; and (e) why the EA should now be 75% of the World Bank Group Subsistence Grant for Room and Board when the World Bank applies 100%.

71. The Respondent contends that the EA changes were the result of a thorough review undertaken in the context of the 2015 Comprehensive Review and included the findings of an internationally recognized consulting firm specializing in expatriate salaries and benefits that informed the Respondent's discussions with its staff over an eight-month period.

72. The review role of the Tribunal in this respect is limited. It is not its role to entertain each element underpinning, or not, the proposed and retained changes. That is the role of management: to be informed, make assessments, retain options, make proposals and consult with staff and their representatives about them. The Tribunal is persuaded that the record amply shows that this is what has happened. The Respondent gathered detailed relevant facts through a consulting firm, analyzed them and relied on them. The Applicants may question the facts or the analysis thereof, but they have not established that the Respondent acted improperly in this respect or abused its powers. It was by a reasoned judgment and after a balance of considerations that the Bank preferred one formula to another, being conscious that none could be perfect in all respects.<sup>12</sup>

*(v) Were the changes proposed in good faith and not prompted by improper motive?*

73. The Applicants contend bad faith on the part of the Respondent since at no stage was it intimated when joining the Bank that they should be aware that Management was at liberty at any time to take away parts of the EA. They relied on the continuation of these benefits and find that the reasons given for the EA changes lack honesty and transparency.

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<sup>12</sup> Cf. *de Merode*, paragraph 76.

74. The Respondent reiterates that the changes were the product of the 2015 Comprehensive Review and were introduced in the context of overall revisions to the Bank's compensation and benefits. They were not introduced without context, or without due consideration, and they were directly related to their underlying objective. The Respondent argues that the Applicants have failed to establish that the EA changes emanated from improper motives.

75. The Tribunal has already concluded *supra* that the Bank has the power, under certain conditions, to unilaterally amend employment conditions and that the terms of appointment did not guarantee benefits indefinitely or without change. The amounts have varied during the staff's employment so far. They have signed a declaration that they accept that employment conditions may be changed. Normative texts provide the same. Moreover, practice over the years shows that the compensation package and the EA package have been reviewed and revised regularly. In entering the service of the Bank, the staff member expects, or should expect, that these elements may be altered in the future to take account of changing circumstances.<sup>13</sup>

*(vi) Do the EA changes have retroactive effect?*

76. The Applicants submit that changing education benefits constitutes a retroactive amendment to the staff members' terms of conditions of employment laid down in contracts that do already exist.

77. The Respondent's position is that the EA changes did not have retroactive effect as these rights did not accrue based on past service (unlike benefits under the Staff Retirement Plan (SRP)). Staff members must meet the conditions for entitlement at the relevant time upon application for the grant in the applicable EAY.

78. The Tribunal has already concluded that the Bank has the power, under certain conditions, to amend unilaterally employment conditions and that the terms of appointment did not guarantee details of benefits indefinitely. It further observes that the changes were introduced with effect from 1 January 2016, i.e. in the middle of an education year. It is perhaps not advisable to introduce

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<sup>13</sup> Cf. *de Merode*, paragraph 41.

changes in the middle of an education year, as the new measures also applied to the first semester of the academic year, i.e. a number of months preceding 1 January 2016. On the other hand, entitlement to the EA and the final calculation thereof can be established only at the end of the academic year when staff can provide all the data and documents in support of their claims. The Tribunal observes that the EA changes were part of a change in the overall remuneration package, including a salary increase. The Tribunal notes that, while the EA changes were introduced during the academic year, the Applicants have not shown that the limited retroactivity caused any financial hardship.

*(vii) Is there different treatment of various groups of staff or do the changes discriminate in an unjustifiable manner?*

79. The Applicants allege that the EA changes are discriminatory since they are retroactive in nature and their impact depends on factors such as how old employees' children are and what courses they study. They also submit that some staff had made prospective plans and committed themselves.

80. The Respondent argues that the principle of non-discrimination requires an organization to treat similarly situated staff members fairly. It does not require the Respondent to treat all staff members identically. It also argues that no impermissible discrimination exists between staff members with regard to EA Changes, since all International Staff are subject to the same rules.

81. The Tribunal holds that the EA provisions, both old and new, apply equally to all International Staff and that similarly situated staff are treated in the same way. The reimbursement amounts themselves obviously differ per child, depending on a variety of factors, such as age, level of studies, place of studies, costs of studies, scholarships, only to name a few. This does, however, not amount to improper discrimination, as the Applicants submit.

*(viii) Are the changes proportionate to the objective of the change? Are the changes reasonable and do they avoid excessive and unnecessary harm?*

82. The Applicants contend that even with the four-year transition period, the majority of the Applicants cannot save enough to compensate for the changes, particularly those Applicants on lower salary scales or with more than two children. They submit that the changes result in, for example, a staff member at level 4 suffering the same reduction in income as a staff member at director level or above. They conclude that this causes excessive harm to staff, particularly those at lower levels.

83. The Respondent considers that providing financial support to International Staff for a period of four years of tertiary education for their eligible dependents is reasonable and consistent with its policy, as it is sufficient to achieve a reasonable level of tertiary education. It underscored that it did not guarantee eligible dependants any number of years of tertiary education but instead eligibility up to the age of 24. It notes that when education grants were first introduced eligible dependants were under the age of 22 years. This was increased only to allow for “progression loss” of children when transferring to schools in Manila. It also notes that the method for calculating the FRA was changed, as the old method was deemed no longer appropriate for achieving its purpose of providing a reasonable allowance to assist International Staff in meeting non-tuition related expenses. The FRA had been increasing at a rate faster than the rate of the actual cost of living.

84. The Respondent further argues that the changes included (1) an increase in the maximum tuition subsidy cap; (2) continued flexibility to eligible dependants in pursuing tertiary studies; (3) no effect on primary/secondary school options for staff stationed in resident missions where options can be challenging; (4) phasing in over a four-year period to ameliorate the financial impact and provide a reasonable time to consider all tertiary education options; (5) a limited impact on dependant’s pursuing tertiary studies beyond four years, as on average, over the last five years only about 20 eligible dependants in any EAY (or 7.5% of eligible dependants) pursued tertiary education beyond four years; and (6) immediate elimination of the FRA for those dependants who reside with family members, which was not excessively harmful as they were not incurring the non-tuition related costs that were intended to be covered by the FRA.

85. The Tribunal, first of all, observes that at this stage the new limit of financial support for a period of four years of tertiary education has not been applied to any of the Applicants and this

matter is therefore hypothetical. Moreover, this measure is subject to a staggered phasing-in period.

*(ix) Should the EA changes have been “grandfathered”?*

86. The Applicants submit that the lawful and appropriate way for the President to achieve his objectives of recasting the benefits so that they are reduced and/or more equitably distributed among the entire staff is to “grandfather” the benefits.

87. The Respondent contends that it is not legally obligated to “grandfather” or “lock in” a non-fundamental or non-essential benefit at the level prevailing when a relevant staff member commences employment.

88. The Respondent submits that, as noted in *de Merode*, an organization retains the authority to decide whether new/revised rules will apply immediately to staff members of an organization already employed, and staff members should expect such revisions from time to time. In the context of the EA Changes, management judged that grandfathering the pre-2016 education grants for existing staff would have led to further inequity between staff on board prior to the EA Changes and those who joined after their introduction. It also decided that in light of the underlying objectives, it was fair and equitable for all International Staff to be governed by the same rules and that the four-year transition period was a reasonable period for International Staff to make the adjustment.

89. The Tribunal agrees that there is no automatic entitlement to “grandfathering” in the present case. It is also persuaded that the Bank pursued a reasonable objective and did not abuse its powers when it decided not to “grandfather”.

*(x) Did the EA changes upset the economic balance of the contract?*

90. Analysis of the data provided shows that between 2015 and 2017, the Applicants received increases in their basic salaries of, on average, five per cent per year. The total income of salary

and allowances of 27 of the 36 Applicants did not decrease in the 2015 – 2017 period. It should be added that fluctuations, upwards or downwards, in allowances were not only due to changes in the EA. Some Applicants saw their total income evolve following changes in the housing assistance or in the Outside Duty Station Allowance. Other Applicants saw their EA going down, for reasons such as children graduating, interrupting studies to do their military service, or receiving scholarships. The Applicant with the largest “loss” (4,4%) fell into this category, by having had his child leave for military service

91. The data provided also shows that the adverse impact, if any, is on average one per cent of a staff member’s basic salary per child. Obviously, someone with more children is affected more, but the impact is still not large. The actual “losses” for staff in the 2016/17 academic year thus represent a small percentage of the total EA, as well as of the total remuneration of each staff member. The Tribunal is of the opinion that the changes are proportionate and reasonable and do not cause excessive harm. The Applicants have not established such harm and have also not established that the newly calculated FRA rates do not provide major assistance regarding real non-tuition costs. The FRA is a flat rate and not a direct, and partial, reimbursement of incurred costs. In order to establish whether the new FRA rates are reasonable assistance or not, one would need to verify what the actual and unavoidable costs really are in this respect and, as a corollary, what any outstanding costs remain for the staff member after the deduction of the grant.

92. Lastly, the notion of “upsetting the balance of the contract” involves a much more significant realignment of the employment relationship than has occurred here. The decrease in EA cannot reasonably be considered as upsetting the economic balance of the relationship that Applicants had and still have with the Bank.

93. The Tribunal notes that the decisions impugned may have an impact in the future. But that is of itself not enough to establish breach of an acquired right.<sup>14</sup>

94. It is also important to note that the negative impact of the disputed measures was substantially cushioned by the introduction of a staggered phasing-in period of four years. This

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<sup>14</sup> Cf. ILOAT, Judgment No. 832, consideration 15.

allows staff members to anticipate and take adequate measures, whenever necessary and possible, for future academic years.

95. The Tribunal repeats that it is the stated purpose of the EA to provide education assistance to International Staff towards meeting costs of educating their dependent children. Assistance towards costs does not amount to income, as the Applicants implied.

*(xi) Was there lack of proper consultations with staff and their representatives?*

96. Lastly, the Applicants submit as a compounding factor that there was no proper consultation with the staff or their representatives. They refer to human rights texts and underscore the need to hold *bona fide* consultations with staff before adopting a decision, to have sufficient time for consultation, and to provide adequate documentation to enable staff to understand the nature of and the rationale for the proposed changes. They conclude that the consultation was “artificial and feigned.”

97. They argue in particular that the Bank did not allow sufficient time for consultations, that the Bank did not provide staff with adequate documentation or financial analysis to enable them to understand the changes, that the decision to change had already been taken and was presented as a “*fait accompli*”, and that the changes made to the original proposal after receiving staff feedback is not evidence of a valid consultation process given that it merely changed flagrantly unlawful proposals to less flagrant but still unlawful proposals.

98. The Respondent submits that it undertook extensive and lengthy consultations with staff and other stakeholders at every stage of the process that led to the approval of the EA changes. It notes that feedback from the consultations led to significant revisions and in some cases, deferral of the proposed changes (such as to the SRP and Group Medical Insurance Plan). In this regard it notes that the changes were not hastily adopted but resulted in careful consideration following adequate and meaningful consultations.

99. The Tribunal observes that the issue at stake is limited to the question whether the Bank properly followed the consultation procedure under its rules and did not violate any of its legal obligations. Applicants do not refer to any specific staff rule or regulation or provision that has allegedly been violated.

100. Genuine consultation in good faith is indeed good management practice. The record amply shows that the Bank more than adequately respected its obligations, in particular under AO No. 2.02 (“Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members”), to consult with the staff through their representatives. Numerous meetings were held, including town hall meetings and proposals were communicated. Staff Council was allowed to have its counsel address all staff, etc. Following all this, substantial changes were made to the initial proposals. The right to consultation, however, does not entail an obligation on the part of the Bank to accept all the proposals made by the staff and their representatives. The Applicants have failed to establish that the extensive consultations were not held by the Bank in good faith. Accordingly, the plea fails.

101. To sum up, the Tribunal finds that the Bank did not violate any essential or acquired rights of the Applicants or act in breach of its obligations towards its staff.

#### **IV. RELIEF**

102. In the *Further Reply*, the Applicants again request an award of reasonable costs in accordance with Article X (2) of the Tribunal’s Statute and taking into account the “nature and complexity of the case and the nature and quality of the work performed.” The Applicants, having been denied their request for an award of costs in Decision No. 109, ask that the Bank refund those costs incurred since Decision No. 109. On 17 April 2018 the Applicants submitted a Costs Schedule in the amount of £12,525 as proof of the legal costs incurred since receipt of Decision No. 109 (i.e. from May 2017 onwards).

103. The Applicants assert that even if the Tribunal rejects the *Further Application*, the Respondent ought to pay for the Applicants’ legal costs incurred in successfully reaching the

merits phase of the proceedings, as the Respondent was unsuccessful in preventing the merits of the case from reaching the Tribunal. The Applicants note that the Respondent did not file preliminary objections after the *Application* was lodged but only after the filing of the *Further Application*. The Applicants note that in Decision No. 112, the Tribunal viewed the Respondent's filing of preliminary objections to its jurisdiction at that stage as "a complication in expediting proceedings." The Respondent has had the opportunity to comment on this statement in its *Further Rejoinder*.

104. The Respondent opposes the Applicants' request for costs and asserts they should be denied. The Respondent notes that the Article X (2) of the ADBAT Statute states that Applicants are only entitled to reasonable costs incurred if "an application is well-founded in whole or in part." It asserts that the rules do not provide for the award of legal costs in the event of an unsuccessful application.

105. The Respondent argues that in any event, the request is not well-founded. It notes that it had no option but to file a Preliminary Objection when the Applicants failed to provide the relevant documentation in support of their claim in the Applicant's *Further Application*. It adds that, even then, the Tribunal upheld Respondent's Preliminary Objection with respect to 59 of the 102 Applicants.

106. It is settled jurisprudence that this Tribunal may award reasonable legal fees and costs pursuant to Article X (2) of the ADBAT Statute, which provides:

If the Tribunal concludes that an application is well-founded in whole or in part, it may order that the reasonable costs incurred by the applicant in the case, including the cost of applicant's counsel, be totally or partially borne by the Bank, taking into account the nature and complexity of the case, the nature and quality of the work performed, and the amount of the fees in relation to prevailing rates.

In addition, proof of costs must be provided:

From its inception (*Lindsey*, Decision No. 1 [1992], I ADBAT Reports), the Tribunal has stressed that an applicant's Reply must contain proof of his costs. (*Galang*, Decision No.

55 [2002], VI ADBAT Reports, para. 50).

The Tribunal notes that only part of costs has been provided.

107. The Tribunal has also noted that although an applicant may succeed only in part, where issues raised are of importance the Tribunal has considered it equitable to award costs:

“Although the Applicants have not succeeded on the merits, their pleadings nonetheless were very useful to the tribunal on issues that were important and complex, and the Applicants did prevail with regard to the preliminary objections. Accordingly, the Tribunal decides to award a sum towards their costs.” (*Mesch and Siy (No. 4)*, Decision No. 35 [1997], III ADBAT Reports, para. 51. See also *De Armas et al.*, Decision No. 39 [1998], IV ADBAT Reports, para. 93.)

108. The Tribunal deems it totally proper and important that staff have the possibility to challenge the legality of changes to underlying general rules that apply or may apply to many present and future staff. The Applicants and the Respondent agreed to submit the case directly to the Tribunal in order to obtain a ruling on the legality of the measures in the interest of legal certainty. Accordingly, the Respondent initially did not raise preliminary objections.

109. Having considered the representation of the parties, the criteria set out in Article X (2), and the Tribunal’s jurisprudence, the Tribunal considers that the Applicants have raised a significant issue in law that had the potential to affect a much wider group of staff regarding their fundamental and essential rights.

110. It must at the same time be underlined, as the history of the present case shows, that some of the costs were avoidable. Time and resources were lost following inadequate preparation and presentation of the applications. Moreover, the Tribunal notes that the Applicants’ pleadings were assisted in great part by the Respondent’s voluntary provision of relevant documentation in support of their claims. The Tribunal considers that under these circumstances an amount of US\$ 10,000 is a fair contribution towards costs.

**DECISION**

For these reasons, the Tribunal unanimously decides:

1. To dismiss the Applicants' claims; and
2. To order the Bank to pay US\$ 10,000 towards costs.

Lakshmi Swaminathan

\_\_\_\_\_  
/s/  
President

Gillian Triggs

\_\_\_\_\_  
/s/  
Vice President

Shin-ichi Ago

\_\_\_\_\_  
/s/  
Member

Anne Trebilcock

\_\_\_\_\_  
/s/  
Member

Chris de Cooker

\_\_\_\_\_  
/s/  
Member

Attest:

Cesar L. Villanueva

\_\_\_\_\_  
/s/  
Executive Secretary

At Asian Development Bank Headquarters, 21 July 2018