

# ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

**Decision No. 118**  
(2 October 2018)

Ms. L  
v.  
Asian Development Bank

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

1. The Applicant seeks relief against the decision of 20 October 2017 taken by the President of the Asian Development Bank (“ADB” or “the Bank”) denying her appeal against the decision to impose sanctions upon her, including dismissal, for having engaged in misconduct. The Applicant seeks several types of relief, including five years of salary, restitution of all retirement and other benefits, moral and exemplary damages, and reasonable legal fees. Three cases which have features in common with the present Application were considered at the same session as the present one and examined separately on their own merits (see *Ms. J v ADB*, Decision No. 116, *Mr. K v ADB*, Decision No. 117, and *Ms. M v ADB*, Decision No. 119).

## **I. THE FACTS**

### **Background**

2. The Applicant joined the Treasury Department of the Bank (“ADB” or “the Bank”) in September 1981. Following several promotions, in November 2001 she reached the level corresponding to National Staff 3 (“NS3”) and became eligible to purchase a tax-exempt vehicle (TEV). On 1 May 2010 she was promoted to Senior Trust Fund/Cash Plan Officer, Level 9a (corresponding to NS4), a position that was renamed on 1 January 2011 as Senior Treasury Officer. Imposition of sanctions on the Applicant followed a Bank investigation into a scheme involving importation of tax-free vehicles. The finding of misconduct was based on a conclusion of the Office of Anti-Corruption and Integrity (“OAI”) that the Applicant had availed herself twice of

the privilege of purchasing a TEV through fraudulent practices by misrepresenting that her purchases were within the tax-exempt limit. This was the Applicant's first instance of misconduct in an otherwise unblemished career of 35 years of service to the Bank.

*Framework and operation of the TEV arrangement for ADB staff*

3. The TEV privilege falls within those foreseen by the Headquarters Agreement ("HQA") concluded between the Bank and the Government of the Republic of the Philippines on 22 December 1966, which provides for "*immunities, exemptions, privileges and facilities as are enjoyed by members of diplomatic missions of comparable rank, subject to corresponding conditions and obligations.*" (HQA, Section 44(c)). Section 49 of the HQA states that such privileges are granted in the interest of the Bank.

4. The HQA further provides that the Bank "*shall take every measure to ensure that the privileges, immunities, exemptions and facilities conferred by this Agreement are not abused and for this purpose shall establish such rules and regulations as it may deem necessary and expedient.*" (Section 51). At the time of the Applicant's vehicle purchase, initiated in the first part of 2013, such measures included:

- a) Section 8 of the Staff Regulations, which recalls that the privileges granted to the Bank are in its interest, and not for the personal benefit of staff, and provides that they "*furnish no excuse to the staff members who enjoy them for non-performance of their private obligations*";
- b) Administrative Order 2.02 on the Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members, dated 20 September 2011,<sup>1</sup> which sets out, under General Principles of Conduct, the expectations of staff members in relation to the privileges they enjoy under agreements entered into between the Bank and governments of ADB member States. Para. 4.3(i) provides that staff members "*shall avoid any action ... which may reflect unfavorably upon their position as employees of an international organization.*" Para. 4.3(ii) recalls that privileges enjoyed by staff under agreements

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<sup>1</sup> This was replaced by later versions, in particular the current Code of Conduct contained in AO 2.02 of 31 March 2017.

between the Bank and its member States are granted to the ADB, not the individual, and that staff members are “*expected to satisfy in good faith their obligations as resident of the host countries of ADB, including all personal obligations outside the ADB*” whose non-fulfilment “*could reflect unfavorably upon their position as staff members.*” Finally, para. 4.8 (vi) provides that accepting benefits from sources external to ADB with respect to any ADB transaction is prohibited;

c) Administrative Order 2.04 on Disciplinary Measures and Procedures, dated 9 September 2010, which specifies that misconduct “*does not need to be intentional.*” (para. 2.01). “*Misconduct includes, but is not limited to, the failure to observe the Staff Regulations, AOs, Administrative Circulars and all other duties of employment.*” (*idem*). This AO includes, as an example, “*abuse or misuse of the privileges and immunities accorded to staff members...*” (para. 2.1(d)); and

d) Integrity Principles and Guidelines (IPG) of October 2010, which include fraud as an integrity violation, defining fraudulent practices as “*any act or omission, including a misrepresentation that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation*” (Section 2A).

5. The TEV privilege was originally provided only to international staff to assist them with relocation to the Philippines; as from 1973, the host country acceded to a request by the Bank to permit certain national staff at “*higher or equivalent level to Administrative Assistant*” (referred to later as Senior National Staff (NS)) to import “one duty free automobile,” subject to certain conditions. (Memorandum from the Office of the President of the Philippines dated 15 August 1973). In 1997, the host country’s Department of Foreign Affairs (“DFA”) agreed to increase the applicable “car value entitlement limit” (“TEV limit”) to USD 24,000 for vehicles imported by Senior NS (DFA Memorandum dated 18 September 1997). The two memoranda did not define or elaborate on the terms “car value entitlement” or the “duty free automobile”. Vehicles with a value in excess of the TEV limit for Senior NS became ineligible for the TEV privilege. Letters exchanged between the ADB and the DFA (dated 15 April, 17 December and 24 December 1999) reiterated that the privileges afforded in accordance with section 49 of the HQA are “*granted in the interest of the Bank*” but shed no light on the price of a vehicle in relation to the TEV.

6. At the relevant time, the Logistics Management Unit of the Office of Administrative Services (“OAIS-LM”) of ADB administered the TEV privilege on behalf of the ADB. The website of the Office of Administrative Services states that, “*Tax-Exempt Vehicle Services is responsible for ensuring that the acquisition, registration and disposal of ADB official vehicles and staff tax-exempt vehicles conforms with government requirements*”. OAIS-LM provided the relevant documentation to eligible Senior NS when they enquired about the TEV importation process and handled communications with the host country. This documentation included the one-page fact sheet entitled “ADB TEV Entitlement,” setting out in tabular form the privilege accorded to each category of staff. The fact sheet noted, next to the notation “NS3-NS6, Eligible National Staff,” “*One imported vehicle within first year of appointment and/or promotion to NS3*”. Directly beneath this statement, the following text appeared in italics: “*Note: The vehicle purchase is limited to US\$24,000.*” Footnotes in this fact sheet referred to the two memoranda of 1973 and 1997 mentioned above, without attaching them.

7. Another fact sheet, entitled “Tax-Exempt Vehicle (TEV) Importation and Registration,” outlined the steps and actions, with an indicative timeframe and remarks, for purchase, customs clearance, and registration. It noted that after submitting proof of eligible status to the Bank’s OAIS-LM, a Senior NS member “*submits the following documents to OAIS-LM for the filing of “Pre-Clearance Request” (PCR) with the DFA....*”. These documents included a “Completed Request to Import a Tax-Exempt Vehicle (TEV) [“RFEMV”] form” and personal identification. The OAIS-LM would then send a copy of the PCR approved by DFA to the staff member and the vehicle supplier. In the next step, “*[s]taff instructs the vehicle supplier or mover/shipper to ship the vehicle and sends scanned copy of shipping documents (i.e. Bill of Lading, packing list and sales invoice or Certificate of Title) to OAIS-LM for the filing*” of the Request for Free Entry of the Motor Vehicle with the DFA. The OAIS-LM is then to submit the second endorsement request to the Department of Finance (DOF). This fact sheet does not specify any particular vehicle supplier, and staff was not required to use a particular provider (in contrast to the designated service providers for vehicle registration processing). The provider of the staff member’s choice would furnish information relating to a vehicle ordered by a staff member as a basis for the Bank to seek the necessary clearances from the host country in order to facilitate the transaction.

8. The OAIS-LM would normally send the staff the RFEMV, a one-page form which included the “shipment value” of the vehicle, instructing him/her to return it to OAIS-LM for preparation of the Pre-Clearance Request to DFA. The covering email from OAIS-LM stated, “*Please make sure that the actual/official invoice of the car does not exceed the US \$24,000 limit, otherwise filing of free entry request with DFA will be delayed.*” This email was sent to the Applicant on 19 February 2009.

*Abuse of TEV privilege scheme uncovered by OAI*

9. In April 2015, and unrelated to the Applicant, OAIS-LM, the Bank’s unit that administered the TEV privilege, noticed irregularities with the paperwork submitted in connection with a number of TEV transactions concerning importation by persons who were not known to the Bank. These irregularities were reported to ADB’s Office of Anti-Corruption and Integrity (“OAI”). The OAI commenced an investigation involving a vehicle sales firm, referred to here as “AAA.” This firm was one of the personal service providers (“PSPs”) maintaining a presence on Bank premises at headquarters as a convenience to staff.

10. The investigation also uncovered a scheme whereby ineligible vehicles were imported by some NS through AAA under the TEV privilege using fraudulent invoices that stated the price so that it fell under the prescribed limit. Several staff interviewed by the OAI explained that the AAA representative, referred to as “Ms. S”, had told them they were entitled to import particular models, and that certain arrangements would be made to ensure that the vehicle’s total value fell within the USD 24,000 TEV limit. The AAA representative prepared two invoices: one with the actual amount paid (“genuine invoice”) and the other with a lower amount under the TEV limit (“fraudulent invoice”). Genuine invoices were never submitted to OAIS-LM.

11. The investigation found that both AAA and the AAA representative had engaged in fraudulent practices. The OAI investigation concluded that the scheme was far-reaching, involving 33 Senior NS. The scheme had operated for more than six years before being investigated. As a

result of the investigation, both AAA and “Ms. S” were subjected to sanctions publicized by the Bank.

12. The OAI proceeded to initiate individual investigations for each Senior NS implicated but, due to the volume of cases, decided to prioritize (i) current staff in entrusted positions, such as those in the treasury, audit, and controller’s departments, and (ii) staff who were “multiple offenders,” i.e. who had imported more than one vehicle using the TEV privilege. According to the Bank, staff who consistently took responsibility for their wrongful actions and fully cooperated with the investigation were also prioritized. As of 17 February 2017, the ADB had issued disciplinary measures to 12 individuals in relation to the scheme; of these, four staff (including the Applicant) were dismissed (each of whom have filed Applications before the Tribunal), another four staff were demoted one level, two former staff were permanently barred from working for the ADB, and two former staff were barred from working for the ADB for three years. Dismissed serving staff (as compared to staff who had already retired from the Bank and were also subject to sanctions for the same type of misconduct) did not lose their post-retirement benefits but they could only receive their pension benefits in a lump sum. An additional 21 staff were subsequently investigated and disciplined for having engaged in misconduct under very similar circumstances.

*The Applicant’s vehicle purchases and the OAI investigation into them*

13. The Applicant used the Bank’s TEV privileges to buy two BMWs. The first TEV was purchased in 2009 at a value of EUR 21,463 (equivalent to approximately USD 26,828.75). The second vehicle was purchased in 2010 at a value of EUR 19,783 (equivalent to approximately USD 25,124.41), replacing the first vehicle which had been declared a total loss following damage during Typhoon Ondoy (which flooded Metro Manila in September 2009). The Applicant purchased both vehicles from AAA and was assisted by the AAA representative, Ms. S. The Applicant has asserted that she had wished to replace the vehicle lost due to the typhoon by the same model, but was told by Ms. S that she was no longer eligible to purchase an X3 model, since it was over the TEV limit. She had therefore purchased the X1 model in 2010. Both models, however, cost more than the equivalent of USD 24,000.

14. Ms. S created “genuine” and “fraudulent” invoices for each purchase, with the “fraudulent invoice” submitted on the Applicant’s behalf by the AAA representative to the OAIS-LM, which submitted it to the Department of Foreign Affairs, and the Department of Finance. The figures in the documents vary slightly. The value of the TEV indicated in the “fraudulent invoice” for the 2009 purchase of an X3 was EUR 19,201 (equivalent to approximately USD 24,001.25). The value of the TEV indicated in the “fraudulent invoice” for the 2010 purchase was EUR 18,509 (equivalent to approximately USD 23,506.43). The Applicant indicated that she had understood from Ms. S. that only the “base value” of the vehicle, excluding options, accessories, freight and insurance, was considered by OAIS-LM in determining whether the TEV limit was exceeded or not. The Applicant, whose work involved the execution of forex transactions, said that she had relied on Ms. S. in relation to the conversion from EUR to USD. The 18 February 2009 statement provided by Ms. S, certifying that the “total price” order for “an X3 2.01 manual transmission with basic specifications” did not exceed USD 24,000, *“provided that basic options as stated in the attached Purchase order is maintained.”* The document stated that it “is being issued upon the request of” the Applicant. On 29 May 2009, the Applicant reacted to a copy of an email sent by Ms. C of OAIS-LM to “Chie” at a private email address. Ms. C had requested “Chie” to file the attached RFEMV and update the Applicant. The Applicant had noticed that the RFEMV, which stated the vehicle shipment value as 24,001.25, had indicated the vehicle color incorrectly.

15. On 7 July 2010, Ms. S of AAA had emailed the responsible OAIS-LM official, copied to the Applicant, confirming that the 2010 TEV was a *“base model and total cost of the unit is within USD \$24,000.”* When shown the false invoice, the Applicant had stated that the amount was lower than what she paid because it did not contain the “accessories” she had requested.

16. Staff with tax-exempt vehicles are allowed by the DFA to sell them after three years, which for the Applicant fell on 19 November 2013 for the X1 model. She sought permission to sell the X1, for which she needed a “Request for Permission to Sell Imported Tax-Exempt Motor Vehicle”. The Bank sent this request on her behalf to the DFA, and it was received on 9 January 2014. The supporting Estimated Tax Computation provided by the ADB indicated the acquisition price as USD 25,124.41, whereas the “1<sup>st</sup> Endorsement” of the DOF dated 27 October 2010 had indicated

the value as “USD 23,506.43. This document had been issued “in view of the representation” of the Bank in relation to the shipment of the vehicle for the Applicant. In any event, the DFA approved the request on 17 January 2014, clearing sale of the vehicle to a privileged or non-privileged buyer.

17. On 3 December 2015, OAI commenced investigations in relation to the allegation of Applicant’s possible integrity violation under the ADB’s Anticorruption Policy and IPGs, and misconduct under AO 2.04. After being notified of the investigation in those terms on 3 December, the Applicant was initially interviewed by OAI on 4 December 2015 and then on 9 December 2015. The OAI reported that during these interviews, the Applicant provided the following information:

- a) She was aware of the USD 24,000 TEV limit;
- b) The AAA agent had explained that the limit referred to the base price only, excluding options accessories, freight and insurance [“base price” theory]. She explained that other ADB staff had the same understanding but chose not to divulge names during the interview. She trusted the AAA representative, so did not ask too many questions. She did not confirm this understanding with OAI-LM on either occasion as she trusted the agent;
- c) She was certain that she did not exceed the limit, but was unable to estimate how much she actually paid for either vehicle;
- d) With regard to the 2009 purchase she supposedly made it clear to the AAA agent that she wanted to comply with the TEV limit;
- e) On both occasions she did not ask the agent for the US dollar conversion of the price in Euros because she trusted the agent’s word that the price was within the limit. She also did not convert the price on her own because she was too busy;
- f) She had no copies of the documents for the 2009 vehicle purchase because her house, where the documents were kept, had flooded;
- g) She could not say if she had seen the invoices or any of the documents related to either purchase but she would check her files;
- h) For the 2010 purchase, she had browsed through the “Request to Import a Tax-Exempt Vehicle” before signing it so she did not notice the provision on the limit;



- i) When shown the false invoice submitted to OAIS-LM for the 2010 TEV she explained that the amount was lower than what she paid because the invoice did not contain the “Accessories” that she had requested;
- j) She received the email from the AAA agent to the OAIS-LM official, in which the agent confirmed the “total cost” of the car was within the limit, but she could not remember nor comment on why she did not question this misrepresentation by the agent;
- k) The agent submitted all the documents to OAIS-LM.

18. Prior to the interviews, on 13 November 2015, the OAI Officer-in-Charge wrote to the Director General of the Budget, Personnel and Management Systems Department (“DG, BPMSD”), in accordance with AO 4.05 para. 5.7(e)(i), to request approval to intercept and access the Applicant’s email account, computer activities and IT records. The OAI substantiated the request for the reason that it believed that the email account *“may provide evidence to enable OAI to substantiate or disprove the allegations under investigation,”* and that it was considered *“urgent to ensure that evidence is not destroyed.”* DG, BPMSD agreed to the request.

19. The Applicant was provided the opportunity to comment on the 29 February 2016 OAI Report. On 8 March 2016 the Applicant submitted her comments, after which the OAI submitted its comments on the Applicant’s Response. The Applicant’s comments were attached as an appendix to the OAI Report submitted to BPMSD on 30 March 2016.

#### *OAI report*

20. On the basis of its investigation, the OAI found, by a preponderance of evidence, that the Applicant had misrepresented the values of the vehicles she had bought so as to knowingly or recklessly mislead ADB to obtain the tax exemption for her vehicle importations. The OAI report stated, *“it is not credible that the [Applicant] understood the TEV limit to cover the ‘base price’ excluding options, accessories, freight and insurance.”*

21. The OAI concluded that the Applicant was aware of the TEV Limit, she had paid more than the TEV limit for her vehicles, she had knowledge of the Fraudulent Invoices, her explanation of the “base price” theory was not credible, and the Applicant was responsible for the AAA representative’s actions as Ms. S had acted on the Applicant’s behalf and for the Applicant’s financial benefit. The OAI found that notwithstanding the Applicant’s explanations during the interview, it was more probable than not that she had engaged in a fraudulent practice through misrepresentation of the value of the TEVs “*so as to knowingly and recklessly mislead ADB to obtain tax exemption of [her] vehicle importations.*” The OAI also found “*the act of not coverting the payment from Euros to US dollars, to be, on a more probable than not basis, a reckless act, considering [her] position as Senior Treasury Officer, TDD, which involves the execution of forex transactions.*” It concluded that these actions amounted to a fraudulent practice as defined under section 2A of the Integrity Principles and Guidelines (IPG) and to misconduct under para. 2.1(d) of AO 2.04 regarding abuse or misuse of privileges accorded to staff.

### **Disciplinary proceedings**

#### *Formal disciplinary proceedings*

22. On 19 May 2016 the Respondent initiated disciplinary proceedings against the Applicant. The Applicant was charged with violating section 8 of the Staff Regulations; paras. 4.3(i), 4.3(ii) and 4.8 (vi) of AO 2.02; and section 2A of the Integrity Principles and Guidelines. The Applicant was told that “*the charges against her were serious and may warrant the imposition of disciplinary measures, including dismissal from ADB.*” Staff of the Budget, Personnel and Management Systems Department (“BPMSD”) held meetings with the Applicant and took submissions. The Applicant sent a response to BPMSD on 8 June 2016, denying the charges, after which a meeting was held on 5 July 2016 between the Applicant and BPMSD.

*Disciplinary measure imposed*

23. After reviewing the OAI Report, the Applicant's comments and written responses, BPMSD established that on the preponderance of evidence, it was more probable than not that Staff had engaged in fraudulent practices and misconduct. The DG, BPMSD sent a 15 September 2016 memorandum to the President outlining the disciplinary proceedings that had taken place in relation to the Applicant and a list of considerations taken into account when deciding which disciplinary measures to recommend. These included the fact that the Applicant had utilized the TEV privilege twice and that she *"had been with ADB for over 35 years and has been occupying a Senior NS position, a position which requires her to be a model of integrity given her specific responsibilities."* The DG, BPMSD recommended the imposition of the following disciplinary measures on the Applicant:

- a) dismissal for misconduct with immediate effect;
- b) in the event that a tax liability for the two TEVs is later discovered or determined that requires ADB to address such liabilities, ADB reserves the right to recover the amount from the Applicant;
- c) permanent ineligibility to work as a consultant or contractual employee employed by ADB or any ADB-financed activity; and
- d) access to ADB premises only allowed with prior approval of Director, Human Resources Business Partners Division (known as BPHP).

24. The President approved these recommendations.

**The Applicant is dismissed for misconduct***Notice of disciplinary measure*

25. On 21 September 2016 the Director, Human Resources Business Partners Division ("BPHP") served the Notice of Disciplinary Measure, which included the Applicant's dismissal with immediate effect.

**Appeals Committee***Appeals Committee Report*

26. On 21 October 2016, the Applicant lodged an appeal, revised on 28 November 2016, of the decision directly with the Appeals Committee (“AC”) under AO 2.06 of 19 February 2013 on Administrative Review and Appeal Procedures (prior administrative review not being required for disciplinary measure cases). The AC, pursuant to AO 2.06 para. 13.2, which permits it to consider appeals jointly “*if they will concern the same subject matter*”, examined her appeal together with three other appeals on the same subject.

27. On 25 October 2017, the Applicant received a copy of the decision of the President rejecting the appeal (No. 3a of 2016), together with the Report and Recommendation of the Appeals Committee (which was dated 11 October 2017 and had been sent to the Applicant on 20 October 2017). The report revealed that the AC had requested additional documentation from the Bank, first in February 2017 and again in May 2017. According to the AC report, the last information it received was a memorandum from BPMSD on 26 May 2017, following the AC’s request of 23 May 2017. When submitting the report to the President, the Chairperson of the Appeals Committee wrote, “*Due to the intricacies of the case, which required request for additional information, the very substantial amount of submitted documentation, and the amount of time necessary to consider this case, the Appeals Committee regrettably submits the attached reports longer than the foreseen 90-day timeframe indicated in AO 2.06*”. Between the filing of the appeal and the submission of the AC report almost one year had elapsed.

28. Additional information requested and received by the AC included i) information regarding the agreements between the ADB and AAA; ii) information regarding the disciplinary measures imposed on 12 staff members (including 4 former staff) for the same type of misconduct; and iii) information on disciplinary measures applied to retired staff for the same type of misconduct. The latter two items are the subject of a request by the ADB Administrative Tribunal for the production of documents in this Application.

29. The AC, comprising a three-member panel of staff appointed to the AC in accordance with para. 9 of A.O. 2.06, found unanimously that there was no abuse of process. The AC was also unanimous in deciding that proper procedures had been followed, but recognized that, despite OAI's efforts, its failure to interview the car company agent, Ms. S, "*may have resulted in missing some crucial information, which could have had an impact on the Decision.*" The AC concluded unanimously that the Appellant's conduct was within the scope of "misconduct". The AC panel was not however unanimous on several points, including whether the "more probably than not basis" was sufficient to warrant dismissal. The AC concluded, by a majority, that the President's decision was not an abuse of discretion or discriminatory, and that the measures were proportionate to the seriousness of the misconduct.

30. One member of the AC, forming a minority, considered that the exercise of discretion amounted to arbitrariness, that the inability of the Applicant to choose between receiving the pension as an annuity or a lump-sum "*may prove significant and ultimately unjustified*" since former staff found to have engaged in similar misconduct were allowed to maintain their pension on an annuity basis, as they were investigated after they retired, and that the abuse of the TEV privilege "*did not rise to the level of such seriousness as to warrant dismissal*". The minority further argued for less severe measures in light of inadequate ADB supervision of the automobile salesperson, who was given license to do business on Headquarters premises, "*leading to an environment in which TEV abuse became common*".

31. A majority of members of the AC recommended that the President reject the Applicant's appeal. The 11 October 2017 Report was signed by one member who also signed "for" another member. In addition, the Secretary of the Committee signed "for" the Chairman of the AC as a member of the panel.

32. On 20 October 2017, the President adopted the AC's recommendations and the Applicant was informed on 25 October 2017 of the decision to reject her appeal.

**Application to the Administrative Tribunal and relief sought**

33. On 1 February 2018 the Applicant brought this Application to the Tribunal. The Applicant seeks:

- a) a letter from the President of the ADB to Applicant to restore her integrity;
- b) independent investigation on institutional and procedural failures that resulted in the charges framed and the method and speed through which a decision was reached;
- c) five years of salary and restitution of all retirement and other benefits, adjusted for inflation, by way of actual and compensatory damages;
- d) restitution of all losses resulting from untimely termination by way of additional compensatory damages;
- e) moral damages of USD 200,000 for the mental anguish, serious anxiety, besmirched reputation, wounded feelings, moral shock, and social humiliation suffered by the Applicant;
- f) exemplary damages of USD 100,000 to serve as an example or correction, in order to prevent the ADB from committing similar wrongful acts in the future; and
- g) reasonable legal fees and cost of legal consultations which have been incurred and which are continually incurred in the course of these proceedings.

34. The Respondent filed its Answer on 3 April 2018. The Applicant's Reply was submitted on 21 May 2018, and the Respondent's Rejoinder on 21 June 2018. The Respondent maintains that the Application is without merit and should be dismissed, and that the Applicant is not entitled to any relief.

*Tribunal's request for additional information*

35. On 11 July 2018, following its consideration of the views of the parties and under Rules 10(1) and 11<sup>2</sup> of the Rules of Procedure of the ADB Administrative Tribunal, the Tribunal sent

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<sup>2</sup> Rule 10 empowers the President of the Tribunal to "call upon the parties to submit additional written statements or additional documents" and Rule 11 empowers such additional documents to be "filed after the case has been included in the list."

the Respondent a “Request for Additional Information” in relation to other ADB staff mentioned in the Appeals Committee Report who had been sanctioned. The information requested included a) position held; b) number of years of employment in the Bank; c) the number of vehicles purchased; and d) the penalties imposed upon the individual. On 16 July 2018, in response to the Tribunal’s request, the Bank submitted the information and requested that the Tribunal review the information *in camera*. The Applicant was provided a redacted version of the information.

36. At the conclusion of its session on 21 July 2018, the Tribunal decided it was necessary to seek additional information and views of the parties and, pursuant to Rule 11(1) of the Rules of Procedure of the ADB Administrative Tribunal, requested additional information from the Bank in relation to the thirty-three individuals referred to in paragraph 47 of the Respondent’s Answer covering the OAI investigation on the fraudulent TEV purchase and import scheme. The Tribunal directed the Bank to provide similar details for these individuals as for its 11 July request. Additionally, the Tribunal asked the Bank to furnish *in camera* any information on action taken by it regarding management and individual accountability of those officers responsible for processing the TEV privilege during the time of the fraudulent scheme. The Tribunal also asked the Bank to provide the final OAI Report covering AAA. On 2 August 2018, the Bank provided these requested documents to the Tribunal along with a request that the Tribunal conduct its review *in camera*. Redacted versions of the documents were provided to the Applicant. The information showed that in relation to the 33 individuals, Respondent had decided to:

- a) dismiss 5 staff;
- b) demote 12 staff by one level;
- c) demote 7 staff by one level with additional salary reduction;
- d) declare 6 retirees/former staff as permanently ineligible to be recruited as a consultant or contractual staff in an ADB financed activity; and
- e) declare 3 retirees/former staff ineligible to be recruited as a consultant or contractual staff in an ADB financed activity for 3 years.

37. Within the entire group, three staff members were found to have “engaged in obstructive practice”; of these, one was dismissed and two were demoted with a five percent salary reduction.

Of those staff who had not retired, seven were in a position of trust, of whom four were dismissed and three received a “mitigated sanction as a result of staff’s cooperation” of demotion by one level with ten percent salary reduction.

*Explanatory information/additional pleadings submitted during sharing of additional information*

38. In its 2 August 2018 response to the Tribunal’s request for additional information, the Respondent supplemented its information with explanatory comments. The Respondent emphasized that *“while the general misconduct of abusing the TEV privilege was common to all cases, consistent with Section 4.1 of AO 2.04, the disciplinary sanctions were determined on a case-by-case basis, taking into account (i) the nature and weight of the evidence gathered in each case; (ii) the individual circumstances; and (iii) the criteria set forth in Section 6 of AO 2.04 [effective as of 9 September 2010].”*

39. The Respondent also explained the mitigating circumstances and aggravating circumstances it considered. With respect to mitigating circumstances, it noted that it considered whether the individuals (i) *“assisted OAI in the investigation and were instrumental in helping it determine how the fraudulent scheme occurred”*; and/or (ii) *“admitted their misconduct and expressed their willingness to mitigate the consequences of their actions”*. With respect to aggravating circumstances, it noted that it considered (i) *“the official position held by the staff/former staff member”*; (ii) whether the TEV privilege had been abused on more than one occasion; and (iii) whether additional misconduct occurred during the investigation phase by engaging in obstructive practices. The Respondent also noted that *“for certain staff who were entrusted with important responsibilities in the Audit, Treasury and Controller’s departments”* or those staff in a *“position of trust”*, the Respondent decided that the breach of trust was so serious that continuation of the individual’s services was not in the interest of ADB.

40. The Respondent also, while maintaining that its processes and procedures were not deficient such that it bears *“any responsibility for the actions of the Applicants”*, explained to the Tribunal that it had approved *“several actions which were aimed at tightening the controls on the*



*administration of the TEV privilege in order to minimize the risk of siar fraudulent acts occurring.*” Those actions included transferring the responsibility for all processing and administration for the TEV privilege from OAIS-LM to the Bank’s “Government Relations” section and revising processing procedures so that staff are now to submit all documents themselves.

41. The Applicant did not comment on the additional information provided by the Bank in relation to the sanctions imposed.

## **II. FINDINGS**

### **Preliminary matters**

#### *a. Confidentiality*

42. The Applicant has not requested confidentiality under the Rules of the ADBAT. The Tribunal has in the past granted confidentiality *sua sponte* [*Ms. C*, Decision No. 58 (8 August 2003)], and chooses to do so in this matter. It notes that three similarly situated Applicants have requested confidentiality, and the Tribunal takes the view that it must treat this Applicant no differently in terms of maintaining confidentiality of her name and of other individuals mentioned in her Application.

#### *b. En banc*

43. In light of the complexity of the issues posed in the case, the Tribunal decides, in accordance with Article V (5) of the Statute of the ADB Administrative Tribunal read with Rule 5A, that this Application warrants consideration by a panel consisting of all its members.

*c. Applicant's request for production of documents*

44. The Applicant has requested production of the following:

- a) “all documents referred to in paragraph 30, items a) to e) and paragraph 31 [of the Appeals Committee Report] for her perusal and that her comments be received as part of the records of her case”, in other words, documents pertaining to the disciplinary proceedings conducted against other staff members investigated for the same misconduct. The Applicant asserts that she has been denied the right to provide comments on the less severe sanctions meted out to “several similarly situated staff members”;
- b) “evidence to show the measures taken by Respondent to produce [the AAA representative] as a material personality in the instant case”;
- c) “a detailed report of changes, adjustments or corrections initiated and implemented by the Respondent as it applied to the administration of the TEV privileges”; and
- d) “a disclosure by the Respondent on the status of the issues presented in the case vis-à-vis Department of Finance and the Department of Foreign Affairs the Philippine Government”.

45. In her Reply, the Applicant again requested the production of a detailed report of changes to the TEV administration, and a “report documenting the case as it related to the host country” [c) and d) above]. The Applicant asserted this was relevant to show the changes that have been adopted owing to institutional weaknesses and so as to establish what had been communicated to the host country with respect to issues surrounding the TEV limit and any relevant reactions or measures taken thereon.

46. The Bank asked the Tribunal to reject the Applicant's requests as it failed to see the relevance of those documents to the inquiry before the Tribunal. In relation to each request it asserted:

- a) the issue is not whether other staff members were properly sanctioned by Respondent, but rather whether, taking into consideration the individual circumstances in Applicant's case, the sanction imposed on Applicant was proportionate to the circumstances in her

individual case;

b) “[e]ven in the absence of direct testimony from [the AAA representative], Respondent had a sufficient basis to conclude that Applicant committed serious misconduct.” The Respondent nevertheless explains that OAI made attempts to contact [the AAA representative] but such efforts were unsuccessful;

c) the fact that Respondent may have introduced additional safeguards on the basis of lessons learned from Applicant’s case, does not detract from the gravity of Applicant’s fraudulent acts; and

d) the Respondent’s correspondence with the host country is not relevant to the issue currently being challenged before the Tribunal.

47. The Tribunal is empowered, under ADBAT Rules 10 and 11, if it considers it necessary for the proper examination of an application, to require the Bank to divulge documents or evidence pertinent to issues posed. It has done so in this case with regard to information regarding disciplinary measures imposed upon other individuals, for purposes of examining the Applicant’s claim of discrimination and disproportionality of the sanction imposed upon her. However, the Tribunal does not see how divulgence of the information she has requested could possibly rebut the existence of the fraudulent invoices for the Applicant’s vehicles, or the fact that she had received a copy of them and had benefited from invoking the TEV privilege on two occasions.

48. The Applicant’s request for documents showing measures taken to produce the AAA representative as a material witness implied inadequate efforts by the Bank to do so, whereas it was in the Bank’s own interest to pursue this individual. The Applicant has not made out a convincing case of why such information would be pertinent to the allegation of her own misconduct, since she cannot shift the blame on to others for her own acts. Nor would provision of a detailed report of changes, adjustments or corrections made by the Bank as it applied the TEV privilege, or disclosure of the status of the issues presented vis-à-vis the Government of the Philippines serve to exculpate her or address her claims for relief in this case. These aspects of the request are thus denied.

## The Merits

### *Summary of positions*

#### **Applicant's position**

49. In the present case, the Applicant argues that her summary dismissal is unlawful on the grounds that:

- a) there was no misconduct and thus the dismissal was without basis:
  - the procedure to avail of the TEV privilege was never clearly defined in any AOs or Guidelines;
  - there was no direct evidence that she was a party to the fraudulent scheme;
  - she acted in good faith;
  - the Respondent is complicit as its safeguards were inadequate; and
- b) there were procedural flaws, as:
  - the OAI investigation failed to interview the key witness (the AAA representative);
  - her email was accessed without her authority;
  - she was not provided appropriate notice;
  - she was denied access to legal counsel; and
- c) it was an abuse of discretion because it discriminated against the Applicant; and
- d) the sanction was disproportionate to the alleged offense.

#### **Respondent's position**

50. The Respondent argues that there is no merit in the Applicant's claim and that it should be dismissed with the Applicant not entitled to any relief. The Respondent asserts that the Applicant's acts of taking advantage of a fraudulent scheme not once, but twice, were a "fundamental violation

of the standards of integrity expected of her” and the only conceivable disciplinary measure was dismissal.

51. The Respondent asserts that the Applicant was aware of the TEV limit, and that the total cost of both purchases was above it. The Respondent notes the Applicant was a long-standing staff member entrusted with sensitive fiduciary responsibilities and leadership within ADB.

52. The Respondent maintains that the dismissal decision was both warranted and proportionate to the serious misconduct of Applicant. The dismissal constituted a lawful exercise of Respondent’s discretion and it adhered to due process and followed all relevant procedures for dismissal.

*The Tribunal’s scope of review in this matter*

53. The Tribunal’s scope of review of an Application is settled:

*...The Tribunal ... 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. [Lindsey, Decision No. 1, [1992], I ADBAT Reports 5, para 12].*

54. In disciplinary cases, the Tribunal examines:

*“... (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided for in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offence, and (v) whether the requirements of due process were observed.” (Mr. H, Decision No. 108 [6 January 2017], para. 47, citing *Hua Du*, Decision No. 101 [2013] IX ADBAT Reports 94, para. 31). See also, inter alia, *Zaidi*, Decision No. 17 [1996] II ADBAT Reports 92, para. 10).*

55. In the present case, there are therefore five principal issues before the Tribunal: whether the procedures utilized by the Bank were proper and in accordance with due process; whether her actions legally amounted to misconduct; whether the sanctions imposed were within the Bank's discretion; whether the sanction of dismissal was significantly disproportionate to the misconduct; and whether it was discriminatory against her.

**Issue (1): Were the procedures utilized by the Bank proper and in accordance with due process?**

*Allegations regarding due process*

56. The Applicant asserts “in numerous aspects, areas and angles of the ADB's dealings with the Applicant – particularly the Bank's administration and supervision of the investigation and disciplinary proceedings against her – the ADB repeatedly and blatantly violated the basic and fundamental requirements of due process.” The Applicant notes that the fundamental requirement to observe due process in all of its dealings with its staff is codified in AO No. 2.02, para. 2.14: “ADB will observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service.” The Applicant also alleges breaches of AO 4.17 para. 6, AO 2.04 para. 6, AO 2.02 para 4, and AO 2.04 paras 8 and 9.

57. The Applicant summarizes these violations as follows:

- a) AO 4.17 para. 6 when the Respondent forced access and an unconsented disclosure of the Applicant's email account in violation of the requirement of “urgent business need” and the decision maker to be at least two among the Director, BPMSD, Chief OIST, or the Chief, OAS;
- b) a fair and impartial investigation – particularly when senior management making the disciplinary measure recommendations were tainted with prejudgment and partiality;
- c) a fair and impartial judge in the President;
- d) no good faith or due care in treating the Applicant and not giving her an opportunity to correct her actions;

- e) not giving prior notice to the Applicant of the investigation before questioning ADB staff members;
- f) instituting an arbitrary and baseless confidentiality order in the conduct of the investigation;
- g) not affording Applicant the benefit of her legal counsel when she was requested to attend an investigative meeting;
- h) failing to treat the Applicant equally by failing to accord her the same favourable treatment given to colleagues who were similarly situated; and
- i) not providing a law or regulation which a reasonable person can understand.

58. The Applicant also asserts violation of due process because her comments on the OAI findings and recommendation do not appear to have been considered in the decision to dismiss her. “There was not even a statement that dismisses her comments to be unsatisfactory” and so presentation of her “contrary view had been totally withheld.”

59. The Respondent asserts that it followed proper process through the investigative and disciplinary proceedings and that the Applicant received ample opportunity to consider the allegations and respond at every stage.

60. As a general matter, the Tribunal notes that paras. 8 to 10 of AO 2.04 set out the procedures to be followed in a disciplinary case and the rights afforded to a staff member suspected of having engaged in unsatisfactory conduct or misconduct. These include the rights to be informed that he or she is under investigation, to be informed in writing of the charges, to provide explanations in response to those charges, and to have certain procedures followed. In relation to disciplinary procedures, the burden of proof is on the Applicant to demonstrate that his/her due process rights were violated. As stated in *Gnanathurai*, Decision No. 79, [2007] VIII ADBAT Reports 32, para. 38: “... [a] staff member must have a reasonable opportunity to show that he did not commit such misconduct.”

## (i) Conduct of the OAI investigation

*(a) Failure to interview witnesses*

61. The Applicant claims that due process was denied by the OAI's failure to interview witnesses from AAA and in particular the AAA representative. The Bank in response explains that AAA did cooperate with the OAI and the OAI made attempts to contact the AAA representative but those efforts were unsuccessful. Nevertheless, the OAI appropriately considered the totality of evidence available to it to conclude, on a more probable than not basis, that the Applicant had committed misconduct.

62. The Respondent asserts that the OAI Investigation (referred to in AO 2.04 para. 8 and Appendix 2) is essentially fact-finding and separate to BPMSD's disciplinary proceedings referred to in AO 2.04 para. 9. The Respondent asserts that it followed the procedures in AO 2.04 and the Applicant in both instances was afforded due process and given a meaningful opportunity to explain herself and provide evidence in support of her defense. The OAI Report indicates that the Applicant submitted a reply to the disciplinary proceedings filed against her, and the report included highlights from her written response. The notification of proceedings also notes that she was given the opportunity to comment on the draft OAI findings, and that her comments were taken into account. The Tribunal observes that the absence of a reference to her comments does not imply that they were not considered before a decision was taken.

**Finding (1)(i)(a): Failure to interview witnesses**

63. The Tribunal finds that neither the OAI nor the AC could compel the AAA representative to participate in the investigation or other proceedings. AAA had dismissed Ms. S in June 2015 and had filed criminal charges against her well before the Bank's investigation of its own staff members began. The Tribunal, having seen evidence *in camera*, considers that the Bank made reasonable efforts to locate her; even in her absence, it took the measure of posting her name in connection with the fraudulent scheme and enabling other development banks to cross-bar her.



While the Tribunal shares the AC's unanimous conclusion that it would have been preferable if Ms. S had been located and interviewed in order to complete the picture, such testimony was not indispensable to reaching a determination about whether or not the Applicant had herself engaged in misconduct. Even if the AAA agent had testified that she did not tell the Applicant that she was preparing a fraudulent invoice, this would not have relieved the Applicant of her own responsibilities as an ADB staff member. For the same reason, the investigation into the alleged abuse by other staff members of TEV privileges as possible misconduct is irrelevant to what the Applicant herself did. Therefore, no violation of due process occurred in relation to these aspects of the OAI investigation. The Tribunal concludes that the Applicant had a reasonable opportunity to show that she did not commit misconduct and that no due process violation occurred in the course of the investigation.

64. The Applicant also is further aggrieved that OAI "cleared OAI-SLM by not looking into its probable liability in terms of negligence or even complicity." She concludes that the investigation was incomplete with respect to all the parties that could more-probable-than-not be liable, and so she cannot be implicated at all.

65. In addition, the Applicant notes documentation that was provided to the Appeals Committee has not been shared with her. She asserts this is a breach of due process as she has been denied the right to provide comments on the less severe sanctions meted out to "several similarly situated staff members." The Respondent noted in its Answer that these documents were irrelevant as "disciplinary proceedings are a matter between the Respondent and an individual staff member." With regard to the allegations of disproportionality and discrimination, this information was subsequently disclosed by virtue of the Tribunal's orders for production of documents. However, the Applicant provided no comments on this information.

*(b) The Respondent's access and disclosure of the Applicant's email account*

66. The Applicant asserts that the Respondent breached AO No. 4.17 (2006) on Electronic Mail and the Internet paras. 6.1 and 6.3 along with her right to privacy and freedom from interference

in correspondence, when it accessed and disclosed her email account. The Applicant asserts there was no “urgent business need” that justified “a forced and unconsented access” to her email account and rejects the position that the lead investigator’s conduct of a preliminary inquiry amounted to an “urgent business need”. The Applicant also asserts that the procedures to determine the existence of the “urgent business need” were not followed. This procedure requires the agreement of at least two among: the Director, BPMSD, the Chief, OIST and the Chief, OAS. In her case it was solely the lead investigator who made the decision.

67. The Respondent asserts that it retains the right to access staff member’s ADB e-mail accounts in the conduct of investigations, subject to certain procedural safeguards pursuant to AO No. 4.05 (2007) on Information and Communication Technology Principles, para. 5.7(e), which were properly followed in this case. AO 4.05 para 5.7 (e) states:

*When Head, OAI requires access to a user’s e-mail box for the purpose of an investigation, the Head, OAI shall request, with reasons, authorization from Director General, BPMSD or the President, who must be satisfied that there is a good cause for access. When authorization is provided, the Principal Director, OIST shall provide the necessary technical assistance.*

68. The Respondent asserts that in accordance with this rule, the Officer-in-Charge of OAI requested access to the Applicant’s email box from the DG, BPMSD on 13 November 2015. The DG authorized the access of the Applicant’s mail box.

**Finding (1)(i)(b): Access to Applicant’s email**

69. The Tribunal finds that the Bank has cited the relevant provisions in force at the time the Applicant’s email account was accessed, and that the procedure was justified and properly followed in this case.

(ii) Alleged denial of appropriate notice and opportunity to correct her actions

*(a) No opportunity to correct her actions*

70. The Applicant notes that “*at no point from the first purchase up to the second purchase and until the initiation of the OAGI investigation did BPMSD or OAIS-LM advise the Applicant of any real or perceived conflicts between her purchase*”. She argues that by denying her any notice and opportunity to correct her actions in spite of full knowledge of all her purchase activities with respect to the TEV, ADB in fact encouraged her by its silent consent and aided her by the process involved to continue to purchase her TEVs, thus denying her the right to due process.

71. The Bank did not respond to this contention.

**Finding (1)(ii)(a): Opportunity to correct her actions**

72. The Tribunal finds that no due process violation occurred in this respect. The shortcomings on the part of the Bank in its supervision of the TEV arrangement did not relieve the Applicant from her obligation to follow Bank rules. She always had the opportunity to do this by choosing a model of vehicle from another manufacturer, with a total cost that fell under the TEV limit. She also could have checked the AAA agent’s interpretation of the TEV limit with the proper authority in the Bank, OAIS-LM.

*(b) No notice of investigation (no notice before questioning other staff)*

73. The Applicant also asserts that the lead investigator questioning ADB staff members in her absence and without the Applicant first being informed that a preliminary inquiry was being conducted against her violated her right to due process as she was not given prior notice. The Applicant refers to two cases of the ILO Administrative Tribunal to assert that a practice of taking evidence “at the back of the concerned party is a violation of due process.” [*In re Sharma*, Judgment No. 999 (there can be no certainty of justice if evidence is taken in the absence of one

of the parties); *In re Manaktala*, Judgment No. 1133]. The Applicant maintains that the same breach of due process occurred when the lead investigator was given unauthorized access to her email account.

74. The Applicant asserts that the 3 December 2015 notification of commencement of the investigation did not provide any details with respect to the nature of the alleged offense, specific acts committed or source of such allegations. She therefore was not fully apprised of the charges or the evidence and individual testimonies against her, she alleges.

75. The Bank disagrees that the Applicant was not provided with appropriate notice. Before the OAI interviewed the Applicant, she was formally notified on 3 December 2015 that she was under the OAI investigation. In that notification she was provided with a copy of para. 15 of the IPG, which outlined her rights and obligations in relation to the OAI investigation and was asked to confirm her availability to speak with the OAI on 4 December 2015, at 3pm. The Bank also asserts that the Applicant was provided at the same time with a copy of Appendix 2 of AO 2.04, which outlines the procedures for the investigation of staff suspected of misconduct. The Respondent asserts that the Applicant was advised to read it and asked at the end of the interview if she had any comments or complaints on the manner in which she was interviewed. The Bank maintains that she replied in the negative.

**Finding (1)(ii)(b): Notice of investigation**

76. As a staff member, the Applicant had access to Bank documents concerning investigations. In her reply, she did not contest the Bank's assertions about the information provided to her regarding her obligation to cooperate and her right to consult outside counsel. For these reasons, the Tribunal finds that although the notification of when she was to be questioned was brief, it was adequate for essentially the initial fact-finding phase of the investigation and did not appear, of itself, to cause the Applicant any adverse consequences. In these circumstances, the Tribunal finds the short notice did not breach due process requirements.

(iii) The “capricious, unreasonable and arbitrary requirement for total confidentiality”

77. The Applicant asserts that by requiring the Applicant not to discuss the investigation with any ADB staff or others (and stating that any breach of confidentiality may constitute misconduct), she was denied due process as she was not able to procure documentary or testimonial evidence. The Applicant argues that such a requirement was “*ultra vires* and therefore void and ineffective from the very start.” The Applicant notes paragraph 15A of the IPG includes a requirement of confidentiality on the duty to cooperate by staff, but she notes that this requirement does not appear in Appendix 2 of AO 2.04 under duty to cooperate.

78. The Respondent maintains that it followed proper process through the investigative and disciplinary proceedings and that the Applicant received ample opportunity to consider the allegations and respond at every stage. Moreover, the Respondent asserts that the Applicant has misconstrued the rights accorded to staff as part of the formal disciplinary proceedings and investigative phase.

**Finding (1)(iii): Request for total confidentiality**

79. As to the Applicant’s contention that the confidentiality requirement as applied to this case was “capricious, unreasonable and arbitrary”, the Tribunal does not find this to be so. The Bank had become aware of an ongoing scheme that involved a number of staff members. It needed to take steps in the investigation to avoid disclosures that could possibly have led to influence of others’ testimony or to others’ suppression of evidence.

(iv) Denial of access to counsel

80. The Applicant asserts that on 4 December 2015 she was “summarily deposed without due and reasonable notice or any adequate warning” in the office of the Director, BPHR where she was questioned by the OAI investigator without having the benefit of legal counsel.

81. The Respondent disagrees with the Applicant's inference. It maintains that para. 3 of Appendix 2 of AO 2.04, which according to the Respondent had been shown to the Applicant, noted that the Applicant could consult with outside legal counsel but could not be accompanied by legal counsel on ADB premises or during interviews conducted as part of an investigation. The Respondent asserts that the Applicant was never precluded from consulting with outside counsel.

**Finding (1)(iv): Denial of access to counsel**

82. In *Claus*, ADBAT Decision No. 105 [13 February 2015], the Tribunal held that there is no right for a staff member to be represented by counsel in internal proceedings. There seems no reason to find otherwise in this case. The Applicant was free to consult outside counsel.

(v) Were the procedures followed by the AC proper?

83. In addition to the questions the Applicant raised about respect for due process in the Bank's handling of the investigation and its disciplinary procedures, where the Tribunal sees no fault, it notes two additional issues that require its examination *sua sponte*. They do not relate to the conduct of the investigation, the determination of misconduct or the imposition of the appropriate penalties, but rather involve the review of these aspects by the Appeals Committee (AC). In the Tribunal's view, it is necessary to raise questions about whether or not the AC correctly followed its own procedures as to the length of time the AC took to submit its report, and as to the propriety of the signatures on that report.

*(a) Time lapse between the appeal to the Appeals Committee and its report*

84. More than a year elapsed between when the Applicant filed her appeal (21 October 2016) and when she received the AC report (dated 11 October and received on 25 October 2017). Although she has not specifically raised a claim on this issue, she has complained of the Bank's alleged failure to follow procedures and has made a plea for moral damages for, inter alia, "mental

anguish and serious anxiety.” The Bank does not dispute the delay in issuing the report, but contests any damages claimed by the Applicant.

**Finding (1)(v)(a): Delay in issuing AC report**

85. The Tribunal notes that AO 2.06 of 19 February 2013 provides that the Appeals Committee is to submit its report to the President within 90 days of its receipt of the appeal (AO No. 2.06, para. 14). The Appeals Committee Rules of Procedure (“AC RoP”) annexed to the AO define “time limit” as “the time period within which an action has to be taken” (AO 2.06, para. 1.2(h)). The statement in the cover memorandum to the AC report, that the 90-day time frame is “indicated” in AO 2.06, downplayed the definition of the time-limit in para. 1.2(h) of the AC RoP as a period in which an action “has to be taken.” The AC may “at any stage of the proceedings” “extend any time limit which may apply under the Rules, taking into account the nature and complexity of the appeal” (AC RoP, para. 1.4(c)). However, nothing on the record indicates that the AC explicitly took that step or informed the parties that it was doing so.

86. The AC’s competence when reviewing decisions and disciplinary matters is essentially to determine whether ADB’s Staff Regulations, Administrative Orders and policies and procedures have been correctly applied (AO 2.06, para. 9.2(d)). The AC thus does not conduct an independent investigation. It can hold hearings, which it did not do in this case, as well as request additional documentation, which it did in February and May 2017. According to the AC report, the last information it received was a memorandum from BPMSD on 26 May 2017, following the AC’s request of 23 May 2017. It was not clear why it had taken this long for the AC to request this information, or whether or not a copy of this memorandum was provided to the Applicant for possible comment.

87. In explaining the reasons for failing to submit the report within the stipulated period, the AC referred to “the intricacies of the case” and the amount of documentation, including additionally requested information, and the time necessary to consider the appeal. The appeal was complex, justifying in the Tribunal’s view a possible extension by the AC of the time limit, in order to grasp the relevant elements of the cases concerned, as permitted by its rules. But in the

eyes of the Tribunal, the delay – exceeding by almost four times the normal time limit of 90 days - was excessive (cf. *BC v IFC*, WBAT Decision No. 427 [2010]). In the interest of transparency, the AC, while it might not be required to do so, should also have informed the parties of the new time limit it was providing for itself under para. 1.4(c) of its RoP.

*(b) Signatures on the AC report*

88. The Tribunal calls attention to two noteworthy features of the signatures on the final page of the AC report. In one case, one member signed “for” another member, and in the other case the Secretary of the AC signed “for” a third AC member.

**Finding (1)(v)(b): Signatures on the AC report**

89. The Tribunal finds it questionable that these signatures were made without an indication of authorization to the person signing, particularly given the lack of unanimity in respect of some conclusions of the AC and the serious sanctions imposed on the Applicant. While the Tribunal does not conclude that the shortcoming was of sufficient import to invalidate the AC’s report, it expresses concern that the Bank has not taken greater care in this respect.

*Compensation*

90. With regard to the excessive delay in the AC report and the irregularities in signature, the Tribunal finds that, while they did not affect the outcome and thus did not amount to due process violations by the Bank, they warrant an award of some compensation to the Applicant for intangible injury.

91. In conclusion, the Tribunal finds no due process violations.



**Issue (2): Did the Applicant's actions legally amount to misconduct?**

92. The Applicant essentially argues that her actions did not legally amount to misconduct because:

- (i) the procedure regarding the TEV privilege was vague;
- (ii) there was no direct evidence that she was a party to the fraudulent scheme; and
- (iii) she had acted in good faith and the Bank was complicit as its safeguards were inadequate.

93. The Bank asserts that the Applicant was aware of the TEV limit and that the total cost of both vehicle purchases fell above it. The Bank pointed to awareness of the fraudulent invoices which were used to facilitate the vehicle importations. Accordingly, the Bank asserts that the Applicant misused the tax privilege to her advantage through her reckless act or omission and, in so doing, placed the ADB's relationship with the host country in jeopardy. In its view, this constituted misconduct and warranted disciplinary measures under AO 2.04, para. 2.1.

(i) Was there a legal basis for the TEV limit and was the TEV procedure vague?

94. The Applicant alleges that the "overreaching nature of the provision that has been invoked against the Applicant" is vague and thus without effect. She claims that she did not ask too many questions and relied on what she had been told by Ms. S about the interpretation of the TEV limit.

95. The Bank did not respond to this contention.

**Finding (2)(i): Was there a legal basis for the TEV limit and was it ambiguous?**

96. The Tribunal finds, firstly, that there was a formal legal basis for the car value entitlement to be limited to USD 24,000. The DFA memorandum dated 18 September 1997, read with the Memorandum from the Office of the President of the Philippines dated 15 August 1973, granted staff at NS3 and above the privilege of importing vehicles tax exempt subject to a maximum car

value of USD 24,000. The Bank accepted this limit as binding on it. Under Bank rules, employees must respect the limit fixed.

97. Secondly, as to the vagueness of the term of “car value entitlement limit,” the “base price” of a car – the notion favoured by the Applicant – can be as little as half the final price of the same car model with a different motor and other options, which would render the ceiling rate of USD 24,000 meaningless. There were other available makes and models of car with a value that fell under this figure, and there was no entitlement to import any particular vehicle tax-free. The Tribunal finds that a normal reading of the words would mean the total value of the car, including accessories, modifications and other costs. Accordingly, the Applicant was at least reckless as to her interpretation of the proper meaning of the “car value entitlement”.

98. While the Tribunal does not consider the rules on the TEV ceiling to have been overly vague, or that the Bank was obligated to provide all of the information in a single document, it notes that the information the Bank made available to persons seeking to avail themselves of the TEV privilege should have been more explicit to provide better guidance. For instance, the heading, “ADB TEV Entitlement Form,” suggests that an entitlement, rather than a privilege, is involved. On the other hand, the limit of USD 24,000 appeared clearly in the documentation available to the Applicant. Rather than seeking clarification from the responsible unit in the Bank as to what the cap included, the Applicant trusted the AAA representative’s “base cost price” explanation and failed to ask questions.

(ii) Was there a lack of evidence?

99. The Applicant asserts that her conduct was not within the scope of “misconduct” as contemplated by AO 2.04 as there is “no direct evidence that [she] was party to a fraudulent scheme”.

**Finding (2)(ii): Was there a lack of evidence that she was party to fraud?**

100. The record established that for the 2009 vehicle purchase, the Applicant received an email on 29 May 2009 regarding the processing of her RFEMV, to which a copy of the fraudulent invoice was attached. The fact that this email, which asked for action by DOF on the tax-free importation of her car, was addressed by an OAIS-LM official (Ms. C) to a personal email address rather than an official government address, and that the invoice understated the price of the vehicle, should have alerted her that something was amiss with the transaction. She did not heed this warning sign, and in the Tribunal's view such recklessness cannot be excused by invoking the Bank's own shortcomings in relation to its supervision of the use of the TEV privilege.

101. The Applicant claims that her possession of the fraudulent invoices was insufficient proof to conclude either that she had knowledge of their contents or that she had consented to the submission of the "fraudulent invoices" to OAIS-LM. She argues that the Bank was totally responsible.

102. The Respondent asserts that the Applicant cannot disown the AAA representative's actions, as the Applicant was responsible for ensuring her compliance with the relevant rules. It points out that the Applicant was aware of the limit, that in both cases her chosen models of vehicle exceeded it, and that she was in possession of the RFEMVs which misrepresented the value of the purchases.

103. The Tribunal recalls that the fact sheet described above at para. 7 stated that the staff member was to "instruct" the vehicle supplier to ship the vehicle and was to send documents, including the sales invoice, to OAIS-LM for the filing of the TEV request. Although in practice AAA sent the documents to OAIS-LM for processing on behalf of the staff member, the Tribunal concludes that the Applicant bears ultimate responsibility for the submission (compare *Bristol*, Decision No. 75 [2006], VII ADBAT Reports, para. 29). In addition, the Applicant in this case herself later initiated the procedure for selling her TEV vehicle, which involved again misrepresenting its value to the Bank, which repeated the false information to the Government, in 2013.

104. In addition, the Applicant's claimed inattentiveness to the exchange rates involved in the vehicle purchases because she was too "busy" were of concern when coming from a staff member whose daily work involved forex. The Tribunal recalls that an unusually heavy workload is "certainly not an excuse for not following the rules of the Bank." (see Z, WBAT Decision No. 380 [2008] para. 42).

105. Having considered the arguments made by the Applicant and the Respondent, the Tribunal recalls that the Applicant has the burden of showing that the Bank's decision "*could not reasonably have been taken on the basis of facts accurately gathered and properly weighed*" (Lindsey, supra). Before imposing disciplinary measures, the Bank had a duty to show that a "preponderance of the evidence" indicated that the Applicant had engaged in misconduct. This term means "*evidence which is more credible and convincing than that presented by the other party. In cases of misconduct, it is a standard of proof requiring that the evidence as a whole shows that it is more probable than not that the staff member committed misconduct.*" (AO 2.04, para.11).

106. As noted in *Gnanathurai*, Decision No. 79 [2007], VIII ADBAT Reports, 29, para. 31:

*"... where the respondent establishes a prima facie case that the staff member did commit the misconduct or unsatisfactory conduct, the staff member must thereupon provide a reasonable and countervailing demonstration that the misconduct is not fairly or properly attributed to him. ... "*

107. On the evidence established, the Tribunal concludes that the misrepresentations, knowingly or recklessly made by the Applicant, and by the AAA agent to her benefit, were designed to induce ADB to process and endorse her TEV application. The Applicant compounded this when seeking permission to sell the TEV she had purchased. A misrepresentation "*that knowingly or recklessly misleads*" is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that "*misconduct does not need to be intentional,*" and that it extends to reckless acts or omissions (para. 2.1). This includes abuse or misuse of privileges and immunities and "*making of knowingly false statements or willful misrepresentation or fraud pertaining to official matters...*" (AO No. 2.04, paras. 2.1(b) and (f)). The facts indicate that there was sufficient

evidence to conclude that the Applicant engaged, if not knowingly, recklessly in relation to the purchase of her vehicles and that she was a party to the fraudulent scheme. The Tribunal is of the view that the finding of the Applicant's misconduct, on a more probable than not basis, was justified in this case.

(iii) Did the Applicant act in good faith and was the Bank complicit?

108. The Applicant maintains that she acted in good faith and for no ulterior motive, and that the Bank was complicit by its lack of warning or caution and allowing the system to continue "unabated" "without check". She stresses that OAIS-LM processed the application without any objections, thereby confirming her interpretation of the TEV limit as excluding accessories. "The lack of regulatory intervention by OAIS-LM" gave the Applicant the impression that she was "acting in consonance with requirements." The OAIS-LM had previously processed the models the Applicant had selected as being below the limit for other ADB national staff. She sees her choice of the second vehicle purchase, in which she had to forego a more expensive model in light of the TEV limit, as a factor in her favour. She states that she neither signed the fraudulent invoices nor authorized AAA to submit them to OAIS-LM.

109. The Applicant claims that by using AAA, ADB staff became assured that their TEV application would proceed in accordance with ADB requirements. She argues that she had relied on previous action taken by OAIS-LM concerning the same type of vehicle. The Applicant maintains that this unit of the Bank *"cannot evade its liability or accountability by limiting its responsibility to merely relying on the documents submitted to it and being a mere facilitator of the ADB's TEV privilege."*

110. The Applicant asserts that she was not required to clarify the basis of the TEV limit with OAIS-LM, and that it was instead the responsibility of the ADB to issue *"guidelines in one single document to assist staff in the avilment of the privilege."* *"If staff were sufficiently guided, and precautions were sufficiently placed, any breach would have been detected at first instance."*

111. The Bank recognizes that the responsibilities of OAIS-LM included “ensuring that the acquisition, registration and disposal of ADB official vehicles and TEVs belonging to ADB staff conform to government requirements.” The Bank states on the other hand that the Applicant cannot shift the blame for her own actions onto others or avoid her own responsibility to alert OAIS-LM that the RFEMV did not reflect the true price of the vehicle.

**Finding (2)(iii): Did the Applicant act in good faith?**

112. The Tribunal finds that in the period of perpetration of the extensive fraud, the OAIS-LM did not meet its responsibilities to monitor and ensure proper use of the TEV procedures by Senior NS staff. The Bank admits that the responsibilities of OAIS-LM included “ensuring that the acquisition, registration and disposal of ADB official vehicles and TEVs belonging to ADB staff conform to government requirements.” The Bank had, in the host country agreement, pledged to take every measure to avoid abuse in relation to such privileges, and yet sufficient checks and balances were not in place for the internal administration of the TEV privilege. With so many parties involved in the transaction and processes, it was particularly important to have robust controls in place. Moreover, the fraudulent scheme operated over at least six years, involving many NS staff, possibly lulling staff into thinking that disrespect for the TEV limit was tolerated. The Tribunal must take into account the failure of the Bank to responsibly monitor the practical operation of the scheme in considering the question of proportionality of the sanctions imposed.

113. However, having said that, staff are not relieved of their own responsibilities under relevant rules. Various Bank rules emphasize the importance of not abusing the privileges granted. The Applicant had a duty to follow the rules, seek advice from the proper authority, and present accurate information to the Bank. She was well aware that the full cost of the vehicles she had ordered exceeded the sum of USD 24,000 that had been set within the framework of agreements between the ADB and the host government. In addition, as a senior NS in the Treasury Department, it was not reasonable for the Applicant to rely on the AAA representative rather than OAIS-LM to provide authoritative information on the scope of the ADB’s tax-exempt vehicle privilege with the host country. The Tribunal also notes that the Bank did not require the Applicant to use AAA as

her vehicle supplier. The Tribunal concludes that this lent credence to the Bank's position that the Applicant was willing to turn "*a blind-eye to the fraudulent acts orchestrated for the purchase of her vehicles*"

114. As the Bank has noted, fraud is not simply prohibited by its internal policies, "*it is a corrosive practice that profoundly undermines ADB's mission to eradicate poverty in Asia.*" In this case, the misrepresentation also involved causing harm to the relationship between the ADB and the host Government. The Applicant was disciplined in the present case because it was found, on a preponderance of the evidence, after an investigation in which she had an opportunity to present her position, that she had possessed fraudulent documents enabling her to benefit from the TEV privilege for her vehicle purchase. She also provided the false value when filing for permission to sell her second vehicle. These documents were intended to mislead the Bank and the host Government. At the least, she had engaged in a reckless misrepresentation for her own benefit. The evidence uncovered in the OAI investigation made out a *prima facie* case of fraud which the Applicant has not convincingly rebutted. She seeks to shift the blame to others, but the role played by other entities does not excuse her actions or inactions in relation to a transaction that benefitted her.

115. By placing the emphasis on good faith and alleged lack of malicious motive, the Applicant has in effect attempted to redefine the standard of conduct set by the Bank's rules. While such elements may indeed be relevant to the choice of sanction imposed in case of misconduct, they do not alter how misconduct is defined with reference to Section 8 of the Staff Regulations and paras. 4.3(i), (ii) and (vi) of AO 2.02. Furthermore, misuse or abuse of privileges and immunities is listed as an example of misconduct under AO 2.04. The IPG includes a misrepresentation that "knowingly or recklessly misleads" a party to obtain a financial benefit (Section 2A). This is precisely what occurred in this case, regardless of the Applicant's alleged motives.

116. In conclusion, the evidence as a whole demonstrates that it was more probable than not that, on more than one occasion, the Applicant engaged in misconduct by abusing the TEV privilege in violation of the Staff Regulations, AO 2.02 and the Integrity Principles and Guidelines

of the Bank. For these reasons, the Tribunal finds that the Bank was justified in finding that the Applicant engaged in misconduct.

**Issue and Finding (3): Were the sanctions imposed by the Bank provided for by its law?**

117. The sanctions imposed on the Applicant were dismissal, permanent ineligibility to work as a consultant or contractual employee employed by ADB or any ADB-financed activity, access to ADB premises allowed only with prior approval of the Director, BPHP and in the case of a tax liability, possible recovery of the amount from the Applicant. Aside from the recovery of tax liability, these sanctions are provided by the Bank's internal law pursuant to AO 2.04, paras. 4 (c), (g) and (h). Moreover, the sanction of dismissal is specifically foreseen by AO 2.04, para. 6.3 (cited below), and AO 2.04, para. 7 grants the President the power to impose the disciplinary measure of dismissal for misconduct.

118. In the Tribunal's view, the Bank had grounds on which it could reasonably have barred the Applicant from other possible future contractual relationships, since the misconduct involved a breach of the Bank's trust in the Applicant. For the same reason, it was within the Bank's discretion to determine the conditions under which the Applicant could have access to ADB premises. The possibility of tax liability which the government would ask the Bank to recover from a staff member derives from the HQA and the memoranda relating to the TEV privilege. Accordingly, the Tribunal finds that the sanctions imposed on the Applicant had a proper legal basis.

**Issue (4): Was the decision to dismiss the Applicant disproportionate to the misconduct?**

119. The Applicant contends that the sanction of dismissal was disproportionate to the conduct involved, essentially arguing that the fraudulent misrepresentation was not perpetrated by her, but rather by Ms. S of AAA and the OAIS-LM. She places considerable emphasis in her pleadings on her exemplary work record and dedication to service, and her lack of malice in what she admits may have been "some missteps," or "an element of lapse in judgment on her part." In her Reply, the Applicant recalls that a minority of the AC had taken the view that less severe measures should



have been applied in light of inadequate ADB supervision. She maintains that instead of dismissing her, the Bank “*should have recognized its own misconduct, mended its ways by informing and making clear to the Applicant that it is not encouraging her questioned activities ... and warning the Applicant to desist from any perceived questioned activities.*” She also asserts that using the “recurrence of her misconduct” through her second purchase as an aggravating factor has failed to consider that she was trying to replace the first vehicle she had purchased due to its flood damage inflicted during Typhoon Ondoy, and that, when told by Ms. S that she was no longer eligible for that original model, she complied by purchasing the less costly BMW model.

120. The Bank stated that while 33 individuals were found to have abused the TEV privilege, the sanctions imposed pursuant to AO 2.04 were assessed in light of the circumstances of each case (para. 4.1 of AO 2.04) and the criteria set forth in AO 2.04 para. 6.2. For the Bank, the Applicant’s serious misconduct warranted the disciplinary measure of dismissal. The Respondent asserts that the issue before the Tribunal is not whether other staff members were properly sanctioned, but whether the President’s decision to dismiss the Applicant in this case was an abuse of discretion, arbitrary, discriminatory, improperly motivated or a violation of fair and reasonable procedure.

121. The Bank maintained that it had assessed the relevant factors in this case, and appropriately concluded that the Applicant committed serious misconduct. After drawing attention to the provisions of AO 2.04, the Bank noted, “*Importantly, Applicant’s position as a Senior Treasury Officer means that she was entrusted with fiduciary responsibilities. As Applicant mentioned...., she was both a role model within the Bank and outside of the Bank and she therefore knew that people looked to her as a model of integrity. ... Respondent no longer had the required trust in [her] and it was not in its interest to continue the Applicant’s services.*”

122. In its Rejoinder, the Respondent notes that the Tribunal has consistently upheld Respondent’s decision to dismiss a staff member when the misconduct involved actions rooted in fraudulent and/or dishonest conduct (see *Domdom*, Decision No. 47, *Bristol*, Decision No. 75, *Abat*, Decision No. 78, *Gnanathurai*, Decision No. 79 and *Ahmad*, Decision No. 80).

**Finding (4): Was the decision to dismiss the Applicant disproportionate to the misconduct?**

123. In relation to a sanction imposed, the Tribunal observes that it cannot substitute its assessment for that of the head of the organization “unless it notes a clear disproportion between the gravity of the offence committed and the severity of the resulting penalty” (*Abat, supra*, citing *Khelifati*, ILOAT Judgment No. 207 [14 May 1973]; see also *Bristol*, Decision No. 75 (2006) Volume VII, para. 45, citing *Zaidi*, ADBAT Decision No. 17, (13 August 1996)). In *Zaidi, supra* para. 22, the Tribunal adopted the test for the question of proportionality as developed in *Planthara*, WBAT Decision No. 143 (1995), para. 37:

*“... to determine whether a sanction imposed by the Bank upon a staff member is significantly disproportionate to the staff member’s offense, for if the Bank were so to act, its action would properly be deemed arbitrary or discriminatory.”*

124. AO No. 2.04 on Disciplinary Measures and Procedures sets out in para. 6 the criteria for imposing disciplinary measures, including relevant factors to be considered. In assessing the seriousness of the misconduct, AO No. 2.04 para. 6.2 lists the following criteria, “among others”, to be taken into consideration:

- a) the degree to which the standard of conduct has been breached by the staff member;
- b) the gravity of the adverse consequences and damage or potential damage to ADB, its staff or any third party;
- c) the recurrence of misconduct by the staff member, particularly when there is a repetition of misconduct of a similar nature;
- d) the official position held by the staff member and the extent to which the staff member was entrusted with responsibilities in matters to which the misconduct relates;
- e) collusion with other staff members in the act of misconduct;
- f) whether the misconduct was a deliberate act;
- g) the personal circumstances of the staff member and the staff member’s length of satisfactory service; and

h) the staff member's admission of the misconduct prior to the date it was discovered and any action taken by the staff member to mitigate any adverse consequences resulting from his/her misconduct.

125. AO No. 2.04 further stipulates in para. 6.3 that, "*The disciplinary measure of dismissal for misconduct is particularly appropriate when the misconduct is serious or recurrent, or has jeopardized, or would in the future be likely to jeopardize, the reputation of ADB and its staff, ... when misconduct involves Fraudulent Practices, Corrupt Practices or abuse of authority or abuse or misuse of ADB benefits .... Dismissal for misconduct is also appropriate when the breach of trust is so serious that continuation of the staff member's service is not in the interest of ADB.*"

126. In response to the Tribunal's second request for information about the sanctions imposed, the Bank stated that "*disciplinary sanctions were determined on a case-by-case basis, taking into account (i) the nature and weight of the evidence gathered in each case; (ii) the individual circumstances; and (iii) the criteria set forth in para. of 2.04.*" The Bank argued that it had considered mitigating circumstances (assisting the investigation, admitting misconduct, expressing their willingness to mitigate the consequences of their actions). It also mentioned, as aggravating circumstances, the official position held by the staff member, abuse of the privilege on more than one occasion, and additional misconduct by engaging in obstructive practices during the investigation.

127. AO No. 2.04, para. 4.1, states that "*disciplinary measures imposed by the bank on a staff member shall be determined on a case-by-case basis....*". The Tribunal finds that this was done with regard to the Applicant in the present case.

128. With regard to the possible mitigating factor of cooperation, the Tribunal observes that it has not been applied in relation to the Applicant. In contrast to some other staff members who were investigated, the Applicant was not forthcoming with information requested. She mentioned that other staff had engaged in similar practices but declined to provide their names to the

investigators. On this basis, the Bank had a basis on which to consider that the Applicant had not cooperated.

129. In considering the question of proportionality, the Tribunal notes that one of the important factors considered by the Bank was the official position the Applicant held in the Treasury Department. The importance of trust is specified in AO 2.04 para. 6.3, which stipulates that “*when the breach of trust is so serious that continuation of the staff member’s service is not in the interest of ADB*” then dismissal will be “particularly appropriate.” These elements were, in the Tribunal’s judgment, legitimate factors for the Bank to weigh in deciding upon sanctions for the misconduct, with dismissal being “not significantly disproportionate.”

130. The Tribunal further notes Applicant’s conduct included documented misrepresentations about the purchase of two vehicles with a value exceeding the TEV limit, enabling her to benefit from a privilege to which she was not entitled. In addition, she later submitted the false information when seeking to sell one of the vehicles. These acts amounted to a recurrence of fraud in violation of ADB rules in a way that jeopardized the reputation of the Bank and its relationship with the host government. Although the fraud was not committed in relation to the Applicant’s own work at the Bank, as a senior NS in the Treasury Department she was expected to comply with the rules of conduct that involved invoking privileges that had been afforded to the Bank.

131. However, the Tribunal takes note that the Bank failed to consider or mention any mitigating factors such as the length of the Applicant’s satisfactory service (AO 2.04, para 6.2(g)). Nor did the Bank refer to the extenuating circumstances in this case, in which the Bank had allowed a process to flourish for at least six years without adequate supervision, as noted above. The Tribunal finds that the Bank should have given sufficient weight to these factors in imposing the sanction of dismissal, and thus committed a due process error that, while not of sufficient gravity to invalidate the decision, entitles the Applicant to some compensation for intangible injury.

**Issue (5): Was the sanction of dismissal discriminatory in the Applicant's case?**

132. The Applicant further asserts that imposing the sanction of dismissal was discriminatory in her case. The grounds of the alleged discrimination were the lesser penalties imposed upon other officials who had also purchased vehicles by invoking the TEV privilege. The Applicant alleged that she was not given the same favourable treatment given to colleagues who were similarly situated. She also recalls that a minority of the AC had questioned the inability of the Appellant to choose between receiving the pension as an annuity or as a lump-sum.

133. The Respondent has denied that the disciplinary measures imposed were discriminatory. In its Rejoinder, the Bank further stated that “*the appropriate disciplinary sanction to be imposed in each case was assessed in the individual facts and circumstances*”. The Bank has maintained throughout the proceedings that it had determined disciplinary action on a case-by-case basis, “*taking into account (i) the nature and weight of the evidence gathered in each case; (ii) the individual circumstances; and (iii) the criteria set forth in Section 6 of AO 2.04*”.

134. The Respondent notes the decision *Khelifati*, ILOAT Judgment No. 207 (1973) considerations, para. 7, in which the applicant challenged his dismissal where his colleagues were not disciplined, even though all were found to have arrived at work drunk. The ILOAT rejected the Applicant's claim of unequal treatment, noting:

*“It is true that officials enjoy the protection, among other things of the rule of equality as between officials within the same category, but this rule does not apply to officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances.”*

**Finding (5): Was the sanction of dismissal discriminatory in the Applicant's case?**

135. In the present case, all the staff members involved in the fraudulent scheme were, by definition of those entitled to invoke the TEV privilege, Senior NS. The disciplinary action was

taken for the same underlying reasons, i.e. abuse of the TEV privilege, in all cases. This leaves their different circumstances to be examined in relation to the facts of this case.

136. The additional information supplied by the Bank to the Tribunal on 16 July 2018 and 2 August 2018 provided details in relation to all the persons disciplined, including other persons whom it had considered to be staff in a “*position of trust*”. With three exceptions, all of the other persons designated as holding “positions of trust” were dismissed for misconduct relating to abuse of the TEV privilege.

137. The Tribunal finds that the criterion of position of trust justifiably applied to the Applicant, who had claimed inattention to exchange rates for the vehicles even though forex formed part of her daily work. In the Tribunal’s view, these considerations were reasonably linked to the Bank’s determinations of appropriate penalties to impose on individuals in whom the Bank could no longer place its trust. Considering it as “*an important consideration in determining the disciplinary sanction in the Applicant’s case,*” as the Bank phrased it in its Answer, did not entail improper discrimination among employees. A person holding a position of trust is expected not only to display integrity in carrying out his or her official functions, but also to do so when availing himself or herself of privileges afforded to ADB Senior NS staff.

138. Turning to those in positions of trust who were not dismissed, all three were Senior Financial Control Officers who were seen by the Bank as having cooperated with the BPMSD and who had consistently taken responsibility for their own actions. Each had fraudulently benefitted from the TEV privilege on one occasion only. These three staff members were sanctioned by demotion by one level with 10% salary reduction, conversion of TEV license plate to a green plate, payment of taxes due, and permanent ineligibility to avail of the TEV privileges. They did not go unpunished. While the Tribunal has some reservations about the Bank’s treatment of mitigating circumstances, the Applicant has consistently maintained that others are to blame for her predicament and failed to acknowledge the existence of any wrongdoing. The Applicant also compounded her situation through her second misuse of the TEV privilege and applying to sell her

second vehicle based on a fresh misrepresentation of its value. In these circumstances, the Tribunal cannot conclude that improper discrimination occurred against the Applicant.

139. The Tribunal concludes that imposition of the penalty of dismissal in response to a finding of misconduct constituted a lawful exercise of Respondent's discretion, was proportionate to the severity of the misconduct and was not discriminatory. The Applicant's claims on these points are rejected, as are her challenges to the other penalties imposed.

### **Relief**

140. For the reasons cited above, the Applicant's claim fails, but the Tribunal finds that she has sustained intangible injury in relation to the Respondent's breach of AO 2.06 in two particular matters and in relation to the Respondent's non-consideration of certain mitigating factors. In accordance with Article X(1) of the Tribunal's Statute, the Tribunal has determined that compensation for intangible injury is to be awarded. In light of these determinations, the Tribunal considers it appropriate, under Article X(2) of the Tribunal's Statute, to award a portion of the Applicant's attorney fees. The amount has been fixed taking into account the proximity in which her case was argued.

### **DECISION**

For these reasons, the Tribunal unanimously decides to:

1. Award the Applicant USD 10,000 in damages for intangible injury;
2. Award the payment of a portion of the Applicant's attorney fees in the amount of USD 1,500;
3. Dismiss all other claims.

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, 2 October 2018