ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 35
(7 August 1997)

Ferdinand P. Mesch and Robert Y. Siy
v.
Asian Development Bank
(No. 4)

Mark Fernando, President
Robert Gorman, Vice-President
Toshio Sawada
L.M. Singhvi
Brigitte Stern

Background and Preliminary Objections

1. The Applicants, Mr. Ferdinand P. Mesch and Mr. Robert Y. Siy, are, respectively, nationals of the United States and the Philippines who began to work for the Bank on 25 February 1980 and 23 June 1989. They challenge the decision of the Bank to deny them reimbursement for the national income taxes they each paid on their 1995 income from the Bank. They claim that they have a vested right to such tax reimbursement and that it is a fundamental and essential condition of their employment which cannot be unilaterally abrogated by the Bank.

2. A key element of the Applicants claim is the decision of the Tribunal in Mesch and Siy, ADBAT Decision No. 2 [1994] - hereinafter referred to as Mesch I -(hereinafter, Mesch I) which held that in principle, the terms and conditions of employment of the Applicants entitle them to reimbursement ... of income tax levied and paid on their salaries. The Tribunal in that case required the Bank to reimburse the Applicants the income tax levied and paid on their salaries for the two calendar years, 1990 and 1991, prior to their demands for reimbursement. In the present case, the Bank's refusal to reimburse the Applicants for their 1995 income taxes was based on a Resolution adopted on 6 October 1994 (hereinafter, the Resolution) by the Board of Directors, after Mesch I was decided. That Resolution declared, among other things, that:

> the Bank shall hereby reaffirm its long-standing practice of no reimbursement of taxes and ... the Bank shall not reimburse the taxes paid by any ... staff member of the Bank for the taxes paid by them on their salaries and emoluments paid by the Bank, effective upon the date of this Resolution.

The Resolution was subsequently accepted by the Board of Governors. The Applicants challenge the validity of this Resolution and its application to them.

3. The Bank has raised preliminary objections to the jurisdiction of the Tribunal. It asserts that the decision of the Bank that is being challenged is the 6 October 1994 Resolution, that the Applicants did not formally challenge the Resolution until after the Respondent had in April 1996 denied their requests for reimbursement of their 1995 taxes, and that therefore their Application is time-barred. Reliance is placed on A.O. 2.06, paragraph 4.1, which provides: A grievance must be formally submitted within six (6) months from the date the staff member is notified of the decision giving rise to the grievance. Consequently, in the Respondent's view, the

Applicants would have had to file their grievance by 10 April 1995, which was six months after the date on which the Bank's professional staff members were notified of the Resolution.

4. In fact, the Applicants did attempt to challenge the Resolution promptly after being so notified, but did so by initiating a second proceeding before the Tribunal which sought an interpretation of the ruling in Mesch I to the effect that the Resolution of the Board of Directors was inconsistent with that ruling. The Tribunal, however, in Mesch and Siy (No. 2), ADBAT Decision No. 6 [1995] - hereinafter Mesch II -(hereinafter, Mesch II) concluded that the question whether the Bank can unilaterally amend the term or condition as to tax reimbursement, ... is not a matter of interpretation or clarification of [Mesch I] but a separate issue which arises from the preparatory steps which the Bank then took with a view to adopting the Resolution of 6 October 1994. Any grievance which the Applicants may have in that respect cannot be decided by the Tribunal in this case. When the Applicants thereafter requested reimbursement, in April and July 1995, for income taxes paid on their 1994 Bank income received from 6 October 1994, they once again sought direct Tribunal review of the Bank's refusal, without exhausting internal remedies. For the latter reason, the Tribunal dismissed the Application, in Mesch and Siy (No. 3), ADBAT Decision No. 18 [1996] - hereinafter, Mesch III -(hereinafter, Mesch III) although the Tribunal there also rejected the Bank's contention that the Tribunal was without authority to review decisions of the Boards of Directors and Governors.

5. In the instant case, which concerns their 1995 income tax payments, the Applicants have invoked their internal remedies, including an unsuccessful appeal to the Appeals Committee, which concluded that it had no jurisdiction to review decisions of the Board of Directors. But the Respondent asserts that that process was begun well after 10 April 1995, and thus beyond the six-month period contemplated in A.O. 2.06.

6. Technically, the Respondent's jurisdictional objection is not that the Application was filed late but rather that the Applicants failed to exhaust antecedent internal remedies within the Bank - which includes timely filing of their grievance. Article II, Section 3(a) of the Statute of the Tribunal provides, in pertinent part: No such application shall be admissible, except under exceptional circumstances as decided by the Tribunal, unless ... the applicant has exhausted all other remedies available within the Bank .... The Tribunal must therefore determine whether the Applicants, to exhaust their internal remedies and thus to preserve their access to the Tribunal, had to direct their grievance against the Resolution, or whether they could - as they here contend - properly seek review of the decision of the Director, Budget, Personnel and Management Systems Department (BPMSD), communicated on 25 September 1996, to deny their April 1996 requests for reimbursement of their 1995 income taxes. The Tribunal found it unnecessary to decide a comparable issue in Mesch III, at paras. 26-29.

7. The Tribunal concludes that, whether or not the Applicants could have contested the Resolution in late 1994 or early 1995, there is no doubt that they may properly contest the specific decision by which it was applied to their personal situation by the supervisors in BPMSD. The Manager, BPMSD, denied their reimbursement requests in April 1996; that was confirmed by the Director in September 1996; and the decision of the Appeals Committee was rendered on 14 November 1996; this Application was filed on 20 November 1996. It may well be that the Applicants were in some sense adversely affected by the adoption of the Resolution, for it clearly signaled that the taxes to be paid by them for their Bank earnings from 6 October 1994 would not be reimbursed. But, even if, as the Respondent contends, the decisions of the Manager and the Director, BPMSD, were ministerial, it was those decisions that constituted a specific, personalized and definitive rejection of the Applicants claims for reimbursement of their taxes on their 1995 Bank income. As noted by the Tribunal in Mesch I, para. 22: [T]he Bank's

obligation of reimbursement in each case could have arisen only upon a reasonably prompt claim being made, accompanied by proof of payment of such tax. This gave rise, for each Applicant, to a distinct cause of action.

8. The circumstances are in essence the same as in Viswanathan, ADBAT Decision No. 12 [1996], involving the applicants claim for severance pay under a scheme that was adopted by the Bank in 1982 but not applied to him until his retirement in 1995. The Tribunal rejected the Bank's contention that the applicant should have promptly challenged the announcement of its 1982 policy, invoking, among other things, Article II, paragraph 1, of the Statute of the Tribunal, which empowers the Tribunal to hear and pass judgment upon any application by which an individual member of the staff of the Bank alleges nonobservance of the contract of employment or terms of appointment of such staff member. (emphasis supplied). See also Amora, ADBAT Decision No. 24 [1997], in which the Tribunal concluded that the applicant had a continuing cause of action for the Bank's recurrent refusals to pay annual dependency allowances. The Tribunal notes, finally, the blatant inconsistency between the Respondent's claim, rejected in Mesch III, that the Resolution, as an act of the Boards of Directors and Governors, was altogether beyond the power of the Appeals Committee and the Tribunal to review - a claim that was obviously intended to deter a prompt challenge by the Applicants - and its claim in the present case that the Applicants had to seek prompt review of the Resolution lest their subsequent challenges to its direct application to them be ruled out of time.

9. Less need be said with respect to the Respondent's other preliminary objections. The Respondent, invoking the doctrine of res judicata, asserts that the claims here are barred by the Tribunal's decision in Mesch III, which dismissed the Applicants claims for 1994 tax reimbursement on account of their failure to exhaust internal remedies. The Tribunal, in paragraph 37 of that decision, cautioned: [The] Application is being dismissed on procedural grounds. The Tribunal does not purport to rule on any other claims for reimbursement which they might make for any other period. As determined above, the Applicants claim to be reimbursed for their 1995 income tax payments is a distinct cause of action, upon which the Tribunal has not yet ruled on the merits.

10. The Respondent's final preliminary objection is that the Tribunal is presented with no justiciable case or controversy, in light of the Applicants failure to state a claim. The Bank rests this objection on the assertion that once the Resolution was adopted, it became the relevant term and condition of the Applicants employment with respect to tax reimbursement, such that it clearly could not have been violated when the 1995 tax-reimbursement requests were denied by the Manager and the Director, BPMSD. Of course, this assumes the conclusion to the very question to be decided here: whether the Resolution was indeed a valid unilateral abrogation of the Applicants pre-existing right, established in Mesch I, to such reimbursement. To adopt the Respondent's argument would be to deny jurisdiction to the Tribunal to decide whether a decision by the Bank (which could then always be said to establish the prevailing terms and conditions of employment) violated such governing principles as those found in the contract with the staff member, the Staff Rules and Regulations, the Personnel Handbook, Administrative Orders and Circulars, and general principles of law that limit the discretion of the Bank. Such a conclusion is untenable. See Lindsey, ADBAT Decision No. 1, [1992], para. 4; Mesch III, paras. 20-24.

11. The Tribunal therefore rejects all of the Respondent's preliminary objections, and thus proceeds to address the merits of the Applicants claims. (The President of the Tribunal, who subscribes to the decision of the majority of the Tribunal with respect to the merits, finds it

unnecessary to address the preliminary objections.) cf. Zimonyi, ADBAT Decision No. 13 [1996], paras. 6-7; Singh, ADBAT Decision No. 16 [1996], para. 10)

Merits of the Case

12. The Application challenges the power of the Bank, inby the Resolution of the Board of Directors, to amend that element of the terms and conditions of staff members requiring the Bank to reimburse income tax levied and paid on their Bank salaries. The Applicants assert:

> In violation of acquired, vested and essential rights, general principles of law, and international law derived from the practice of international organizations generally, the decision ... to deny us tax reimbursement of taxes paid on 1995 salaries and benefits constitutes an impermissible, improper and arbitrary amendment of fundamental and essential conditions of employment regarding tax reimbursement, competitive pay and equitable remuneration for similar responsibilities internally and externally.

13. In Mesch I, the Tribunal observed - despite the fact that the Bank had not expressly assumed the obligation to reimburse taxes in its By-Laws, Staff Regulations, Administrative Orders, contracts of employment or other Bank documents, and despite the absence of any past practice of making such reimbursement - that there was such an obligation, and that it was part of the terms and conditions of employment of staff members. The Tribunal's conclusion was based on the fact that the Bank had long endorsed the principle of equal compensation for comparable work and that, absent express exclusion by the Bank of the obligation to reimburse income taxes, this obligation was properly imposed through the interpretive principle of contra proferente. It was that decision, dated 8 January 1994, which resulted in deliberations by the Board of Directors that led to the adoption of the Resolution, which now must be quoted at length:

> NOW THEREFORE the Board of Directors hereby RESOLVES:
>
> I.
>
> That the Bank shall discharge its obligations under the Statute of the Administrative Tribunal of the Asian Development Bank in connection with Decision No. 2 and reimburse the income tax levied and paid by staff members as follows:
>
> a. With respect to [the Applicants], the Bank shall make tax reimbursement as instructed by the Decision ...;
>
> b. With respect to other members of the professional staff in situations comparable to those of the Applicants, the Bank shall reimburse taxes paid by them at least in 1994 for their income derived from the Bank in respect of the year 1993 upon a reasonably prompt claim being made before the end of 1994, accompanied by proof of payment of such taxes, in accordance with the same rationale of the Decision;
>
> c. With respect to those professional staff members whose letters of appointment included the express exclusion of the prospect of tax reimbursement since July 1992, the Bank shall make no tax reimbursement in accordance with the letters of appointment accepted by those staff members; and

d. in determining the amount of taxes to be reimbursed pursuant to the Decision and its rationale, the Bank shall exclude the amount of the taxes paid, if any, on the Bank's and the staff members contributions to the retirement plan; furthermore, the Bank shall likewise exclude the amount of the taxes paid by beneficiaries of the Bank's Retirement Plan on their income.

II.

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

III.

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

In sum, the Board of Directors declared that, although it would abide by the Tribunal's decision in Mesch I with respect to the two Applicants and would extend its benefit to other professional staff members for taxes on their 1993 Bank incomesalaries, it would cease reimbursement of taxes on income earned from 6 October 1994. The Tribunal must decide whether the Bank's decision thus to terminate the rights of its staff members was a lawful exercise of its authority - for if not, that portion of the Resolution would be null and void.

14. There are two important principles upon which the Applicants and the Respondent agree. First, the Bank - as it states in the concluding paragraph of the Resolution - is bound to implement the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally. This principle is rooted in a longstanding series of formal published declarations - an Administrative Instruction in 1967, Administrative Orders beginning in 1972, a Personnel Policy Statement in 1990, and the Personnel Handbook for Professional Staff in 1991 - as recounted by the Tribunal in Mesch I, para. 12. A second undisputed principle is that the Bank may not unilaterally abrogate fundamental and essential terms or conditions of employment. With respect to the latter point, the Tribunal stated, in Mesch III, that:

> Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. (para. 22)

This principle of law is most fully discussed by the World Bank Administrative Tribunal (WBAT) in de Merode, WBAT Reports 1981, Decision No. 1.

15. The parties also agree that, although the Tribunal decided in Mesch I that the reimbursement of income taxes was one of the terms of the Applicants employment, the Tribunal did not decide the question, because it was not confronted with it, whether tax reimbursement was so fundamental and essential that it could not be amended or abrogated by subsequent unilateral action of the Bank. As the Tribunal has stated, in Mesch II, para. 12, with respect to its decision in Mesch I: It was sufficient for the Tribunal to decide that the obligation to reimburse tax was a condition of employment. The quality of that condition - whether it was fundamental and essential or not - was not relevant since, at that time, the question whether the Bank had any right to change that condition had not arisen; and it is only in relation to the possibility of change that the characterization of the condition as fundamental and essential matters. That is the issue to be decided here.

16. At the outset, it is necessary to clarify which term or condition is under consideration here. The Respondent contends that it is the staff members right to tax reimbursement, while the Applicants contend, more broadly, that it is the staff members right to an equitable and competitive salary. Rather than claim a vested right to tax reimbursement as such, the Applicants contend that the more general right - which is indisputably fundamental and essential and cannot be unilaterally altered - must be understood to entail the reimbursement of taxes, as a necessary and proper element. The Tribunal concludes that this difference is largely semantic. The true difference between the parties is that the Respondent, while acknowledging the central nature of staff compensation that is equitable and competitive, asserts that this right is accorded when pre-tax salary is equivalent for staff members doing the same work; while the Applicants assert that this right is accorded only when there is an equivalence in after-tax salary, so that the United States or Philippine national retains a net salary that is the same as the non-taxed salary paid by the Bank for the same work to a national of another country. In selecting between these two positions, the practical consequence is that the Tribunal must frame the issue before it, as whether the obligation to reimburse tax is a fundamental and essential condition of employment.

The Meaning of Fundamental and Essential Conditions of Employment

17. Although the principle has become well-settled, in the jurisprudence of other international administrative tribunals, that certain employment conditions cannot be unilaterally altered by the organization, there is far less clarity as to the criteria by which those conditions are to be identified. Some tribunals have drawn a distinction between statutory terms, which pertain to the structure and functioning of the international civil service and the benefits of an impersonal nature and which are subject to unilateral modification, and contractual terms, which pertain to the individual terms and conditions of an official in consideration of which he or she accepted the appointment and which are not subject to unilateral modification. E.g., Kaplan, UNAT Judgment No. 19 (1953),; In re Lindsey, ILOAT Judgment No. 61 (1962). Other tribunals have embraced the principle that conditions cannot be unilaterally modified if that would interfere with acquired rights. E.g., In re Niesing (No. 2), ILOAT Judgment No. 1118 (1991).

18. These formulations, however, have been often applied in an inconsistent or conclusory fashion. Perhaps the fullest statement of criticism of these approaches, and the most constructive attempt to put forward a more useful formulation, is found in the decision of the World Bank Administrative Tribunal in de Merode, supra , Decision No. 1, which also involved the issue of reimbursement by the Bank of income taxes paid by United States nationals. There,

the WBAT examined the pertinent history, documents and practices at the World Bank, and concluded (indeed, it was not disputed by the World Bank) that tax reimbursement was a fundamental condition of employment, but also that the method of implementation of the reimbursement principle was nonessential and was thus subject to unilateral modification by the World Bank (subject to certain requirements of nondiscrimination, nonretroactivity, due process and the like). That tribunal stated:

> The Tribunal recognizes that it is not possible to describe in abstract terms the line between essential and non-essential elements any more than it is in abstract terms possible to discern the line between what is reasonable and unreasonable, fair and unfair, equitable and inequitable. Each distinction turns upon the circumstances of the particular case, and ultimately upon the possibility of recourse to impartial determination. ... . Sometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its implementation will possess a less fundamental and less essential character. In other cases, one or another element in the legal status of a staff member will belong entirely - both principle and implementation - to one or another of these categories. In some cases the distinction will rest upon a quantitative criterion; in others, it will rest on qualitative considerations. Sometimes it is the inclusion of a specific and well-defined undertaking in the letters of appointment and acceptance that may endow such an undertaking with the quality of being essential.
>
> In describing the distinction between essential and non-essential elements, the Tribunal prefers not to use such terminology as contractual rights as opposed to statutory rights. Some of the conditions contained in the contract, that is, in the letters of appointment and acceptance, may be non-fundamental and non-essential, while some of the conditions lying outside the contract, and therefore called statutory, may be fundamental and essential. Likewise, the Tribunal prefers not to invoke the phrase acquired rights in order to describe essential rights. The content of this phrase is difficult to identify. It is not because there is an acquired right that there is no power of unilateral amendment. It is rather because certain conditions of employment are so essential and fundamental and, by reason thereof, unchangeable without the consent of the staff member, that one can speak of acquired rights. In other words, what one calls the doctrine of acquired rights does not constitute the cause or justification of the unchangeable character of certain conditions of employment. It is simply a handy expression of this unchangeable character, of which the cause and the justification are to be found in the fundamental and essential character of the relevant conditions of employment. (paras. 43-44)

19. To conclude as the Tribunal did in Mesch I that tax reimbursement may fairly be implied, in the absence of an express Bank disclaimer of a correlative obligation, does not mean that tax reimbursement is a fundamental and essential condition and that the Bank must therefore forever lose the power to make such a disclaimer for the future, absent the consent of the staff. Indeed, the Tribunal in that case also suggested that its holding was not meant to exalt tax reimbursement to such a level as to be irrevocable: In balancing in the present case the equities as between the Bank and its staff, the Tribunal considers that more weight should be given to the interests of the employee than to those of the employer, if only because the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement. (para. 17)

20. Fundamental terms are of two kinds. Some terms are so basic that they will always be implied, and perhaps are not even capable of express waiver save in extraordinary

circumstances: that an employee must be paid for his services, that he is entitled to a weekly holiday and to leave, that due process must be observed before he is dismissed, and that on matters of remuneration, employees are entitled to a fair wage, one that assures equal remuneration for work of equal value, and one that does not discriminate between men and women. The International Covenant on Economic, Social and Cultural Rights, Article 7, provides for equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

21. Apart from such terms which, by their very nature, are fundamental, there are others which are not intrinsically fundamental, but may become so if the parties so intend. As the International Labour Organisation Administrative Tribunal (ILOAT) stated in Los Cobos and Wenger, ILOAT Judgment No. 391 (1980):

> First, a right should be considered to be acquired when it is laid down in a provision of the Staff Regulations or Staff Rules and is of decisive importance to a candidate for appointment. To impair that right without the officials consent is to impair terms of appointment which he expects to be maintained. Alternatively, a right will be acquired if it arises under an express provision of an officials contract of appointment and both parties intend that it should be inviolate. Thus not all rights arising under a contract of appointment are acquired rights, even if they relate to remuneration: it is of the essence that the contract should make express or implied provision that the rights will not be impaired. Thus there may be an acquired right to application of the principle that an allowance will be paid, but not necessarily to the method of calculation - in other words, to the actual amount - of that allowance. (para. 6)

In addition to the terms of the original contract of employment, it is also possible that a new term which is later incorporated into the contract or staff regulations - after a staff member entered into service - may become a fundamental and essential term, provided the above conditions are satisfied. And perhaps that could happen, through practice, and even without a written agreement, provided such practice is clear, unambiguous, consistent, and of significant duration, and is followed as a matter of obligation. See de Merode, supra, para. 23.

22. It follows that a term, whether contained in the letters of appointment or staff regulations at the outset, or introduced later, will not be a fundamental and essential term unless it satisfies these tests. It is to this question, in the circumstances of this case, that the Tribunal turns.

The Application of These Principles to the Case

23. Because the central purpose of the doctrine of fundamental and essential conditions of employment is to protect staff members against the unilateral alteration of significant elements of their contract of service - viewed expansively to include the ensemble of pertinent rules, regulations and practices within and without the institution - there must be evidence that those elements were indeed in existence at the time of the Bank's attempted unilateral change in October 1994, and that they were reasonably regarded as an important element about which there was a reasonable expectation of continuity.

24. The Tribunal concludes that, although there are a number of elements of the facts in this case that might be thought to point to tax reimbursement as a fundamental and essential condition of the Applicants employment, it is far more significant that there is no provision - or indeed any reference whatever - expressing an obligation on the part of the Bank to make such

reimbursement in the Bank's Charter, or its By-laws, or any resolution of the Board of Directors, or in staff regulations, or in administrative orders, or in the written offers and acceptances that constituted the staff members contracts of employment. Nor is there any pattern or practice of making such reimbursement, let alone one that is clear, unambiguous, consistent and of significant duration. Indeed, the practice of the Bank prior to the decision of the Tribunal in Mesch I, in January 1994, was entirely to the contrary. It can therefore hardly be said under the facts of this case that tax reimbursement was reasonably assumed by staff members to be central to their contract of service or that they had a reasonable expectation of its continuation, in light of the fact that the Bank, over the decades since its formation in 1966, had never implemented such a benefit.

25. This is particularly true of the Applicants here. Mr. Mesch, an attorney, joined the staff of the Bank in February 1980, and paid income taxes to the U.S. on his Bank salary for some twelve years before making a request for reimbursement as a predicate to the institution of the proceeding in Mesch I. Mr. Siy came to the Bank in 1989, before which he had been employed by the World Bank, where his salary was not taxed by the Philippine Government. In his dealings with an interviewing personnel officer for the Respondent Bank in 1989, Mr. Siy acknowledged that his income would be taxable by the Philippine Government and that this would result in a significantly lower net-of-tax salary than he had earned at the World Bank, and he expressed a desire to minimize the differential between his untaxed World Bank income and his after-tax ADB income; a negotiated salary figure was obviously meant to accommodate fortake into account the imposition, unreimbursed, of Filipino-Philippine income taxes. Both Applicants were therefore fully aware on and after the date of their entry into service that the Bank had no policy of tax reimbursement. It cannot reasonably be said that tax reimbursement was of decisive importance to them, or that they had a reasonable expectation that the Bank would provide such a benefit.

26. These conclusions illustrate that it is not possible to determine in the abstract and for all international organizations whether a matter such as tax reimbursement, or equivalence of after-tax salary as distinguished from before-tax salary, is an unalterable fundamental and essential condition of employment. There is thus no inconsistency between the conclusion the Tribunal reaches in this case and the conclusion reached by the WBAT in de Merode, supra, which held that the principle of tax reimbursement was a fundamental and essential condition of employment that could not be fully abrogated by the World Bank, as distinguished from being modified by the Bank with respect to the formula for calculating the precise amount to be reimbursed. At the very first meeting of the Board of Governors of the World Bank in 1946 a by-law was adopted (Section 14(b)) which provided: Pending the necessary action being taken by members to exempt from national taxation salaries and allowances paid out of the budget of the Bank, ... the staff members shall be reimbursed by the Bank for the taxes which they are required to pay on such salaries and allowances. Moreover, letters of appointment of staff members uniformly stated that [y]our salary will be at the rate of ... per annum and will be net of income taxes as presently and hereafter provided in the Bank's by-laws and regulations. It is of course noteworthy that since its founding, and for more than thirty years at the time the de Merode proceeding was initiated, the Bank had grossed up the salaries of U.S. staff members by a figure roughly equivalent to their income taxes so that their net salaries and the salaries of their fellow staff members doing comparable work was the same. In holding that the policy of tax reimbursement was not subject to unilateral revocation by the World Bank, the Tribunal relied upon both the long-established practice and the Bank's express and repeated statements confirming that practice.

27. The Applicants attempt to rebut the conclusions above with a number of assertions: that the decision and analysis of the Tribunal in Mesch I, in substance and effect, compel the conclusion that tax reimbursement is a fundamental and essential condition of their employment; that even apart from that case, tax reimbursement is a logically necessary element of the principle of equal pay for comparable work, which itself is an unalterable principle of employment; and that the fundamental and essential nature of tax reimbursement is confirmed by the common law of international organizations. The Tribunal must now address these contentions.

28. In Mesch I, did the Tribunal decide only that tax reimbursement was a term or condition of employment, or did it also decide, expressly or by necessary implication, that tax reimbursement was a fundamental term? The Tribunal itself was in no doubt about what it had decided. It has been clearly stated, in Mesch II:

> Although it is true that in the proceedings leading to the [Mesch I] Decision the parties exchanged arguments as to whether the right to tax reimbursement was a fundamental and essential condition of employment, the fact remains that the Tribunal decided no more than that the terms and conditions of employment of the Applicants required the Bank to reimburse income tax levied on their salaries by the member States of which they were nationals. In order to determine that question the Tribunal did not need to discuss or decide - and did not actually discuss or decide - that those terms or conditions could not be unilaterally amended by the Bank either because they were fundamental and essential or because the Applicants had acquired rights or vested rights in respect thereof. It was sufficient for the Tribunal to decide that the obligation to reimburse tax was a condition of employment. The quality of that condition - whether it was fundamental and essential or not - was not relevant since, at that time, the question whether the Bank had any right to change that condition had not arisen; and it is only in relation to the possibility of change that the characterization of the condition as fundamental and essential matters. (para. 12)

Further, the Tribunal did not consider tax reimbursement to be an intrinsically fundamental term which could not have been excluded. Indeed, it expressly held that the Bank could have excluded tax reimbursement but never did (Mesch I, para. 17).

29. The Tribunal did say, in Mesch I, that the failure to consider the incidence of taxation is inconsistent with the principle of equal compensation for comparable work(para. 15). This, taken in isolation, appears to suggest that tax reimbursement is a necessary consequence of the principle of equal compensation for equal work. It is based on this observation that the contention is now advanced that equal compensation for equal work is a fundamental term; that tax reimbursement is an inseparable part of that term because it secures on the practical plane the equality in net benefits after tax; and that therefore tax reimbursement is also fundamental.

30. It is necessary to clarify the term equal compensation for equal work, because it is often used in more than one sense; for instance compensation is sometimes used narrowly to mean pay or salary, and at other times as including benefits; and equal is sometimes treated as equitable. In the strict sense equal compensation for equal work means equal pay for work of equal value; and then the application of the principle involves only a consideration of the value of the work to the employer. The fact that to another employer that work might have a greater or lesser value is irrelevant. Equally, the personal circumstances of the employee are irrelevant: thus the fact that, due to some physical disability, he has to incur additional expenses in coming to work does not entitle an employee to additional pay, because the value of his work to his employer remains the same. The employers obligation to treat his employees equally does not

extend to remedying irregularitdiscrepancies created by the conduct of the State of which the employee is a citizen.

31. Undoubtedly, in that sense, the principle of equal compensation for equal work is intrinsically fundamental, and must be implied in every contract of employment. When the Tribunal concluded in Mesch I that the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement (emphasis supplied), the Tribunal was clearly not suggesting that the principle of equal pay for work of equal value could have been excluded. Obviously, the Tribunal was referring to something else.

32. What then was the principle of equal compensation for comparable work which, the Tribunal held, required consideration of the incidence of taxation, and which could have been excluded? There is no need to speculate. The Tribunal set out its reasoning, starting with paragraph 14, which concludes thus: Thereafter, the Bank accepted, in principle and in practice, that its professional staff were entitled to equitable remuneration both internally (in relation to their colleagues in the Bank) and externally (i.e., bearing a reasonable degree of comparability with the remuneration of their IBRD counterparts). The principle which the Tribunal was considering was therefore not restricted to the relationship between the employer and the employee; nor to the value to the employer of the work done by the employee. It was not equal pay, but equitable remuneration, and the equities were to be determined not only as between the Bank and the staff, but also vis-à-vis other employers and other employees, and inequalities created by the exercise of member States of their rights to tax their nationals wasere also to be considered.

33. It was in the context of this wider principle of equal compensation that the Tribunal held - and that, too, because there was no pronouncement by the Bank as to the exclusion of tax reimbursement - that the failure to consider the incidence of taxation is inconsistent with the principle of equal compensation for equal work. What kind of pronouncement was necessary from the Bank in order to exclude expressly the prospect of equal pay for comparable work? It would have sufficed had the relevant Administrative Orders and Personnel Policy Statements contained a provision that the Bank does not undertake any obligation of tax reimbursement or that the principle of comparison with the International Bank for Reconstruction and Development (IBRD) shall not extend to any obligation of tax reimbursement.

34. It is therefore not possible to treat Mesch I as having decided that tax reimbursement is always a corollary of equal compensation for equal work, or is inextricably intertwined with external comparison with the IBRD. On the contrary, the Tribunal recognized that it need not be. It is clear what the Tribunal decided in Mesch I. Tax reimbursement could have been, but was not, expressly excluded. On the other hand, although there was no clear intention to grant tax reimbursement, the position was ambiguous. That ambiguity could have been resolved by the Bank, but it was not. Accordingly, the contra proferentem rule was applied in favor of the Applicants. That disposed of the issue before the Tribunal.

35. The contention that the Resolution is invalid, as being a unilateral amendment of a fundamental term, can succeed only if tax reimbursement is either intrinsically fundamental or if it became fundamental in some recognized way. Neither nationally nor internationally has tax reimbursement been recognized as a condition of employment that is per se fundamental. Wherever it has been recognized as a fundamental and essential term it has been on account of express terms inor pronouncements. The decision in Mesch I that tax reimbursement could have been excluded is consistent with the conclusion that it is not intrinsically fundamental. It has already been clearly concluded above (paras.24-25) that tax reimbursement did not

become fundamental in one of the recognized ways - either by declarations by the Bank in its staff regulations or letters of appointment or by any pertinent past practice.

36. To move, then, to the Applicants final major contention, they assert that there is a prevailing rule of law among international organizations that requires tax reimbursement as a means of achieving the principle of equal pay for equal work. It is true, as the Tribunal stated in Mesch I, that most international organizations do arrange for reimbursement of income taxes paid to member states. Even if there were uniformity in this respect, although it may carry a persuasive force and may be pertinent to determining the respective expectations of the Bank and its staff members, it would not generate a legal obligation that is unalterable by the Bank. Indeed, the Tribunal in Mesch I (para. 17), expressly so acknowledged when it stated that the Tribunal could have, had it done so clearly, dissociated itself from any such prevailing practice.

37. But it is important to note that there are indeed significant exceptions to the practice of tax reimbursement among other international organizations. That is particularly the case for organizations headquartered outside the United States - which is the principal non-acquiescent nation in the United Nations Conventions calling for non-taxation of nationals employed by international organizationon the Privileges and Immunities of the Specialized Agencies. The African Development Bank (AfDB) and the European Bank for Reconstruction and Development (EBRD) have expressly disclaimed the obligation to reimburse. Moreover, a number of organizations, headquartered in the United States, that have sought to implement the principle of after-tax salary equality, have chosen devices other than tax reimbursement to do so, in order to avoid any adverse impact upon the organizationsir resources and ultimately upon the other member states which conform to the norm of non-taxation.

38. Thus, the United Nations (UN) and the Organization for Economic Co-operation and Development (OECD) have been successful in accomplishing what the Respondent Bank has intermittently attempted to do: they have made arrangements with the United States Government that effectively shift to the United States the financial burden of reimbursing the taxes paid to it by United States nationals. In the UN, the annual contribution of the taxing state to the budget of the Organization is increased to support a Tax Equalization Fund; and the OECD has negotiated a Tax Reimbursement Agreement with the United States, which funds the cost of the income tax paid by its nationals on OECD income.

39. It is therefore not altogether accurate to find anything approaching a uniform principle requiring the international organizations to bear the burden of tax reimbursement - at least so as to warrant a conclusion that the Respondent Bank may not unilaterally depart from such a principle if it so expressly declares, which of course it did in the Resolution.

40. In assessing whether or not there is indeed a norm of international law that supports the claim of the Applicants to tax reimbursement, it is important to examine the jurisprudence of other international administrative tribunals. Again, these are not in any way controlling upon this Tribunal, but are persuasive in identifying prevailing norms and expectations.

41. As already noted, the prevailing approach of these tribunals - whether invoking such terms as acquired rights or fundamental and essential rights - is to curtail the power of the international organization to change conditions of employment only in limited circumstances, in particular when the condition has been manifested in written assurances, whether in general staff regulations or letters of appointment, or by longstanding practice, and typically by both together. An examination of the decisions of other administrative tribunals warrants several conclusions:

a. It has been assumed by such tribunals that tax reimbursement, when manifested both in such documents and in a pattern of payment, becomes fundamental and essential and not subject to unilateral abridgment. de Merode, supra (express reference to tax reimbursement in By-laws, staff regulations, letters of appointment); Hopkins, OECD App. Bd. Dec. No. 111 [1988] (most letters of appointment referred to tax-free income).

b. Absent explicit coverage in the written policies of an organization, particular tax payments need not be reimbursed, or other salary-equalization payments continued, and the organizations discontinuance of those payments will not be found to violate a staff members acquired rights - despite the possible resulting inequality in net compensation. In re Settino, ILOAT Judgment No. 426 (1980) (no acquired right to reimburse tax paid on lump-sum pension payment); In re Alonso (No. 3), ILOAT Judgment No. 514 (1982) (same conclusion, despite 22 years of practice and directive); Davidson, UNAT Judgment No. 88 (1963) (no obligation under principle of equality to reimburse social security taxes, despite the not inconsiderable psychological effect resulting from diminished take-home pay of U.S. staff members); In re Niesing (No. 2), ILOAT Judgment No. 1118 (1991) (no acquired right to salary parity with European Communities despite past practice; even if parity has been absolute in the past, the Organisation has made no express or implied commitment to continuing it); Hopkins, OECD App. Bd. Dec. No. 111 [1988] (no obligation to reimburse social security taxes; no vested right, particularly when not a determining factor in the officials decision to accept an offer of appointment).

c. There appears to be no case in which an administrative tribunal has found an unmodifiable acquired right, or fundamental and essential right, to exist with respect to even a substantial economic benefit when payment of that benefit has not been assumed either in an organizations express constitutive or personnel documents or in a past practice of significant duration. E.g., Oummih, UNAT Judgment No. 395 (1987) (cost-of-living salary component, based on General Assembly resolution and staff information circulars, which cannot be cancelled retroactively for work previously performed, can be cancelled for work performed thereafter).

42. In conclusion, any claim of a general norm of international law that is manifested in legislation or adjudication of international organizations, creating uniform rules of reimbursement of national income taxes, which might bind even in some informal sense the Respondent so as to prevent its modification or abridgment thereof, cannot be supported.

43. It should be noted that the Respondent, as have other international organizations, has attempted to ameliorate the discrepancy between after-tax salaries and the salaries of staff members who pay no income taxes by appealing to the United States Government for at least partial relief. In 1975, the President of the Bank reacted to a United States congressional proposal to eliminate the foreign earned-income exclusion (of about US$20,000) then available to the American staff of the Bank, by communicating with the United States Secretary of the Treasury: The Bank, unlike certain other international organizations, is not in a position to reimburse national taxes assessed against its staff members, and the Bank salary structure is based on the assumption that staff salaries are not subject to national income taxation. The effect of the proposed legislation would be to reduce the net salaries of Americans on our staff sharply. In 1981, the Bank and the United States Department of the Treasury concluded an agreement whereby the Treasury paid US$500,000 to the Bank to be used for partial reimbursement of 1980 taxes paid by United States staff members. It is true, as the Applicants

have asserted and as the Tribunal concluded in Mesch I, that these communications evidence a strong interest by the Bank in salary equity and comparability. But it must also be noted that the Bank reaffirmed its unwillingness to assume the reimbursement burden itself and manifested its policy to ease the after-tax discrepancies by payments directly from the taxing nation. That the Bank made efforts to move toward greater after-tax equity by seeking such external funding can hardly be said to confirm the Applicants claim that full after-tax equality has been, or has become, since 1966 a fundamental and essential condition of employment.

44. The Tribunal is confident that the Bank will continue to take purposeful steps to induce those of its member states which tax the salaries of Bank staff to remedy the resulting inequality by the grant of tax reimbursement or otherwise.

Whether There has been an Abuse of Discretion

45. That the Tribunal so concludes does not mean that the Bank was altogether unfettered in the substance and process of the Resolution of the Board of Directors. The power to amend even a nonessential condition of employment, although within the discretion of the Bank, is subject to the substantive and procedural restrictions properly imposed on all such discretionary decisions. It is the duty of the Tribunal to ensure that this discretionary power is not abused, and that the exercise by the Bank of its discretion is not arbitrary, discriminatory, unreasonable, improperly motivated, [and has not been] carried out in violation of fair and reasonable procedure. (Lindsey, ADBAT Decision No. 1 [1992]). The World Bank Administrative Tribunal has formulated a number of more specific limitations upon the exercise of an institutions power to amend nonfundamental and nonessential conditions of employment.

> First, no retroactive effect may be given to any amendments adopted by the Bank. The Bank cannot deprive staff members of accrued rights for services already rendered. This well-established principle has been applied in many judgments of other international administrative tribunals.
>
> The principle of non-retroactivity is not the only limitation upon the power to amend .... The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing the highest standards of efficiency and of technical competence. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal. (de Merode, supra, paras. 46-47)

The Tribunal must therefore address a number of the more significant additional claims of the Applicant.

46. One such claim is that the Resolution was, in effect, arbitrary and unreasonable in treating equitable before-tax salaries as a fair application of the fundamental principle of equal pay for equal work. A related claim is that the Directors were improperly motivated in using the Resolution as a means of expressing their disagreement with, and of evading the decision of the Tribunal in Mesch I, rendered only some ten months before. To both these claims, the Tribunal

concludes that the policy of before-tax equivalence - or, phrased differently, the policy of the Bank not to reimburse staff members for national income taxes - is not so unreasonable as to constitute an abuse of discretion. As a matter of comparison with other international organizations, the Bank's policy has also been adopted by other - although by no means the preponderance of - such organizations, as noted above. As for the Directors motive in adopting the Resolution, although in one sense it may certainly be viewed as an expression of strong disagreement with the result reached by the Tribunal in Mesch I, it more fundamentally reasserts what the Directors regarded as a longstanding Bank policy to avoid diverting the income from Bank loans and other Bank activities so as to create a subsidy, and thus an implied endorsement, for the national taxes collected by the United States and the Philippines. The Tribunal does not find such a purpose to be unreasonable, let alone illicit.

47. Finally, the Tribunal considers the Applicants claim that the Respondent had an obligation, before adopting the Resolution, to notify staff at the earliest possible time of a proposed or impending change in policy affecting the conditions of employment. They rest their claim on Sections 2.1 and 2.11 of Administrative Order No. 2.02, which provide, respectively: [T]he Bank ... is guided by fair, impartial and transparent personnel policies and practices in the management of all its staff, and The Bank's Management will work at all times in close cooperation with staff representatives in order to safeguard staffs interests. The Applicants point out that at all times between the Tribunal's decision in Mesch I in January 1994 and the Bank's action in the Resolution rescinding the force of that decision with respect to taxes on all income earned by staff members in the future, the Bank gave no notice to staff representatives (and in particular the Staff Council) of its intention to do so and failed to consult with and solicit the views of such representatives.

48. The Tribunal notes with regret that, on a matter as significant as that reflected in the Resolution, the Bank did not initiate discussions with, and indeed did not even provide advance notification to, staff representatives. However, the Tribunal must reluctantly conclude that Administrative Order No. 2.02 does not clearly enough impose that obligation upon the Bank such that non-compliance must result in the nullification of the Resolution.

49. The Tribunal holds that reimbursement of national income taxes is not a fundamental and essential condition of employment; that the Bank therefore had the power unilaterally to amend the condition as to tax reimbursement; and that the Board of Directors Resolution was valid.

50. Several other staff members have filed Applications for Intervention, after the Respondent had similarly rejected their claims for tax reimbursement on the basis of the Resolution. They stated that they did not wish to participate actively in the proceedings, but that they wished merely to associate themselves with the past and future submissions of the Applicants, and to receive the same relief that the Tribunal may grant to the Applicants. Neither the Applicants nor the Respondent have objected to any of the Interventions. Because the Application fails on the merits, so do the Interventions.

51. Although the Applicants have not succeeded on the merits, their pleadings nonetheless were very useful to the Tribunal on issues that were important and complex, and the Applicants did prevail on the matter ofwith regard to the preliminary objections. Accordingly, the Tribunal decides to award a sum towards their costs.

Decision:

For these reasons, the Tribunal:

a. dismisses the Applicants claims; and

b. orders the Bank to pay the sum of $5,000 jointly to the Applicants towards their costs.

Mark Fernando
President

R. Gorman
Vice-President

L.M. Singhvi
Member

R. C. Pangalangan
Executive Secretary

At Manila, 7 August 1997

Dissenting Opinion

I. General statement

1. This case involves fundamental questions of equal treatment of international civil servants.

2. This Tribunal has said in Mesch and Siy, ADBAT Decision No. 2 [1994] (hereinafter, Mesch I):

> The Tribunal observes that the comparison of compensation levels on the practical plane necessarily involves a consideration of the net benefits, after tax if any, to the recipient. Therefore, it cannot be said that a given salary which, in the hands of one recipient, is taxable is the same as an identical figure which, in the hands of another, is not. Accordingly, the failure to consider the incidence of taxation is inconsistent with the principle of equal compensation for comparable work. (para. 15) (emphasis supplied)
>
> The Tribunal now holds that the Bank is at liberty to adopt a contrary resolution deciding that the failure to consider the incidence of taxation is consistent with the principle of equal pay and equal work recognized by the Bank.

3. I am compelled, as a matter of conscience and as a matter of law, to say that I regret that the Tribunal has de facto overruled one of its decisions in such a way, without saying so. I cannot accept that the Tribunal has endorsed, through what I personally consider a painstaking and contradictory legal reasoning, the Bank's 6 October 1994 Resolution (hereinafter, the Resolution) whose avowed purpose was to eliminate for the future the normal consequences that were to flow from one of its decisions. Even more importantly, I cannot approve that the Tribunal, by its decision, negates a fundamental aspect of the principle of equal pay for comparable work.

II. The problem raised before the Tribunal

4. Obviously, a resolution adopted by the Board of Directors is binding only if it is legal. The Tribunal has to determine whether, at the time of the adoption of the Resolution, each employee was entitled to equal net remuneration for comparable work, as a fundamental and essential condition of employment. If the answer were to be in the positive, the Resolution would be illegal; if the answer were to be in the negative, the Tribunal would still have to verify that the modification brought about by the Resolution is not arbitrary, discriminatory and involves no abuse of power.

III. The principles to be applied

5. In fact there are two important principles to be applied by the Tribunal in this case upon which the Applicants and the Respondent agree. The first principle is the most important principle of equal pay for equal work. The second uncontested principle is that any element of a staff members condition of employment which is fundamental and essential cannot be unilaterally amended. Before applying these principles to the case, I shall present them more thoroughly.

1. The principle of equal pay for equal work

6. In Administrative Order No. 2.04 of 30 May 1972 the Bank stated the basic principles governing salary administration:

> It is the policy of the Bank to provide equal compensation to staff members performing comparable work.

This principle was even more clearly and thoroughly elaborated in the new version of A.O. No. 2.04, which became A.O. 3.01, revised 1 November 1993, stating:

> The Bank will systematically evaluate ... the equitable remuneration for similar responsibilities both internally and externally ....

7. It appears that there are two formulations of the principle of equal pay for equal work: one which could be referred to as the narrow formulation, the other, as the broad formulation. The narrow formulation adopted in some organizations requires equality only inside the organization. The broader formulation, adopted by the Bank, lays a stronger burden on the Bank, which must not only ensure that there is equality inside the institution, but also that there is equality with regards to the situation outside the institution. In other words, the Bank has stated that the guarantee of equality given to its staff has to be understood as equality for people in like situation inside the Bank as well as outside the Bank. This, of course, means that the Bank has accepted an obligation to ensure the same treatment internally to staff members who are subject to taxation in comparison with their colleagues of the Bank who do not pay taxes, and externally with their IBRD and other counterparts, who when they are subject to taxation generally benefit from tax reimbursement, or other equalization schemes.

2. The meaning of fundamental and essential terms and conditions of employment

8. Although everyone agrees on the consequences of the existence of fundamental and essential conditions of employment, there is no precise definition of what is fundamental or essential. Only some abstract definition, like in de Merode, WBAT Reports 1981, Decision No.1,

or some illustration like in In re Settino, ILOAT Judgment No. 426 (1980), can be given, both cases involving a change in the policies of tax reimbursement.

9. In de Merode, supra, the following definition was given:

> Certain elements are fundamental and essential in the balance of rights and duties of the staff member; they are not open to any change without the consent of the staff member affected. Others are less fundamental and less essential in this balance; they may be unilaterally changed by the Bank in the exercise of its power, subject to the limits which will be examined later. (para. 42) (emphasis supplied)

It might be useful to underline that the World Bank Administrative Tribunal has rejected some analysis formerly used based on the parties expectations (although this analysis has been used in Lindsey, ADBAT Decision No. 1 [1992]):

> Nor can the distinction between what is permissible and what is impermissible rest on the state of mind or the intentions of staff members at the time of taking their employment, on their expectations or reliance or on the motivating factors which might have induced them to accept or remain in employment with the Bank (id. at para. 41) (emphasis supplied)

10. In other cases, like In re Settino, supra, the emphasis was put on the importance of the right in question:

An official is not given ... a right of which he cannot be deprived by unilateral amendment, to every benefit conferred by his contract, but only to those which are fundamental. The right to salary and to the well established allowances, such as those for dependants, is essentially a fundamental right. But this does not mean that every item making up the salary or allowance and every detail of the process by which it is calculated are to be deemed inviolate; or that minor benefits what are sometimes called fringe benefits are to be treated as unchangeable features .... (para. 7) (emphasis supplied).

IV. The Former Decisions of the Tribunal in the Tax Cases

11. As far as the interpretation of the meaning of the principle of equal pay for equal work is concerned, this Tribunal has already taken three decisions, each of which brings an element to the picture. However it was for the Tribunal to decide in this case whether or not tax reimbursement - or any other equalization scheme to the same effect - is an essential and fundamental condition of employment.

12. I will try to emphasize the points that have already been decided by the Tribunal with final and binding force (under Article IX of the Statute of the Tribunal) in these cases.

Mesch I

13. In Mesch I, the Tribunal, having considered all pertinent documents - letters of appointments, the Bank's Charter, by-laws, Administrative Orders and Regulations, Personnel Policy Statements and Handbooks, as well as the long-standing practice of the Bank of non-reimbursement - has declared that the failure to consider the incidence of taxation is inconsistent with the principle of equal compensation for comparable work. In other words, the decision was to the effect that equal pay for equal work, as it should have been interpreted from

1967 to 1997, was to be understood as applying after-tax: the two elements of equal pay for equal work and tax reimbursement according to Mesch I are inextricably intertwined and inseparable.

14. This was considered by the Tribunal to be the situation from the inception of the Bank: the Tribunal recognized therefore that there is, no doubt, force in the argument that the Applicants are entitled to reimbursement of taxes from the beginning of their respective periods of employment with the Bank, although for reason of practical difficulties, it only granted them relief for the two preceding years.

15. How did the Tribunal arrive at such a conclusion? The Tribunal so decided because it is the only interpretation that brings about a fair result, which is in line with the requirements of the principle:

The Tribunal observes that the comparison of compensation levels on the practical plane necessarily involves a consideration of the net benefits, after tax if any, to the recipient. Therefore it cannot be said that a given salary which, in the hands of one recipient, is taxable is the same as an identical figure which, in the hands of another, is not. Accordingly, the failure to consider the incidence of taxation is inconsistent with the principle of equal compensation for equal work. (para. 15) (emphasis supplied)

16. At the same time, the Tribunal in Mesch I had noted that the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work. I deem it necessary to say here that I consider that the only way to understand this statement, is to read it in the light of the former statements made by the Tribunal in Mesch I, to the effect that the Bank had deliberately not excluded the broader meaning of the principle of equal pay, and had therefore guaranteed to its staff external equality, which it was not obliged to include when the Bank was created. This is the only way to understand the possibility of exclusion mentioned by the Tribunal, as it goes without saying that there is no possibility to set aside the basic principle of equal pay for equal work inside the organization, which implies that the staff members in an international organization should be treated equally and not discriminatorily. The majority decision arrives at the same conclusion in paragraph 32, although it draws different consequences from this analysis.

17. To summarize, Mesch I has decided with final and binding force that:

- the Bank has voluntarily adopted the principle of equitable remuneration both internally and externally;
- the principle of equal pay - understood as equitable remuneration both internally and externally - and tax reimbursement are inseparable;
- as equal pay for equal work is a term or condition of work, so is the right to tax reimbursement;
- equal pay for equal work as well as its inherent consequence, the right to tax reimbursement, has been a term and condition of employment since the inception of the Bank.

18. It results from the inseparability of equal pay and tax reimbursement - or any other device to the same effect - that as long as the Bank has not abolished the principle of equal pay for equal work internally and externally, that after-tax equality is a right of the staff members of the Bank. It seems contradictory to hold in Mesch I that the two elements cannot be separated, and at the same time hold, as the majority does in this case, that one element, equal pay for equal work, is fundamental, while the other element, tax reimbursement, is not. To arrive at such a result and at the same time to pretend not to contradict Mesch I, the majority has to completely misrepresent the holding in Mesch I. The decision in Mesch I was in fact very coherent: it stated first that equal pay and tax reimbursement are inherently linked; it stated second that the Bank could have excluded both, which is quite logical because they are linked - the precise wording of Mesch I is worth quoting again: the Bank could have so structured its terms of employment as to exclude expressly the prospect of equal pay for comparable work and could thus have excluded the need for tax reimbursement (emphasis supplied). So in the Tribunal's view the exclusion for tax reimbursement can only be a consequence (thus) of the exclusion of equitable remuneration both internally and externally. It never imagined - what the majority does here in paragraphs 33 and 34 - that the two could be separated. To me, the two just cited paragraphs are a total misrepresentation of what the Tribunal has decided in Mesch I. It is false that the Bank could have excluded the prospect of equal pay for comparable work, by a pronouncement to the effect that tax reimbursement was not due (para. 33). It is false that the Tribunal has decided that tax reimbursement is not always a corollary of equal compensation for equal work (para. 34). In Mesch I, the Tribunal declared that either both have to exist, or that both could have been excluded.

19. It is also important to underline that the element of tax reimbursement was in existence by implication - that means would have been in existence had it not been illegally denied by the Bank - throughout the history of the Bank, as was the principle of equal pay. Tax reimbursement must be considered as having been a term and condition of employment for almost 30 years when the Resolution cancelled it.

Mesch II

20. In Mesch and Siy (No. 2), Decision No. 6 [1995] (hereinafter, Mesch II), because the Applicants asked the Tribunal, in a request for interpretation of Mesch I, to answer a new question, the Tribunal quite rightly answered, that:

> The Tribunal holds that the question whether the Bank can unilaterally amend the term or condition as to tax reimbursement, insofar as it arises between the Applicants and the Bank, is not a matter of interpretation or clarification of the Decision, but a separate issue which arises from the preparatory steps which the Bank then took with a view to adopting the Resolution of 6 October 1994. (para. 13)

21. No inference can be drawn by this Tribunal from Mesch II, that the right to tax reimbursement has been qualified. In other words, in Mesch II, the Tribunal reminded the parties that:

- it did not decide that equal pay for equal work was a fundamental condition of work;
- but by the same token, it did not decide either that equal pay for equal work was not a fundamental condition of work;

- it did not decide that tax reimbursement was a fundamental and essential condition;
- but by the same token, it did not decide either that tax reimbursement was not a fundamental and essential condition of employment.

Mesch III

22. In Mesch and Siy (No. 3), Decision No. 18 [1996] (hereinafter, Mesch III), the Tribunal denied the Applicants claim for tax reimbursement, made after the Resolution, on procedural grounds. At the same time, it set the legal framework within which the Tribunal has to decide the present case concerning tax reimbursement, as a term or condition of employment:

> Although some terms and conditions of employment can be prospectively altered, the principle that fundamental and essential terms and conditions of employment cannot unilaterally be amended is now a recognized principle which can be regarded as part of the law common to international organizations. That principle imposes a limitation on the powers of the governing bodies of every international organization, restraining the unilateral amendment of such terms and conditions. (para. 22)

So what Mesch III reminds the parties is that:

- an organization has the power to alter certain terms or conditions of work of its staff;
- a fundamental and essential term of employment cannot be unilaterally suppressed or even amended.

V. General comments on the majority decision

23. I would like to focus first on a few points in the Tribunal's decision with which I particularly disagree.

24. I particularly disagree with the overwhelming emphasis put on past practice of the Bank, in order to deny the fundamental character of the right to tax reimbursement, when the Tribunal has unambiguously declared such practice to be illegal. What the Tribunal in fact says in paragraph 24 is that a right cannot become fundamental because it has been illegally denied for a long time. This means that, according to the majority decision, it suffices that an illegal practice denying a fundamental right lasts long enough to preclude this right to be protected as a fundamental right.

25. I particularly disagree with the theoretical analysis of what is a fundamental condition. I agree with the majority that some rights are fundamental per se, but disagree with the majority, when it declares in paragraph 21, that some rights may become fundamental if the parties so agree. It was quite clearly underlined in de Merode, supra, that the expectations of the parties are not a workable criteria as there are usually two conflicting intents: there are at least two subjective intentions in any contract (para. 41). So I cannot accept that a fundamental right can only be created by the subjective intents of the two parties. To me, there must be an objective definition of what is fundamental, a point which I shall later develop in my dissent.

26. I particularly disagree with the very obscure paragraph 30 which tends to blur completely the meaning of the principle of equal compensation for equal work, which is a principle of utmost importance. Nobody has ever pretended that any extra cost to come to work incurred by a staff member for whatever reason should be included in his salary and in the salaries of all the staff members. This is just beside the point, and obscures the issue in an unjustified manner. By the same token, I cannot agree with paragraphs 46 and 47, which give a narrow interpretation of the obligation of fair treatment owed by the Bank to its staff.

27. I am also surprised by the statement by the President in paragraph 11, which implies that it is possible to rule on the merits without having jurisdiction. This is quite new to me. To my knowledge, if the Tribunal has no jurisdiction, it cannot validly rule on the merits.

28. I cannot understand exactly on what clear legal basis the Tribunal rests its decision that tax reimbursement does not form part of the fundamental and essential terms or conditions of employment. I summarize below the four cumulative reasons relied upon by the Tribunal, and briefly explain why these reasons must fail.

a. The Tribunal contends that the right to tax reimbursement was not written in the Charter. But the Tribunal itself, in Mesch I, has found that the right was implied and thus written into the Charter.

b. The Tribunal contends that there was no prior practice of tax reimbursement. But the Tribunal itself, in Mesch I, has declared precisely that the Bank's practice of no reimbursement was illegal.

c. The Tribunal contends that there was no expectation of tax reimbursement. But the Tribunal itself, through Mesch I, gave rise to such expectations, and the majority in this case cannot limit its analysis to expectations before Mesch I.

d. The Tribunal contends that the Bank could have excluded the principle of equitable remuneration both internally and externally to which tax reimbursement is inherent. But the fact is that even if the Bank could have done so, it did not. It did not exclude from the Resolution the principle of equitable remuneration both internally and externally. I therefore cannot see how the Tribunal can now conclude that a right to tax reimbursement inherent to an existing fundamental principle can be set aside.

It must be underlined that the Tribunal has in this case recognized in a side statement that the right to tax reimbursement was inherent in the principle of equitable remuneration both internally and externally, as this principle implies that the equities were to be determined not only as between the Bank and the staff, but also vis-à-vis other employers and employees and inequalities created by the exercise of member states of their rights to tax their nationals was also to be considered. This is neither a quote from Mesch I, nor from the dissent, but rather from the majority decision itself. I am thus unable to understand how the majority - having found that the principle of equitable remuneration both internally and externally has not been excluded (para. 14), and having accepted that inherent to this principle is the need to correct inequalities resulting from taxation (para. 32) - can now exclude the right to tax reimbursement, or any device to the same effect. Indeed, it appears that, at the end of the day, the only legal basis for the Tribunal's decision is the Resolution itself.

VI. The application of the general principles to the case

29. The pertinent parts of the Resolution, which were under review before this Tribunal are the following:

> The Board of Directors hereby RESOLVES ...
>
> > That the Bank shall hereby reaffirm its long-standing practice of no reimbursement of taxes and, except as otherwise provided in Part I of this Resolution, the Bank shall not reimburse the taxes paid by any Governor, any Director, any Alternate, the President, any Vice President and any staff member of the Bank for the taxes paid by them on their salaries and emoluments paid by the Bank, effective upon the date of this Resolution.
> >
> > That for the purpose of the preceding paragraph, the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally shall be construed to be applied before the imposition of any tax, and any policy pronouncements, administrative regulations, orders and circulars not consistent with the provisions of this Resolution shall be deemed to have been amended by this Resolution.

30. First, I feel strongly compelled to declare that I consider it quite inappropriate for the Bank to reaffirm its long-standing practice of no reimbursement, when this Tribunal had just decided a few months earlier, in Mesch I, that this practice was illegal, and that the staff members of the Bank were entitled to tax reimbursement. This is a blatant disregard of the Tribunal's authority.

31. I also note that at the same time the Bank confirms that it will apply the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally (emphasis supplied).

32. It was then for the Tribunal to decide in this case whether tax reimbursement - or any other after-tax equalization scheme - is an essential or fundamental term or condition of employment that cannot unilaterally be set aside. The Tribunal has found that equalization of remuneration is not a fundamental right. I consider that the right to equal after-tax remuneration is a fundamental and essential right of the Banks staff members.

33. My first remark is that the principle of equal pay for equal work is a fundamental and essential principle. This principle is to be applied in the administration of the Banks personnel, which none of the parties contest. It goes without saying that the basic principle of equal pay for equal work is a fundamental principle per se, ensuring equality of treatment to all the staff members of an international organization. Without needing to decide here the issue of whether the broader principle, implying a certain equality among staff members of different international organizations, has to be considered per se as a fundamental principle that all organizations are obliged to enforce, suffice it to say here that this broader principle of equitable remuneration both internally and externally having been repeatedly referred to by the Bank since its inception - and again in the Resolution - has to be considered as a fundamental term or condition of the employment of the Banks staff members.

34. I further consider that equalization of remuneration is a fundamental and essential condition of employment in the Bank - whether through tax reimbursement or any other system to the same effect - for the cumulative following reasons.

35. First, the Tribunal has considered in Mesch I that the two principles of equal pay for equal work and tax reimbursement are inseparable. As I consider the principle of equal pay for equal work to be a fundamental and essential condition of employment in the Bank, I do not see how the Tribunal - without overruling Mesch I or deciding that equal pay for equal work is not a fundamental principle - can avoid considering that equalization of salaries, through tax reimbursement or otherwise, is also a fundamental or essential term or condition of work.

36. Second, even without the holding in Mesch I, the principle of equal pay for equal work must mean not only purely nominal equality, but also effective equality. Each staff member is entitled to the same net receipt for comparable work because it would not be fair if a staff member A could spend 1,000 pesos while his colleague B had only 700 pesos to spend despite the fact that A and B perform comparable work of comparable quality. This interpretation is supported by the past rulings and practices of various international organizations and would be the only sound and fair interpretation even if other organizations or tribunals of other organizations expressed no opinion thereon.

37. Third, even without the holding in Mesch I, the application of the principle of equal pay for equal work both internally and externally compels me even more to the conclusion that tax reimbursement - or any other device to the same effect - is a fundamental condition of work. This is so, because it is not only necessary to enforce effective equality among persons differently taxed (among staff subjected to taxation and staff exempt from taxation in the same organization) but also formal equality among persons similarly taxed (among all the staff members in different organizations which are subject to taxation). Clearly the Bank did not set aside the principle of equal pay for equal work in the Resolution, even if it annuls the right recognized by the Tribunal to tax reimbursement: far from setting this principle aside, the Bank has reiterated in the Resolution its intention to apply the more demanding formulation of the principle, that is the principle of equal pay for comparable work and the equitable remuneration for similar responsibilities internally and externally (emphasis supplied). Considering that the IBRD, its principal comparator, grants tax reimbursement, I consider that the principle cannot on the mere plane of logic, be enforced without tax reimbursement. It can be reminded here that the de Merode decision found that tax reimbursement was a fundamental condition: it is difficult to see how tax reimbursement could be considered as a non-fundamental condition of employment for the Banks staff members, if external equality has to be satisfied.

38. Fourth, even without the holding in Mesch I, if one applies, for the sake of reasoning, some of the other criteria that have been used from time to time by international administrative tribunals, there is no analysis that seems to permit anyone to consider in the present case the right to equal remuneration after tax not to be a fundamental and essential right.

The balance of interest test

39. If one looks at the interests at stake it is clear that the only negative consequence of the refusal to grant tax reimbursement is a heavier financial burden for the Bank; on the other hand it ensures the highest level of expertise and the hiring of American and Filipino professional staff, who might otherwise prefer to work for an institution enforcing correctly the equal pay principle. This is not to speak of the fundamental fairness due to civil servants throughout the different organizations and of their necessary independence from their own State, and their tax system.

The expectation test

40. It is quite clear that after the decision in Mesch I had clarified what the Applicants thought to be their rights, any staff member of the Bank had a good faith expectation that the Bank was under a standing obligation to reimburse taxes. This is even more so, as the right to tax reimbursement existed potentially for almost 30 years, and in clear and express terms for some 10 months. The majority decision denies the existence of such expectations in paragraphs 24 and 25. But, as formerly mentioned, the Tribunal analyses these expectations before the decision in Mesch I, which demonstrate that this criteria is of no use in a situation of illegal denial of a right. The conclusions drawn from the specific situation of Messrs. Mesch and Siy do not seem acceptable either. Let us imagine for a moment that the Bank would have had a general practice to give lower salaries to women than to men since its inception. So the women working with the Bank would have had no reasonable expectations to have the same salaries than men, and could not have had recourse to a Tribunal as none existed before 1992. Let us even imagine that a Mrs. Siy, at the time of her supposed appointment to the Bank expressed a desire to receive a salary equivalent to her husbands salary, and on the Bank's refusal, still joined the Bank. If the Tribunal were to apply to such a case the same principles as applied in this case, it would rule that women were fully aware on or after the date of their entry into the service that the Bank had no policy of [equal salaries for women]. It cannot be reasonably said that [equal salaries for women] was of decisive importance to them, or that they had a reasonable expectation that the Bank would provide such benefit and conclude that the right being not reasonably expected was not fundamental and essential.

41. The Tribunal does not seem to take into account the expectations after Mesch I. This suggests that in the Tribunal's view a right recognized by the Tribunal is weaker than a right recognized by a Bank. Again an hypothetical example will illustrate the contradictions which I see in the implications of the majority decision. Let us suppose that in January 1996, the Bank would have said that it recognizes that its past practice was not in conformity with its stated principles and that it will therefore grant a right to tax reimbursement to its staff; suppose that 10 months later, the Bank cancels such granted right. Would the Tribunal have decided in this case that the right to tax reimbursement is not a fundamental condition? I do not think so. But if one applies to this hypothesis, the principles used in the present case, one should conclude that the Bank was free to cancel the given right.

The minor benefits test

42. The right to tax reimbursement, recognized solemnly by this Tribunal as a condition of employment, cannot be considered as a minor right or a fringe benefit, which the Bank is at liberty to suppress at any time. I think that, as soon as tax reimbursement has become a term or condition of the contract of employment - however granted, through the rules of the organization, through express mention in the contract or implied by a tribunal - it is a fundamental condition. Everyone knows how meaningful it is for international civil servants to receive salaries that are not diminished by taxation.

43. Fifth, even without the holding in Mesch I, my interpretation in the present case is in line with the generally accepted practice of the overwhelming majority of international organizations. In Lindsey, supra, the Tribunal has declared that the principal rules of law within the framework of which the facts must be analyzed comprise the staff practices of international organizations generally .... There is a great uniformity among the regulations and practices of international organizations, concerning after tax salary equalization. This has been clearly underlined in Mesch I:

> The Tribunal observes, however, that although there are notable differences in the mechanisms adopted by the United Nations and its Specialized Agencies, the IBRD, the International Monetary Fund, the Inter-American Development Bank and some other international organizations, they all succeed in achieving effective equality among comparable staff members of the organization in respect of after-tax salaries. (para. 20) (emphasis supplied)

In fact, the majority acknowledges this overwhelming practice, recognizing that it is true, as recognized in Mesch I, that most international organizations do arrange for reimbursement of income taxes paid to member states (para. 36).

44. Sixth, even without the holding in Mesch I, my interpretation is also in full conformity with the precedents of international administrative tribunals. The Tribunal has also considered in Lindsey, supra, that it should take into account the decisions of international administrative tribunals, adding, There is, in this sphere, a large measure of common law of international organizations to which, according to the circumstances, the Tribunal will give due weight (para. 4).

45. As far as decisions of international administrative tribunals are concerned, no case can be found similar to the present one, where an international organization attempted to deny an existing right to tax reimbursement, as is the case before this Tribunal. Most often, cases have been brought to tribunals, when the scope of the right to tax reimbursement was modified. But, when dealing with such cases, quite often different administrative tribunals, while deciding that the details of the enforcement of the right to tax reimbursement were not essential and fundamental terms and conditions of employment, at the same time recognized by implication the principle of tax reimbursement to be a fundamental right of the international civil service. It must also be underlined that there is not one single pronouncement of an international administrative tribunal to the effect that tax reimbursement is not a fundamental right.

46. Among the decisions of international administrative tribunals, there is one case which is of great importance for this case, as the decision was framed in very general and unambiguous terms. In Hopkins, OECD App. Bd. Decision No. 111 [1988], the tribunal declared that even without the express mention of the right to tax reimbursement in the contract of employment, such a right must be considered as being an implied condition of employment, flowing from the principle of equal pay for equal work. In the terms of the OECDs tribunal:

> Whereas international organizations have all adopted arrangements whereby they reimburse any tax paid by officials subject to United States income tax ...;
>
> Whereas there is an explicit guarantee of this type in the letters of appointment of most of the claimants and, in cases where there is no such explicit guarantee, the latter should, in the absence of any express provision to the contrary, be considered as implicitly incorporated in the service conditions in accordance with the principle of equal treatment.

47. In the Hopkins case, the claimants were complaining because of changes in the method of calculating the amounts paid by the organization in reimbursing the taxes due by the US citizens on their salaries and emoluments. In dismissing the claim, the OECD tribunal made a clear distinction between the principle of tax reimbursement and the implementation of that principle. Although it did not use the vocabulary of fundamental and essential conditions of employment,

this distinction was made in order to say that the principle of tax reimbursement was a customary principle of international law, that cannot be abrogated, while the implementation did not meet the test of a customary law and could therefore be changed by the organization. It is worth citing this decision:

Whereas it has been the general and constant practice, at least of those international organizations of which the United States is a member, to reimburse taxes levied by the United States...; such reimbursement is held to be an obligation of these organizations resulting from the principle of equal treatment which organizations must ensure towards all their staff; the duty of an organization to reimburse taxes levied by the United States on income received from international organizations (at least from those of which the United States is a member) results therefore from a customary rule of the law of international organizations;

Whereas there has, on the other hand, been no general or constant practice either over time or within different international organizations as to the method of such reimbursement; it is therefore not appropriate to speak of any customary rule in this respect. (emphases supplied)

In other words, the OECD has some freedom to change the methods used to enforce tax reimbursement, even if not complete freedom, as the goal must not be forgotten, this is the fundamental goal of ensuring equality among international civil servants. But it also flows from the judgment that the organization could not change the principle of tax reimbursement.

48. Many other statements of international tribunals sustain the basic idea on which this dissenting opinion rests, according to which tax reimbursement - or any other equalization scheme - is inherent to equal pay for equal work.

> The employees of international organizations are of course of many different nationalities. Consequently, if their salaries were diminished by taxation under their own national laws, there would be inequalities in the amounts of their net earnings. This is thought by all the international organizations to be undesirable. (para. 1) (In re Settino, supra) (emphasis supplied)

The Inter-American Development Bank used a system of reimbursing taxes to staff established in the Headquarters, and a system of paying gross salaries to local staff outside the Headquarters who were subject to taxes, in order to avoid a difference in remuneration between these two categories. In de Andrade, IADB (1988) Case No.8, the IADB Tribunal upheld the global system, while interpreting the principle of equal pay for equal work as implying necessarily a comparison after-tax:

> [T]he establishment of gross salaries does not essentially contravene the principle upheld by the Bank of equal pay for equal work, which essentially means the reimbursement of taxes, even though the means by which this is accomplished may differ. (emphasis supplied)

49. For all these reasons, the principle of equal compensation for equal work requires equal net remuneration and that is a fundamental and essential condition of employment in the Bank; and the Resolution denying tax reimbursement, in the absence of any other measure to ensure equalization of salaries, violates this fundamental and essential condition, and is therefore void.

B. Stern
Member

I join in dissenting, agreeing to the statements made in paragraphs 1, 2, 36 and 49 of the Dissenting Opinion

T. Sawada
Member

R. C. Pangalangan
Executive Secretary

At Manila, 7 August 1997