

## **ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 39  
(5 August 1998)**

**De Armas et al.  
v.  
Asian Development Bank**

**Mark Fernando, President  
Robert Gorman, Vice-President  
Martti Koskenniemi  
Thio Su Mien  
Shinya Murase**

1. The Applicants grievance is set out in a memorandum dated 24 January 1995, addressed to the Manager of the Benefits and Compensation Division (BPCB) of the Bank, by thirty-six Filipino professional staff (the Group) who asked the Bank to extend to them six employment benefits, saying:

The Bank effectively discriminates against Filipino professional staff with respect to certain employment benefits and remuneration. The failure of the Bank to extend to us these benefits results in our compensation from the Bank being less than that of other professional staff who have similar qualifications and experience, are at the same position level and performing the same work. [This is] contrary to the principles of equal remuneration for equal work, natural justice, fair play and the rule of law.

In its Personnel Policy Statement the Bank commits to systematically evaluate the relative levels of jobs, the equitable remuneration for similar responsibilities internally and externally, and reward staff according to performance, length of service and other relevant factors to maintain its salaries, allowances and benefits at competitive levels with due regard to the locational considerations of the Bank's Headquarters, and the employment, promotion and assignment of (its) staff without discrimination on grounds of sex, race or creed.

In practice, however, the Bank has disregarded these personnel policies and the fundamental principle of equal remuneration for equal work. In the guise of providing compensation based on the expatriate status of other professional staff, the Bank effectively discriminates against Filipino professional staff by providing other professional staff additional remuneration and benefits not directly related to their expatriate status, or allegedly because of their so-called expatriate status. [emphasis in original]

2. The Group listed six employment benefits, namely, Education Grants, the Force Majeure Protection Program, Home Leave Travel, Severance Pay, the Group Medical Insurance Plan (with respect to the enrollment of parents and parents-in-law), and the Salary Advance for Incoming Professional Staff.

3. Discussions over the next four months having proved unfruitful, the Group filed a formal grievance with the Manager, BPCB, who rejected it. The Group then elevated their grievance to the Director, Budget, Personnel and Management Systems Department (BPMSD), who affirmed the decision of the Manager, BPCB.

4. On 30 August 1995, the Group filed an appeal with the Appeals Committee, which declined jurisdiction. In its decision dated 20 June 1996, the Committee noted that the Bank had decided to extend to all professional staff without exception two benefits those relating to the Group Medical Insurance Plan and the Salary Advance for Incoming Professional Staff so that those questions had become moot. It concluded that the denial of two benefits Home Leave Travel and Severance Pay did not violate the terms and conditions of employment of the Group and did not suffer from any relevant flaw. The Committee expressed the view that the Bank should review the Education Grant benefits, because:

the manner in which this benefit package is implemented has changed its nature from a compensation for additional cost arising from living outside the home country to a more general benefit [undermining] the rationale for limiting this benefit to expatriate staff members.

Finally, the Committee also recommended that the Bank consider extending the Force Majeure Protection Program to all professional staff, as they are all exposed to the same risks.

5. On 31 July 1996, the Director, BPMSD, informed the Group that the Bank, having reviewed those two recommendations (as to Education Grant benefits and Force Majeure protection), found no new basis for extending those benefits to staff members currently excluded.

6. On 30 October 1996, twenty-nine of the Group (the Applicants) filed this Application to the Tribunal, seeking the rescission of the several decisions of the Bank refusing to extend those benefits to them, as well as the immediate retroactive extension of those benefits to them.

7. On 22 January 1997, Mr. Paul Chang filed an Intervention seeking to be included in the proceedings, associating himself with the past and future submissions, actions and statements of the Applicants, and asking for the same relief. He stated, however, that he had no wish to comment on the submissions of the parties. He explained that he was similarly situated as the Applicants, but had been unable to sign the Application filed on 30 October 1996 as he had been away on an official mission.

## **I. The Four Benefits in Dispute**

8. It is convenient at the outset to describe the four benefits which are now in dispute.

### **A. Education Grants**

9. Section 1 of Administrative Order (A.O.) No. 3.06 (revised 1 November 1993) states that it is the policy of the Bank to provide education grants to partially compensate a professional staff member whose duty station is outside his/her home country, for the additional costs involved in the education of the staff members [dependent] children. A dependent child is an unmarried child under the age of 24, who is a full-time student and obtains more than half of his/her support from the staff member.

### **Primary and Secondary Education**

10. In respect of primary and secondary education, a staff member was entitled to reimbursement of 75% of his actual educational expenses for each child for an education grant year, but not exceeding (a) US\$6,500 if the child was being educated in the duty station country,

or (b) US\$10,900 if the child was being educated outside the duty station country which, in regard to primary and secondary education, necessarily meant his home country.

11. Since educational expenses vary from country to country, the Bank decided to replace that limit of US\$10,900 with individual limits, based on educational expenses in each country. To do that an assessment of educational expenses in each of the Bank's Member States was necessary. However, the International Bank for Reconstruction and Development (IBRD) had already made such an assessment and had determined the IBRD school country limit for each country. Without attempting to make its own assessment, the Bank quite justifiably adopted the IBRD limits.

12. Accordingly, the ceiling of US\$10,900 was replaced in September 1994 (through a BPMSD Inter-Office memorandum of 16 September 1994, supplemented by the Manager BPCBs memorandum of 26 September 1994) by the IBRD school country limit applicable to the staff members home country.

### **Tertiary Education**

13. The entitlement was, until September 1994, virtually the same in respect of tertiary education. The only difference was that a staff member (if appointed after 16 November 1982) had also the option of sending his child for tertiary education to a third country i.e., a country other than the duty station and the home country. However, his right to reimbursement was only in an amount not in excess of the equivalent costs of the home country. But A.O. No. 3.06 made an exception:

under certain special circumstances where tertiary education in a third country can be justified, such as the inability to be assimilated back into the education system in the home country due to a prolonged period of schooling of the child at the duty station or away from the home country, applications may be made to [BPCB], for approval of costs to be reimbursed up to the limits applicable for third country tertiary education.

14. However, by the BPMSD and BPCB memoranda of September 1994, the need to obtain authority upon proof of special circumstances was done away with. All eligible children of expatriate professional staff were allowed tertiary level education in a third country, subject to the IBRD school country limit for such third country.

### **Education Travel Grants**

15. There are travel benefits related to the education grants.

(a) The child is entitled to a one-time education placement grant for the actual cost of travel, for the first time, by the most direct route from the duty station to the place of education abroad, but not exceeding the normal (one-way) full economy class airfare.

(b) After placement, the child is entitled to an annual education travel grant for two round trips, based on the actual cost of travel by the most direct route between the duty station and the place of education abroad, the cost of each trip not exceeding the normal (round trip) full economy class airfare.

Both the placement grant and education travel grant are available even for travel to the place of education in a third country, but the Bank is liable to pay only the actual cost of travel or the cost of travel to the home country whichever is less.

(c) In both the above cases, the child is also entitled to a baggage allowance to cover the cost of shipping additional baggage, but not exceeding the cost of shipping 20 kgs. by air cargo between the duty station and the staff member's designated town in his/her home country.

(d) Provision was also made for a per diem allowance and reimbursement of reasonable incidental expenses, but by the BPMSD memorandum of 16 September 1994 these were replaced by a flat travel allowance of US\$150 per round trip or US\$300 per child per academic year.

16. If the child was unable, for reasons satisfactory to the Bank, to visit his parents at the duty station, either parent resident at the duty station could use one of the child's round trips to meet the child either in the home country or in the third country. Where there was more than one child in the family, the parents could, between them, make one round trip per dependent child up to a maximum of two round trips per year per family. The Bank's liability in respect of each round trip was limited to the airfare which would otherwise have been paid to the child. However, the BPMSD memorandum of 16 September 1994 provided that a spouse may utilize the education travel entitlements in lieu of the child(ren) without restriction, but limited to the airfare that would otherwise be paid to the child(ren).

### **Overseas Apprenticeship**

17. The BPCB memorandum of 26 September 1994 also made express provision in respect of apprenticeship overseas of dependent children. If such apprenticeship is required to qualify for a vocation where government licensing is required or to meet requirements of a professional body, or if this is an integral part of a degree or diploma, the age limit and the granting of education benefits, will be extended by a period of up to the equivalent of the apprenticeship period if the student continues after apprenticeship at the educational institution to complete the license, degree or diploma requirements; travel grants and subsistence allowances are payable.

### **Reimbursement Procedure**

18. Before September 1994 a staff member was required to submit an Education Grant Claim Form with itemized receipts or other documentary evidence. While advances were possible in respect of some expenses, a staff member had to submit satisfactory evidence of actual payment within three months.

19. The BPCB memorandum of 26 September 1994, while providing that the old procedure would continue to apply to duty station schools, introduced a new procedure for schools outside the duty station:

- a. A flat 65% of the school country limit could be claimed as a lump sum without initially submitting documentary evidence in the form of itemized receipts etc., for subsistence, textbooks, school supplies, extra fees (library, sports, parent-teacher association, laboratory, diploma, graduation, etc.) tests, tutorials and local transportation.

- b. The balance of 35% of the school country limit could be claimed for tuition and enrollment fees, but only to the extent that the amount claimed did not exceed 75% of the actual expenditure on tuition and enrollment fees, without initially furnishing receipts.
- c. There would be random but strict audit of both the above categories of claims; staff members would have to submit proof of enrollment, and with respect to (b) above, proof of payment in the form of original receipts; staff members were required to retain proof of enrollment and original receipts for at least 90 days after the end of the relevant academic year.

20. However, the procedure was amended by another BPMSD memorandum issued on 30 September 1996, shortly before this Application was filed:

After a trial period of two years, it has been found that staff do not generally appreciate being subjected to an audit and many prefer to submit supporting documents as part of their original claim, instead of safekeeping these for presentation, when audited. In addition, the audit process turned out to be more time-consuming than anticipated taking into account the follow-up work that had to be done to resolve problematic cases.

[I]t has been decided to require staff to submit pertinent supporting documents as they become available to substantiate their claims for education grant, education travel and home leave travel, without requesting for the presentation of every individual receipt.

At the time of application [for] an education grant, staff will be requested to submit proof of enrollment when they are claiming a flat rate allowance and an invoice (or other similar document showing tuition fees to be paid), when tuition fees are also being claimed. In instances where such documents are not available, staff will make a commitment to present these within three months of obtaining the advance. The original receipt of the tuition fee paid will also have to be submitted within 3 months of obtaining the advance. [emphasis in original]

## **B. Home Leave Travel**

21. To facilitate periodic visits by eligible staff members and their dependents to their home country in order to maintain association with their home culture (A.O. No. 3.05, revised 1 November 1993), the Bank provides home leave travel and benefits for every expatriate staff member, his spouse, dependent children, and one authorized dependent parent or parent-in-law normally residing with him. A staff member and his dependents, travelling on home leave, are required to visit the home country. The benefits consist of:

- a. air travel by the most direct route,
- b. per diem allowances (US\$75 for staff members and US\$80 for officials, 50% for dependents, and 25% for dependents below 4 years),
- c. home leave allowance of US\$1,000 for the staff member and US\$340 for each eligible dependent,

- d. fixed allowance for travel-related incidental expenses (US\$80 for the staff member and US\$40 for each eligible dependent),
- e. additional travel costs of further rail or road transportation to the staff members designated place of permanent residence, up to a maximum of US\$500 per family, if that residence is located at least 75 kilometers from the nearest airport, and
- f. advance payment of salary, in case of home leave of at least ten days.

22. There are four options as to the frequency of home leave travel:

- a. A three-year option based on first class ticket with full allowances and travel time;
- b. A two-year option based on business class ticket where available or economy class ticket with full allowances and travel time;
- c. An 18-month cash option based on a year-round economy class ticket (first class ticket for staff at levels 9 and 10) with full allowances and travel time;
- d. A 12-month cash option based on a year-round economy class airfare with half the allowances and travel time offered for the other options. (However, the BPMSD memorandum of 16 September 1994 provided for full allowances and travel time.)

23. Home country means the country of nationality at the time of appointment; where a staff member has dual nationality, he has to elect, and that election is normally irrevocable except for compelling reasons. (A.O. No. 2.09, para. 1). However, the Bank can approve a third country in which the staff member had established (prior to employment with the Bank) long, uninterrupted and actual residence of at least seven years, and with which he could prove, beyond a reasonable doubt, a genuine personal nexus. Where a staff members spouse is of a different nationality, home leave travel is permitted to the spouses home country, but the Bank is liable to pay only the actual cost of such travel, or the cost of travel to the staff members home country, whichever is less.

24. Actual travel to the home country is dispensed with only in the event of civil disturbances in the home country, but the Bank is liable to pay only the actual cost of travel, or the cost of travel to the home country, whichever is less.

### **C. The Force Majeure Protection Program**

25. It is the policy of the Bank to provide basic force majeure protection to expatriate professional staff members against loss or damage to personal property when such protection through insurance is generally not commercially available in the market, or is available only at prohibitive cost. That program is intended to supplement the normal insurance protection which an expatriate professional staff member should himself have personally taken for his household and other property and for his automobile(s), and it covers the insured value under the staff members commercial insurance policies up to a maximum of US\$130,000, subject to a minimum loss of 10% of the insured value.

## D. Severance Pay

26. The Bank provides severance pay and resettlement allowance to eligible staff members leaving the Bank's employment. Severance pay is a one-time lump-sum payment upon separation, equivalent to two weeks final net salary for each year of eligible service after 1 May 1982 up to a maximum of one years net salary for 26 years of service after that date, if the staff member resettles outside the duty station country upon separation; but only two-thirds of that amount is payable if the staff member remains within the duty station country upon separation (A.O. No. 2.05, revised 1 June 1995).

## Cost of Benefits

27. In response to a request by the Applicants, the Tribunal directed the Bank to furnish particulars of the 1995 costs of Education Grants, Home Leave benefits and Severance Pay in respect of non-Filipino professional staff. Those costs may be summarized as follows:

- Out of a total of 613 non-Filipino staff members, 577 received grants for educational expenses in respect of 852 children, aggregating to US\$6,972,890 (US\$8,184 per child);
- 279 staff members received education travel grants, in respect of 324 children, aggregating to US\$1,185,044 (US\$3,658 per child), for a total of 521 trips; thus out of the aforesaid 852 children, only 324 received education travel grants, indicating that the majority of children were being educated at the duty station;
- Further, 596 staff members received home leave benefits, in respect of 1,625 trips, aggregating to US\$3,908,123: on an average, each trip cost US\$2,405, and each staff member received US\$6,375.

28. Based on those figures the Applicants claimed that the salaries and benefits of the non-Filipino professional staff were more than double those of their Filipino colleagues, and submitted the following comparison:

Professional Staff	Education Grant	Education Travel	Home Leave Benefits	Tax	Average Salary	Total
Non-Filipino	16,368	7,316	9,620	0	85,941	119,245
Filipino	0	0	0	-31,522	90,064	58,542

29. That comparison is faulty in several respects. The right to reimbursement of income tax is not in issue in this case, and the liability of Filipino staff to national income tax cannot be taken into account. Further, that analysis assumes that in 1995 all 613 staff members received education grants in respect of two children, as well as education travel grants for two trips, and were reimbursed for four trips on account of home leave. In fact, however, those 613 staff members received education grants for 852 children (i.e. 1.4 children per staff member), education travel grants for 521 trips (i.e. 0.85 trips per staff member), and home leave benefits for 1,625 trips. The total value of those benefits was US\$12,066,057: which was equivalent to US\$19,683 (and not US\$33,304 as estimated by the Applicants) for each of 613 staff members, or 22.9% of their average basic salary of US\$85,941.

30. It is also useful to consider education travel and home leave travel together, because children entitled to education travel are not entitled to home leave travel. The 613 staff members were reimbursed, on account of education travel and home leave travel, for 2,146 trips in all: i.e., 3.5 trips per staff member. Those trips were not only by the 613 staff members and their 852 children eligible for education grants, but also by their spouses, other (younger) children, and other eligible dependents. It is likely, therefore, that the total number of staff members, spouses, and dependents would have exceeded 2,146, and also that the two travel facilities resulted in an average of no more than one trip per person per annum.

31. The amount of severance pay in 1995 was US\$2,583,031 for 49 non-Filipino staff members (an average of US\$52,714 each), and US\$133,246 for four Filipino staff members (an average of US\$33,311 each).

## **II. Preliminary Matters**

32. Upon request by the Applicants which were in part granted by the Tribunal, and upon the direction of the Tribunal, the Respondent was required, under Rules 6 and 10 respectively, to produce more specific information about the benefits in question for the year 1995. This information related principally to: the grant of education benefits to non-Filipino professional staff members (average and total amount, relation to average salary, number of staff members and dependents affected); the grant of home leave benefits to non-Filipino professional staff members (average amount, relation to average salary, number of staff members affected); the grant of severance pay to all separated staff members (average amount and relation to average salary); the nationality and salary-level of staff members; and the pertinent staff rules and regulations of other international organizations. This information was furnished to the Applicants, and the parties were permitted to comment thereon. The Tribunal, elsewhere in this decision, makes specific reference to this information where pertinent. Because of the time concerned in the production and transmittal of this information, the exchange of comments, and in filling two vacancies in the Tribunal, the Tribunal deferred its decision until its next session in January 1998, and thereafter again until its session in August 1998. On 12 February 1997, the Tribunal decided that this Application should be considered by a panel consisting of all its members.

## **III. General Considerations**

33. The Applicants contend that the refusal of the four benefits described above constitutes discrimination against the Filipino professional staff, and in favor of the non-Filipino professional staff. However, the Tribunal finds that those benefits depend not on the nationality of a staff member but on the place where he serves. An expatriate staff member, i.e. one who serves outside his home country, is subject to some obvious disadvantages vis-à-vis a colleague who



serves in his home country. On principle, the grant of compensatory benefits to the former does not constitute discrimination if such benefits are reasonably related and proportionate to those disadvantages. Furthermore, the Bank has cited instances of Filipino professional staff members being allowed those benefits: e.g., those whose home country was not the Philippines at the time of recruitment, and others whose home country was the Philippines, during periods of service in duty stations outside the Philippines. The Bank has also cited instances where Japanese and American nationals were denied expatriate benefits while serving, respectively, in Japan and the United States.

34. The Tribunal will therefore examine the disputed benefits in that light: whether the expatriate benefits are reasonable compensation for the disadvantages which expatriates experience, particularly because of the need to attract and retain staff with the highest standards of efficiency and competence as required by the Bank's Personnel Policy Statement.

35. The Applicants also contend that the grant of these benefits violates the principle of equal pay for equal work, and cite the Tribunal's decision in *Mesch and Siy* (No. 4), Decision No. 35 [1997], III ADBAT Reports 80, 84, paras. 20 and 30:

20. 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

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. (Applicants' emphasis)

They urge that the personal circumstances of the expatriate staff, namely their expatriate status, are irrelevant and must be ignored.

36. In that case the Tribunal decided two matters. First, it held that the value, to the employer, of the work of two comparable staff members remained the same, although the salary of one was subject in his hands to national income tax, while the other was not. Accordingly, the principle of equal remuneration for work of equal value did not require the Bank to reimburse the national income tax paid by the former on the salary he received from the Bank: that was a personal circumstance irrelevant to the value of his work. Second, it decided that although in that case the Applicants employment contracts entitled them to the benefit of tax reimbursement, yet that was not a fundamental and essential term of their contracts, and could therefore be unilaterally amended by the Bank.

37. The Tribunal did not rule that the Bank, when determining what employment benefits it would grant to its staff, was disentitled from taking the personal circumstances of staff members into account. Indeed, the personal circumstances of employees are generally very relevant to most, if not all, employment benefits. Thus spousal allowances, dependency allowances, and

education grants for children, necessarily depend on a staff members personal circumstances: whether he has a spouse, dependents and children in school.

38. It is therefore a new issue which the Tribunal has now to decide in relation to the four benefits in dispute: Whether the differences in personal circumstances, arising from the fact of expatriation, of the expatriate professional staff members vis-à-vis their non-expatriate colleagues constitute a rational basis for the Bank granting those benefits only to the former. It is not disputed that although the Bank may decide such questions of policy, the Tribunal has the power to review such policy decisions:

In the Tribunal's opinion, the Bank enjoys discretionary power in determining benefits such as severance pay. It is nevertheless 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, or adopted without due process .... (Viswanathan, Decision No. 12 [1996], II ADBAT Reports 38, para. 13)

39. Both parties referred to the practice of other international and regional organizations in regard to the disputed benefits, citing the staff rules and regulations of several organizations, as well as memoranda from some. In the absence of a completely uniform practice, in regard to any particular benefit, by all organizations, it is inevitable that one organization will be the most generous, and another the least generous. But that by itself is no proof of unreasonableness, perversity, or discrimination on the part of either. Further, the benefits reasonably necessary to attract staff with the highest standards of efficiency and technical competence, may differ from place to place.

40. For the reasons which are set out below, the Tribunal has been able to determine, independently of the practice of any other organization, whether or not the Bank has acted reasonably in refusing the disputed benefits. While the practice of other organizations might well have become relevant if the contending considerations had been evenly balanced, that was not the case here. Accordingly, in setting out its reasons, the Tribunal has made no reference to the practice of other organizations.

#### **IV. Education Grants**

41. It is a reasonable assumption that, in general, it is in the best interests of a child that he should grow up enjoying the twin advantages of living with his parents, and of receiving his education in his home country maintaining family, social and cultural links. When a parent chooses to work outside his home country, the child must forego one or the other of those invaluable advantages: either he will continue to be educated in his home country, at the cost of long periods of separation from his parents, or he will be educated in the duty station, maintaining his links with his parents, but weakening other family, social and cultural links. An expatriate is thus subject to serious disadvantages, to which a colleague working in his home country is not subject. Although the Bank was not obliged to offer compensatory benefits, it was entitled in principle to do so, inter alia, in order to recruit and retain staff with the highest standards of efficiency and technical competence.

#### **Purpose**

42. Section 1 of A.O. No. 3.06 states the purpose of education grants thus:

to partially compensate a professional staff member whose duty station is outside his/her home country, for the additional costs involved in the education of the staff members children. [emphasis supplied]

43. The Applicants contend that education grants presuppose substantial differences in educational systems between the home country and the duty station, which entail additional costs for obtaining similar education; that education grants are nevertheless allowed and administered without regard to any additional cost of education; that education grants are part of an internationally competitive remuneration package which enables expatriates to provide quality education for their children, going far beyond compensating the person for the costs of so-called expatriation; and that education grants have become pure and simple allowances to defray the cost of education, and are thus tantamount to additional remuneration.

44. An examination of the provisions of A.O. No. 3.06 reveals justification for the contention that education grants may often do more than partially compensate for additional costs. Thus education travel is undoubtedly an additional cost incurred by a staff member who opts for home country education for his child. However, A.O. No. 3.06 provides that the Bank will reimburse authorized education travel costs in full, and not merely partially compensate them. Other educational benefits are not even related to actual additional costs, and are allowed even if there is no additional cost. Thus, where a staff member opts to have his child educated in his home country, some of his expenses (such as tuition and other fees, text-books, school supplies, etc) are not additional, because he would have incurred them in any event. Nevertheless, A.O. No. 3.06 entitles the staff member to reimbursement of 75% of such expenses (subject, of course, to school country limits). In the case of home country education, a staff member is also allowed 75% of other expenses; and where the expenses of tuition and other fees exceeds 25% of the total, then the staff member would in fact receive reimbursement in a sum which is more than his actual additional expenses. Likewise, a staff member from a country where tuition fees are higher than in the duty station, would save if he opts for duty station education but he is nevertheless entitled to reimbursement of 75% of educational expenses, although there is no additional cost.

45. It is clear, therefore, that although section 1 of A.O. No. 3.06 refers only to partial compensation for additional costs, the other provisions of A.O. No. 3.06 in fact allow benefits in excess of, or even quite unrelated to, additional costs.

46. However, that inconsistency between Section 1 and the other provisions of A.O. No. 3.06 does not invalidate those provisions. The Tribunal must consider whether Section 1 controls, or is subject to, the other provisions of A.O. No. 3.06. When A.O. No. 3.06 is considered as a whole, it reveals a clear intention on the part of the Bank to allow the benefits described in its other provisions; thus Section 1 cannot be construed as controlling or limiting the scope of those other provisions. To construe it otherwise would make the provisions of A.O. No. 3.06 meaningless. The mere fact that the benefits allowed by A.O. No. 3.06 are, in some instances, in excess of the additional expenses incurred by a staff member does not make them unreasonable. Accordingly, the real question which the Tribunal has to decide is whether those benefits constitute reasonable compensation for the disadvantages which expatriates face in regard to their childrens education. In the opinion of the Tribunal, it would be wrong to consider only the financial aspects of those disadvantages, for there are other, more important, aspects which cannot even begin to be quantified in purely pecuniary terms: the separation of the child from his parents in the case of home country education, and the weakening of other family, social and cultural links in the case of duty station education. Those aspects the Tribunal cannot possibly ignore.

## **Primary, Secondary and Tertiary Education**

### **Home Country And Duty Station Only**

47. The Tribunal will deal first with education in the home country and in the duty station. What A.O. No. 3.06 does, in effect, is to tell expatriate staff members: The Bank realises that if you work for the Bank, your child's education, in its fullest sense, will suffer because of one kind of separation or another; no one can place an exact price on those disadvantages, nor is it practicable for the Bank even to determine the purely financial costs, either for each individual or even in a general way; and so, to try to make up for all those drawbacks, the Bank will meet a substantial part of your child's education costs if you work for the Bank. That compensation takes the form of an additional sum of money. However, simply because that benefit is a monetary one, that does not make it tantamount to additional remuneration. It is not remuneration for work done, but compensation for some of the disadvantages of living away from one's home country. To look at it another way, if similar reimbursement is granted to non-expatriate staff, it might well be argued that they are more favourably treated than expatriate staff because they are allowed the same benefits although not subject to the same disadvantages.

### **Education Grants**

48. The expenses which the Bank reimburses are described in Administrative Circular No.

C-1 which was issued in order to implement A.O. No.3.06. They include tuition and other enrollment fees; cost of prescribed text books; library, sports, laboratory and other fees; costs of course-related materials, equipment and educational trips; supplementary tutorial fees; and cost of school supplies and publications. In addition, the costs of board, lodging, subsistence, and utility charges are allowed in the home country. The Bank reimburses 75% of these expenses, for primary, secondary or tertiary education, either in the duty station or in the home country, subject to the relevant duty station or school country limit. 49. The Tribunal is not persuaded that the mere reimbursement of part of the expense of education adequately compensates for the disruption of and inconvenience to the education of the children of expatriates. The Tribunal holds that such reimbursement is neither unreasonable nor discriminatory.

### **Travel Grants**

50. The Tribunal must now turn to the travel grants allowed in the case of children being educated in the home country: a one-time education placement grant and an annual travel grant for two visits to the duty station, as well as the associated travel and baggage allowances. The Tribunal must observe that a child living with his parents in the duty station is periodically allowed home leave benefits in order to renew family, social and cultural links with his home country, and thereby to compensate somewhat for the disadvantages of separation from his home country. A child who is being educated in the home country suffers what may be an even greater deprivation, of separation from his parents in his formative years; he is not entitled to home leave travel because his problem is not separation from his home country. His is a greater need, to maintain his links with his parents. To allow every child to visit his parents twice a year may well be generous, but is hardly arbitrary, unreasonable or discriminatory.

51. The Applicants complain that since September 1994 the Bank had allowed a staff member and his spouse to utilize their child(ren)'s annual education travel entitlements without any

restriction. The Applicants point out that earlier parents were allowed one round-trip per dependent child up to a maximum of two round-trips per year per family, and that, too, only where the child was unable, for reasons satisfactory to the Bank, to travel to the duty station. The rationale of the education travel facility is to allow the child to maintain his links with his parents. Accordingly, it is not unreasonable for the Bank to let family convenience alone, as determined by the staff members family, decide whether the child should visit his parents, or vice versa: it makes no difference to the Bank, from the point of view both of principle and cost, whether the child makes all the visits or the parents. The Tribunal holds that the relaxation of the restrictions was not improper.

### **Apprenticeship**

52. The Applicants also complain that the Bank extends travel grants and subsistence allowances in respect of apprenticeship overseas even though it is not an integral part of the degree or diploma. But even then the Bank, quite properly, allows that benefit only where it is required to qualify for a vocation where government licensing is required or to meet requirements of a professional body. The Tribunal holds that it was within the Bank's discretion to treat apprenticeships as falling within the scope of tertiary education.

53. Finally, the Tribunal notes that the costs of the benefits, considered in the context of a staff members average annual basic salary of US\$85,941, have some relevance to the question whether the Bank has acted arbitrarily or unreasonably in allowing them.

54. As already noted (paras. 27 to 30), in 1995 the average education grant exclusive of travel amounted to US\$8,184 per child. The school country limit for 1995/96 for the Philippines (which would have been the duty station for most expatriates) was US\$12,470. The other school country limits ranged from US\$8,893 (Afghanistan) and US\$9,015 (New Zealand) at the lowest, to US\$23,877 (Japan) and US\$16,820 (Switzerland) at the highest; in between were Australia (US\$11,509), Canada (US\$10,343), France (US\$14,210), Germany (US\$14,500), U.K. (US\$12,857), and U.S.A. (US\$12,810). In 1995, 324 children received education travel grants for 521 trips (1.6 trips per child), at an average cost to the Bank of US\$3,658. As a proportion of average annual basic salary each of these benefits may well be considered generous, but that does not make them arbitrary, unreasonable or discriminatory. As for the frequency of travel, the Tribunal is of the view that the 1.6 trips per child per year are reasonable, particularly considering that they are in lieu of trips due under the home leave travel benefit.

### **Tertiary Education in Third Country**

55. The Applicants make the following submission:

The Bank provides third country education grants [for the education of the child(ren) of expatriates] outside the home country and duty station. Third country education affords superior educational opportunities which are perceived to be unavailable in the home country or duty station. It practically sets aside the grants original purpose of providing education approximating that of the home country and compensating for additional expenses incurred therefor. Instead of being linked to the expatriate status the education grant is effectively transformed by the third country education alternative to an additional benefit in the form of wider and superior educational options for the staff members children.

They complain, in particular, that after the BPMSD and BPCB memoranda of September 1994, an expatriate need no longer establish special circumstances, such as the inability to be assimilated back into the education system of the home country; he is entitled to third country education costs as of right.

56. The Bank argues that there are valid reasons for education grants for third country tertiary education:

- a. schools of the educational system of the staff members' home country are frequently not available at the duty station, or may not be accessible for other reasons. Parents may be unprepared to send their children at a young age to boarding schools in their home country, or such schooling may not be available. Accordingly, it may be necessary for the staff member's child to be enrolled in an "international" school and to be educated in a language other than that of the staff member's home country. This often makes it difficult for such a child to obtain suitable tertiary (university) education in a duty station country or in the home country of the staff member. In such circumstances, university enrollment opportunities for such children may only exist in third countries.
- b. third country education is intended to address circumstances in which the return of the children of expatriate professional staff members to the country of permanent residence can be facilitated by study in a country other than that of the duty station or the country of permanent residence.

The Bank's contentions as to the need to allow third country education are based entirely on the difficulties that result when an expatriate opts for secondary education at the duty station. These difficulties arise from differences in educational systems between the duty station and the home country, including the language of instruction, and eligibility requirements for tertiary education. They do not affect the position of children educated in the home country (which the Tribunal deals with in paras. 62 to 63 below).

58. The Tribunal cannot accept the Bank's contention that third country tertiary education is intended to facilitate the return of children to the home country. Indeed, not only is duty station secondary education a possible hindrance to return to the home country, but third country tertiary education is probably a much more serious disincentive to returning to the home country, particularly in the case of children from developing countries who go to developed countries. Nor can the Tribunal accept the Applicants submission that the original purpose of the grant was to provide education approximating that of the home country: the grant was intended to give expatriates the option of either home country or duty station education, and in the latter case similarity to home country education was irrelevant. However, there is no doubt that the differences in duty station education may give rise to difficulties in access to tertiary education in the home country.

59. The Applicants reply that expatriate children who receive their secondary education in the English language at the duty station (which is Manila in most cases), and who face difficulties in access to tertiary education in their home country, can well receive their tertiary education in the Philippines, because, they say, English is the medium of instruction in tertiary schools in the Philippines, and thousands of foreign students have in fact studied in those schools. If the Bank considers that tertiary education in the Philippines is as satisfactory as in the countries most popular for tertiary education, they argue, then there is no cogent reason for expatriate children to seek tertiary education outside the Philippines; if, however, the Bank considers that tertiary schools in the Philippines are below par, then it is but fair and just that the Bank should extend

the same option - for "quality" education in those other countries - to the children of Filipino staff as well.

60. The Tribunal holds that the issue is not whether the Bank considers tertiary education in the Philippines to be satisfactory or not. The children of Filipino staff working in their home country, who have received their secondary education in the Philippines, are not in the same category as children of expatriates, working in Manila, who have received their secondary education in Manila even if in the very same school. The two groups are distinctly different. The former have had the advantage of both living, and being educated, in their home country; and usually have no difficulty in access to tertiary education in their home country. The latter have not had the advantage of living and being educated in their home country; and although partially compensated for that disadvantage by quality education at the duty station (through education grants and home leave travel), yet that education itself often creates an obstacle to tertiary education in the home country. Thus the two groups cannot be treated as if they were similarly circumstanced, simply because both were educated in the Philippines. Education in the Philippines whether secondary or tertiary means two different things to the two groups: to the former it is home country education, to the latter it is not. To offer tertiary education in the Philippines to the two groups is not equal treatment: it is an offer of home country tertiary education for Filipinos who have had the advantage of home country secondary education, but for non-Filipinos who have already lost the advantage of secondary education in their home country, it is a further disadvantage.

61. The additional cost of third country tertiary education is not significant. The relevant school country limits have been set out (in para. 54), and there is hardly any difference between the limits for the countries which the Applicants say are popular, and for the Philippines. The amounts allowed for education travel are restricted to home country costs. The Tribunal holds that in allowing third country tertiary education (and the associated travel grants and other benefits) the Bank is not acting arbitrarily, unreasonably, or discriminatorily.

62. Where the child of an expatriate has received his secondary education in his home country, ordinarily he would have adequate access to tertiary education in his home country. He therefore does not labour under the disability (of access to home country tertiary education) which justifies compensation for third country tertiary education for an expatriate child educated in the duty station. It is true that a child receiving secondary education in the home country is, during that period, subject to a disadvantage; but for that the Bank allows compensatory benefits, and that disadvantage ceases when he completes his secondary education. What arises then is a new question: What should he be allowed home country, duty station or third country education? In relation to that question, he is similarly circumstanced to the non-expatriate child who, having received his secondary education in his home country, experiences no difficulty in access to home country tertiary education. To both, therefore, the rationale for allowing third country tertiary education does not apply. The fact that if the Bank nevertheless allows the expatriate child tertiary education in a third country, the Bank will not incur significant additional costs, makes no difference because the same consideration would apply in the case of the non-expatriate child.

63. The Tribunal holds that to that extent, the amendment to A.O. No. 3.06, effected by the BPMSD and BPCB memoranda of September 1994 was discriminatory. While the Bank may compensate for third country tertiary education, subject to third country limits (and associated travel grants and other benefits) for the child of an expatriate staff member who faces difficulties in being assimilated back into his home country tertiary education system because of a prolonged period of schooling at the duty station, it may not compensate for such education for

a child who does not face such difficulties. If, however, the Bank does allow that benefit, it must also allow it for non-expatriate children who have received secondary education in their home country.

### **Reimbursement Procedure**

64. The Applicants also complain about the procedure for reimbursement of education expenses for outside duty station schools at all levels. They contend that:

the Bank's actual practice is to merely impose a cap on the allowance which may be granted to [expatriate staff]. As a first category, a flat sixty-five (65%) percent of the school country limit can be claimed as a lump sum without any documentary evidence of expenses incurred or to be incurred. The only documentation required [even upon a random audit] is proof of enrollment. As a second category, the balance of thirty-five (35%) percent of the school country limit can be claimed for tuition and enrollment fees to the extent that the amount claimed does not exceed seventy-five (75%) percent of the actual expenditure on tuition and enrollment fees [R]eceipts for tuition and enrollment fees need not be furnished initially, subject, however, to a random audit which requires submission of proof of enrollment and proof of payment in the form of original receipts.

65. The Bank replies that that procedure was changed in September 1996; that an amount up to the equivalent of 65% of the school country limit is allowed, upon proof of enrollment, to cover board, lodging, etc; and that the balance 35% of that limit may be applied for to cover tuition and enrollment fees, but must be substantiated. The Bank states that, based on its previous administrative experience, on average, expenses incurred for board, lodging, etc., was equivalent to 65% of the school country limit, and therefore authorized a procedure by which a sum not exceeding that amount would be granted to staff upon proof of enrollment and certification that the information provided was true.

66. A.O. No. 3.06 provides for reimbursement only of 75% of educational expenses. The provisions of the memoranda of September 1994 and September 1996 may result in an expatriate receiving 75% of tuition and enrollment fees, as well as a flat allowance of 65% of the school country limit, even if that allowance exceeds 75% of his actual expenses for board, lodging, etc. Consequently, he may receive reimbursement in a sum exceeding 75% of total educational expenses. To that extent, those provisions are inconsistent with A.O. No. 3.06. The Bank's Administrative Orders and Circulars prevail over memoranda issued by BPMSD and other Departments, and accordingly the latter must be implemented so as to ensure compliance with the former. While convenience may justify an initial advance of 65% of the school country limit, yet, unless and until A.O. No. 3.06 is duly amended, the Bank must take appropriate steps to ensure that the grant does not exceed 75% of the staff members total expenses, and the school country limit.

67. Having regard to the fact that the average educational grant in 1995 was US\$8,184 per child, it is probable that if there were any such excess payments, they were both few in number and modest in amount. The Tribunal does not consider it equitable to direct the Bank to review payments for years prior to the education grant year 1997/98.

### **V. Home Leave Travel**

68. The Applicants contend that the actual, established, and long-standing practice of the Bank shows that it grants home leave travel benefits not in order to achieve its stated purpose of



helping the non-Filipino professional staff members to maintain their ties and links with the home culture, but on the contrary, as opportunities for rest and recreation:

First, the Bank allows its non-Filipino professional staff with spouses of different nationalities to use this benefit to visit the home country of the spouse. This defeats the very purpose of the home travel benefit;

Second, the Bank adopted procedures for the extension of the benefit with the least concern for the purpose thereof. The Bank initially required [tickets to be obtained] only from authorized travel agents. Later on, [it] allowed [the staff member] to nominate the desired travel agent. The Bank further liberalized the rule by directly paying cash lump-sum [to staff members], thereby surrendering whatever control the Bank had in monitoring [utilization];

Third, the Bank, as a matter of policy does not require submission of proof of stay in the home country although subject to a ten (10%) percent random audit for a specified limited period of time after travel;

Fourth, the Bank extends the benefits even to non-Filipino consultants who are engaged even for only a year and, thus, are not really detached from their home culture. [emphasis in original]

The Applicants conclude that home leave travel has been transformed into a general benefit available to expatriate staff on the mere pretext of their expatriate status, and effectively increases their remuneration and, thus, unfairly discriminates against the local professional staff.

69. The Bank - justifiably - submits that in granting this benefit it does not distinguish between Filipino and non-Filipino professional staff, but only between staff members whose duty station is outside their home country, and those whose duty station is in their home country.

70. The Bank contends that the benefit is not a payment for a periodic vacation or a holiday but is part of a philosophical approach to the employment of expatriates by international organizations which recognize that the health and effectiveness of such staff members derives in part from, and is sustained by, continued connection with their home countries and cultures and families. It further pleads that:

- a. the extension of the benefit to visit the spouse's home country [was] largely due to cultural and family considerations;
- b. it is rare for a consultant to be engaged for an initial period of more than twelve continuous months; and the Bank has exercised its discretion to allow home leave benefits to such consultants because "a person who is away from his or her home country for more than twelve continuous months is in danger of becoming detached from his or her home culture"; and
- c. the Bank has always exercised proper controls over the implementation of the benefit.

71. Clarifying the question of controls, the Bank refers to the provisions of Section 9 of A.O. No 3.05 which, during the period November 1993 to September 1996, required

- a. staff members electing the two-year and three-year options to submit proof of travel costs and expenses incurred, e.g., used airline tickets for the actual journey, and
- b. staff members availing of the 12-month and 18-month cash options to retain documents on travel costs and expenses including documents to prove travel to home country (e.g., used airline tickets, receipts, boarding passes and photocopies of relevant pages of passports indicating arrival and departure dates) for a period of three months during which the documents would be subject to a periodic random audit; twenty-five percent of expatriate staff were subject to random audits, and were liable to disciplinary action for failure to provide required evidence.

72. The Bank claims that that random audits were introduced in order to streamline procedure and reduce paperwork. However, the BPMSD memorandum of 30 September 1996 records that:

After a trial period of two years, it has been found that staff do not generally appreciate being subjected to an audit and many prefer to submit supporting documents as part of their original claim, instead of safekeeping these for presentation, when audited. In addition, the audit process turned out to be more time-consuming than anticipated taking into account the follow-up work that had to be done to resolve problematic cases.

Accordingly the Bank again changed its procedures, and now all staff members are required:

to submit proof of travel within three months of return from home leave. The Boarding Pass(es) or copies of the passport showing the departure/arrival stamps at both the Home country and Manila will be the primary documents to be submitted to substantiate travel. If these are not available, other documentary evidence evidencing travel to destination can also be accepted, other than airline tickets.

73. The Tribunal notes that the Applicants do not claim that home leave travel is in principle discriminatory, or that the frequency of travel and the amount of the allowances are excessive. Undoubtedly, staff members working outside their home country forgo the advantages of the frequent family, social and cultural contacts with their home country and community, which nationals working in their home country never cease to enjoy. Home leave, therefore, cannot be equated to an annual vacation, because its primary purpose is significantly different from a vacation, or mere rest and recreation. The Tribunal holds that the Bank was entitled in principle to take note of the loss of those advantages and to provide reasonable compensation for those disadvantages, inter alia, in order to recruit and retain staff with the highest standards of efficiency and technical competence. And in determining the amount of such compensation, the Bank was entitled to take note of the fact that a staff member on home leave would not only incur the expense of travel to his home country, but other expenses (e.g., accommodation and local travel) as well.

74. Turning to the amount of such compensation, arguably, the entitlement to travel every twelve of eighteen months, and the cash allowances, are quite generous. It may be contended, on the one hand, that travel once in two years and smaller allowances would have been adequate. On the other hand, it may be said that one short visit annually to the home country hardly compensates for a whole years deprivation of contact with family, friends and home culture, and that such deprivation cannot be measured in purely pecuniary terms. The amount of the benefit is therefore a matter of policy for the Bank. In considering whether the Bank had

acted arbitrarily or unreasonably, it is relevant to consider the cost of the benefit. As noted already (see para. 27 above), 596 staff members utilized 1,625 trips in 1995 (2.72 trips per staff member), at an average cost of US\$2,405 per trip (or US\$6,375 per staff member). In relation to the number of persons in a staff members household who are entitled to home leave travel, the benefit is not excessive in relation to the number of trips per staff member, the cost of such trips and a staff members average annual basic salary.

75. The dispute, then, is in regard to the exceptions and the manner of implementation.

76. Where the staff member and his spouse are not of the same nationality, difficult questions arise for the whole family: Should they maintain social and cultural contacts only with the staff members home country? Or with the spouses? Or with both? That is a decision which may reasonably be left to them. The Tribunal holds that the Bank was well within the spirit of the stated objective of the benefit when it allowed the alternative of home leave travel to the spouses home country, on condition that there was no additional cost to the Bank. Consultants too have the same need to maintain their ties and links with family, friends and home culture. Since a consultant can return to his home country at the end of his one-year engagement, the additional facility of home leave during that period places him in a more favourable position than a regular staff member entitled to home leave once in twelve months. On the other hand, a consultant may not be able to arrange for his immediate family to be with him at the duty station. The question is thus one of degree. While the Bank appears to have been generous, the Tribunal is unable, on the evidence, to say that the Bank was arbitrary, or unreasonable.

77. The Applicants assertion that the Bank does not require proof of travel to the home country is contradicted by the BPMSD memorandum of 30 September 1996 (para. 4(c)).

78. The Applicants complaint in regard to implementation appears to be based upon an apprehension that inadequate controls by the Bank will result in abuses by staff members remaining undetected. It was possible for a staff member to draw advances for travel, and not travel; or to travel elsewhere than to his home country; or to obtain unauthorized or secret discounts from travel agents. However, there is no evidence that there were significantly more abuses during the period before September 1996, or that the Bank had relaxed the controls which existed in 1994 in order to allow expatriates to take the cash advances without actually travelling.

79. Whatever shortcomings there might have been previously, the Tribunal holds that the BPMSD memorandum of 30 September 1996 made satisfactory provision for the implementation and control of the Home Leave Travel benefit.

## **VI. The Force Majeure Protection Program**

80. This program covers loss of and damage to staff members personal property, caused by riots, strikes and civil commotion, malicious damage (including acts whose aim is overthrowing the government by terrorism or violence), and confiscation, expropriation and nationalization, but not Acts of God (typhoons, floods, earthquakes and similar disasters) and burglary, housebreaking, theft, larceny, and nuclear contamination (A.O. 3.16, Section 3).

81. The Bank contends that this benefit is provided to expatriates:

in recognition of the fact that expatriates in any country are more vulnerable than local staff to loss and damage through force majeure events, other than so-called Acts of God

(e.g., natural disasters) and normal risks (e.g., burglary) which would be expected to be covered through normal insurance. They are exposed to additional risks resulting from the fact that they are posted outside their home country. In any event, the Bank's policy does not distinguish between Filipino staff members and non-Filipino staff members. [emphasis supplied]

In a letter dated 22 January 1997, the Bank explained that the program:

is a self-insured program of the Bank covering loss of or damage to staff property resulting from political risks such as coup d'etat, expropriation, or nationalization ... Since the risk of receiving claims is not very high, and it is difficult to quantify the risk, the auditors had advised the Bank that it need not set up a reserve for the program ... any claim will be paid from the Bank's ordinary capital resources .... [emphasis supplied]

82. The Applicants reply that the risks mentioned by the Bank, in its letter dated 22 January 1997, are risks which apply with equal persuasion to Filipino Professional Staff as well.

83. In its Rejoinder the Bank clarifies its position. It denies the relevance and materiality of the Applicants contention that local professional staff are exposed to the same risks, because:

the issue is not exposure to risks. Rather, the legitimate basis for such a protection program derives from the principle of State responsibility under the international law which distinguishes the treatment of aliens from the treatment of nationals. Under this principle of State responsibility, the State is responsible for any failure of the State to carry out international obligations of the State which cause[s] damage to the person or property of a foreigner in the territory of the State. The [Bank] as an international organization may make a claim in behalf of its injured staff and itself against the Host State for reparation for an injury to its staff [citing the Reparation for Injuries Case, 1949 ICJ Reports 174]. Accordingly, the [Bank] may legally design and implement such a protection program for expatriates who are not properly protected by the Host State, and are therefore more vulnerable than local professional staff for such losses and damages caused by force majeure events. To provide benefit programs carefully tailored to meet the needs of the staff who are at greatest risk, the [Bank] is required to draw reasonable distinctions based on perceived different levels of risk as well as capacity to recover losses and damages from such risks for local professional staff and for expatriate staff. [emphasis supplied]

84. The Bank goes on to argue that expatriates may be distinguished from local staff not only because of the protection accorded to aliens in a State under international law, but also because foreigners:

do not vote in the country where they work and lack other means to participate effectively in local political processes and cannot rely to the same degree as citizens of a country on the societal support structure available to such citizens. Since expatriate professional staff lack the ability to participate in local political processes, the risk of losses and the lack of political recourse to obtain reimbursement for such losses result in a greater risk for expatriate staff .... [emphasis supplied]

85. The Tribunal agrees that the Bank's policy does not distinguish between Filipino staff members and non-Filipino staff members, but between expatriate staff and staff working in their home country. The Tribunal has therefore to consider the two factors on which according to the pleadings that distinction is sought to be justified: the risk of loss and damage, and the capacity to recover such loss and damage.

86. It is not the Bank's position that only expatriates are exposed to the force majeure risks, and that locals are not; or that although both groups are exposed to risk, the former are exposed to a high risk while the latter are exposed only to negligible risk. Indeed, the Bank's contention is that even for expatriates the risk is not very high, and that they are more vulnerable. The Tribunal notes that in some situations, non-expatriates share those very characteristics (ethnic, religious or otherwise) which expose expatriates to risk.

87. In regard to the capacity to recover loss and damage, it is not the Bank's position that locals have remedies while expatriates have none; the Bank recognizes that it can make a claim on behalf of its expatriate staff. It is true that non-expatriate staff have remedies in their capacity as voters, which expatriates do not. On the other hand, expatriates have remedies through the States of which they are nationals, which non-expatriates do not. Thus both local and expatriate staff do have remedies, although they may differ in nature and efficacy. Indeed, the purpose of providing protection, in the nature of insurance, is precisely because existing legal remedies are inadequate or ineffective.

88. The Tribunal holds that, since the benefit does not consist of a fixed allowance, but is in the nature of insurance, the Bank's liability to make payments will vary proportionately to the levels of risk and the capacity to recover loss and damage. Thus, all professional staff must be considered to be similarly circumstanced, and force majeure protection should have been afforded to local staff as well.

## **VII. Severance Pay**

89. The Applicants contend that reducing severance pay by one-third, in the case of a staff member who remains in the duty station, actually singles out and discriminates against Filipino staff who are the ones who usually remain in the duty station after separation. Since the amount of severance pay is directly related to the length of service, they argue that severance pay is remuneration for loyal and dedicated service to the Bank, and that any reduction based on the place of retirement is discriminatory.

90. The Bank replies that the appearance that the reduction applies only to Filipino staff stems from the facts that the headquarters of the Bank is in the Philippines, and that a large number of Filipino staff serve the headquarters in Manila and continue to live in the Philippines after separation. However, in fact the deduction is applied uniformly to all staff regardless of nationality. Thus the deduction is applied to non-Filipino staff who choose to remain in the Philippines, but not to Filipino staff who re-settle elsewhere. The Bank submits further that the purpose of severance pay is not to reward service but to facilitate retirement; expatriates, and indeed all those who choose to re-settle outside their last duty station, face greater disruption and incur more expense than others.

91. The Applicants urge that even Filipinos who remain in the Philippines need help to meet the expenses for reintegration into the mainstream society from the privileged community of international civil servants; in particular, because they may avail of the Bank's rental subsidy

during their tenure of service only if they do not own a house in Metro Manila, and accordingly, they incur heavy expenditure on housing after retirement.

92. The Tribunal holds that severance pay although its amount is based on length of service is not a reward for service, but a payment towards the expenses of re-settlement; that it is a legitimate assumption that a staff member who resettles outside the duty station will incur greater expense than a colleague who remains in the duty station; and that it is not discriminatory to grant a smaller allowance to the latter.

93. Although the Applicants have succeeded only in part, the issues raised by them were important and their pleadings and submissions were of considerable assistance to the Tribunal. The Tribunal considers it equitable that they be awarded US\$4,000 on account of those costs.

**Decision:**

For the above reasons, the Tribunal unanimously:

- a. directs the Bank to extend the Force Majeure Protection Program to all professional staff members;
- b. directs the Bank to amend its Education Grants scheme, to eliminate the discrimination, in respect of the reimbursement of third country tertiary education, between the children of expatriate and non-expatriate professional staff members (as set out in paragraph 63);
- c. directs the Bank to take steps to ensure that the Education Grants paid to expatriate professional staff members do not exceed the stipulated limits;
- d. dismisses all the Applicants other claims;
- e. directs the Bank to pay the Applicants, collectively, costs in a sum of US\$4,000;
- f. allows Mr. Paul Chang's intervention, and declares him entitled to the same reliefs as the Applicants (other than costs) insofar as he is in the same position as the Applicants.