ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 111
(28 February 2018)

Ms. D
v.
Asian Development Bank
(No. 3)

Lakshmi Swaminathan, President
Gillian Triggs, Vice-President
Anne Trebilcock

1. This is a request by Ms. D of 18 June 2017 to reopen Decision No. 95 of 8 September 2011 and Decision No. 99 of 15 August 2012 of the Asian Development Bank Administrative Tribunal ("Tribunal"). Ms. D also asks the Tribunal to remove all restrictions on her engagement in any project administered by the Asian Development Bank ("ADB" or "the Bank") or on application for any Bank staff position. On receipt, the Tribunal treated Ms. D's submission as a Request to Reopen Decisions No. 95 and No. 99.

2. In Decision No. 95, the Tribunal found that proper procedures had been followed by the Bank in its decision not to confirm Ms. D's appointment on completion of her one-year probationary period. Her subsequent requests for "reconsideration" of Decision No. 95 and for an oral hearing were denied in Decision No. 99 on the ground that she had provided no fact which might have a decisive influence on the earlier judgment as required by Article XI of the Tribunal's Statute.

3. In the present proceedings, Ms. D asks the Tribunal to reopen the abovementioned Decisions, making two allegations. The first allegation is that untrue information was provided by her Country Director (CD), People's Republic of China Mission (PRCM), in his two Notes-to-File. The second allegation is that the Performance Development Plan (PDP) review procedures were not followed by her supervisor. Ms. D asks the Tribunal to contact the Task Managers in ADB Headquarters, with whom she had worked, for their testimony.

I. THE FACTS

4. On 27 April 2016, a firm, of which Ms. D was listed as one of its proposed team members, submitted a proposal to provide consulting services for an ADB study. Ms. D identified herself as a former staff member. According to the requirements of the Project Administration Instructions ("PAIs"), paragraph 44, the Applicant's name was referred to the Budget, Personnel and Management Systems Department ("BPMSD") for clearance. BPMSD did not confirm that Ms. D had "no performance issues" while working in ADB and so asked the Firm to replace her as a team member. On learning of this, Ms. D requested the Bank to "remove any restriction on [her] engagement in ADB's consulting work". On 3 August 2016, this request was denied by the Director Operations Services and Financial Management Department who informed Ms. D of the reasons for the Bank's decision and that the requirements of PAI 2.01 had been consistently applied.

Summary of Decision No. 95, 8 September 2011

5. In Decision No. 95 the Tribunal concluded that the Respondent had met the requirements of due process in evaluating the Applicant's performance at the end of her probationary period as set out in Administrative Order ("AO") 2.01, section 11. Accordingly, the Tribunal dismissed unanimously the Applicant's challenge to the Bank's decision not to confirm her employment as a National Officer of the ADB Resident Mission in China.

6. The Tribunal also held that the Applicant's own acknowledgement of her shortcomings provided in her comments on her six-month performance evaluation, dated 20 May 2009, demonstrated that her allegations of improper motive, arbitrariness and abuse of discretion on the part of her Supervisor and others were "*baseless and without merit*".

7. The Tribunal found that the Applicant had "*failed to adduce any persuasive evidence that the assessment of her performance by her Supervisor was "distorted" or tainted by his personal feelings towards her and instead is based on her work performance considerations."*

8. With respect to the Task Managers' assessment of her work, the Tribunal held that A.O. 2.01 "*already provides for a multi-layered review of the work of the probationer by a number of officers",* and that there is "*no provision for independent assessment under [AO 2.01]*". In any event, the Tribunal found "*the CD, PRCM, took into account the various e-mails and written communications from the Task Managers and other agencies she had submitted, while assessing her work."*

9. Under those circumstances, the Tribunal concluded that there was no merit in the Applicant's claim that proper procedures had not been followed, or that the decision was arbitrary, pre-motivated, unjustified or distorted.

Summary of Decision No. 99, 15 August 2012

10. On 17 March 2012, the Applicant made a request for review of Decision No 95 on two grounds. First, she alleged that the PDP review procedure was not followed by the CD, PRCM. Secondly, she alleged that the CD did not hold independent discussions with the three Task Managers who had worked with the Applicant.

11. Article XI paragraph 1 of the ADBAT Statute requires the Applicant to satisfy three conditions before a decision can be revised. There must be:

> *"…discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time of the judgment was delivered was unknown both to the Tribunal and to that party...".*

12. As the two grounds advanced by the Applicant for review of Decision No. 95 were essentially the same as those advanced earlier, the Tribunal, on 15 August 2012, denied the Applicant's request. There had been no 'discovery' of a fact that might have influenced the judgment, thus the conditions for review had not been met. The Tribunal concluded in Decision No. 99 that the "*Applicant essentially repeats the arguments already put forward before the*

Tribunal." The Tribunal also noted that, as all judgments of the Tribunal are final, any decision to review a prior decision is to be "*construed very strictly'*.

13. In her Application for a review of Decision No. 95, the Applicant had also asked the Tribunal to hold hearings and to "*call for all the Task Managers as well as the CD [PRCM] to testify"*, as she alleged they had never been contacted for assessment of her performance. The Tribunal denied this additional request as a "*logical consequence of not permitting a revision of the Decision*".

Relief prayed for by Ms. D:

14. In her third request in this matter, Ms. D asks the Tribunal to:

1. reopen her cases and review all evidence and facts to revise its decisions;
2. remove all restrictions on her including restrictions on her engagement in any ADB administered projects or application for any ADB staff position; and
3. make appropriate financial compensation for damage to her career and persistent mental suffering.

15. Ms. D also reiterates her request that an oral hearing be held.

16. The Tribunal gave the Bank 30 days to submit its response, including comments and observations on the issues raised by Ms. D regarding the restrictions on granting a consultancy assignment to former employees. On 6 September 2017, the Bank submitted its response, rejecting the request to reopen the Decisions, setting out its policies and processes for engaging former employees as ADB consultants, and describing how the process had been applied to Ms. D.

17. The Tribunal transmitted the Bank's response to Ms. D on 12 September 2017 and notified Ms. D that she had 30 days to submit a reply. Ms. D confirmed receipt of this advice on

13 September 2017, but has failed to submit a reply within the prescribed period. The matter was then submitted to the Tribunal for its decision.

II. CLARIFICATION OF THE ISSUES

18. The legal issues are:

1) Whether Ms. D's request to revise the Tribunal's Decisions No. 95 and No. 99 satisfies the conditions for revision in Article XI (1) of the Statute of the ADBAT as an exception to the rule that a judgment of the Tribunal "*shall be final and binding*".

2) Whether Ms. D has legal standing before the Tribunal to ask it to instruct the Bank to remove restrictions on her engagement as an ADB consultant or application for any ADB staff position and, if so, whether the Bank's policies in PAI 2.01 were correctly applied in Ms. D's circumstances.

III. SUMMARY OF THE PARTIES' CONTENTIONS

Ms. D's Contentions

Issue 1: Revision of Decision No. 95 and Decision No. 99

19. Ms. D seeks to reopen Tribunal Decisions Nos. 95 and 99 for the following reasons:

a) During her 2009 PDP, her CD "*provided a raft of untrue information in his two Notes-to-File ("NTF") including his lie that he had independent discussions with task managers."*

To redress this alleged failure of process, Ms. D requests "*the Tribunal to contact all task managers listed on my work plan to get their testimonies on this issue*." Ms. D notes that

she has requested the ADB to contact the task managers to ascertain the truth of the CD's statements "*from the very beginning of the Administrative Review in 2010. However, no action has ever been taken on this critical issue."*

b) Ms. D contends that the "*PDP form clearly indicates that the immediate supervisor who completed Sections 1&2 of PDP needs to explain his assessment to me. However, this never happened. … This clearly violated ADB's established PDP review procedure."* Accordingly, Ms. D requests "*the Tribunal to revisit the PDP review procedure to draw a fair conclusion in the interest of respecting the sanctity the organization's policy and procedure instead of in the interest of those who were abusing power and violating women's rights."*

Issue 2: Request for removal of restriction

20. Ms. D contends that she was forced to leave the Bank, not because of performance related issues, but because of her supervisor's *"improper motivations."* Ms. D states that she has been prohibited "*for many years"* from "*engaging in any consulting assignment administered by ADB"* and had attempted to discuss this with the Bank's senior management. Ms. D says she tried unsuccessfully to gain an intervention by the Bank's President. On 27 October 2016, Ms. D had an unscheduled meeting with the Vice President, Administration and Corporate Management ("VP"), asking that the employment restriction be lifted. The VP advised Ms. D that the Bank's established policy was not to engage former staff as consultants in circumstances where they had performance related issues.

The Bank's Response:

Issue 1: Revision of Decision No. 95 and Decision No. 99

21. The Bank submits that there is no legal basis to re-open Ms. D's case concerning her non-confirmation of appointment with the Bank, and that Ms. D's request should be declared inadmissible.

22. The Bank submits that Article IX of the ADBAT Statute provides that Tribunal judgments "*shall be final and binding*" and that the principle of *res judicata* of Tribunal judgments is well established. The Bank contends that any successful request for revision of a Tribunal decision must satisfy the three conditions set out in Article XI (1) of the ADBAT Statute. The Bank contends she failed to do this.

23. The Bank submits that the two reasons Ms. D has advanced to support her present request are the same grounds cited in her earlier 2012 request to revise Decision No. 95, that is, the provision of untrue information and a failure to follow the proper review procedures. The Bank observes that the 2012 request was dismissed unanimously by the Tribunal in Decision No. 99 because Ms. D had not satisfied the conditions specified in Article XI(1) of the ADBAT Statute. In short, Ms. D had failed to discover any fact that by its nature might have had a decisive influence on the judgment and that had been unknown either to her or to the Tribunal at the time of the judgment. Accordingly, the Bank contends that the present request should be denied on the same grounds.

Issue 2: Request for removal of restriction

24. With respect to the restrictions on engagement of consultants and staff, the Bank contends that PAI 2.01 was correctly applied to the request for a consulting assignment that included Ms. D as a member of the team.

25. The Bank explained that the framework for recruitment and supervision of consultants for ADB financed Technical Assistance grants and loans is set out in the PAIs. The PAIs include detailed policies on the recruitment of former ADB staff for consulting assignments and are available to the public on the Bank's website.

26. The purpose of PAI 2.01 is to prevent any actual or perceived conflict of interest by precluding former staff from working as consultants "*for consulting services that ADB administers within 1 year of their effective termination date"*, unless waived by the President of

the Bank. To guide the Bank's selection policy PAI 2.01, para. 3, sets out six principles: (i) consulting services should be of high quality; (ii) engagements should be economical and efficient; (iii) all eligible consultants should have an equal and fair opportunity to compete for assignments; (iv) ADB encourages developing and using consultants from developing member countries; (v) the selection process should be transparent; and (vi) transactions should be without corrupt, fraudulent, coercive or collusive practices.

27. In addition to the 'cooling off' period of a year, former employees must have a clearance from BPMSD before they are eligible for a consulting assignment. PAI No 2.01, para. 44, provides that:

> "*The Budget, Personnel, and Management Systems Department (BPMSD) clears proposals to engage former ADB staff for the first time as consultants for consulting services that ADB administers and in the case of former staff at director level and above, for each engagement. This occurs if: (i) the former staff was nominated by a first-ranked consulting firm in its technical proposal, or (ii) the former staff is proposed as an individual consultant for consulting services that ADB administers. The procedures to obtain clearance are as follows:*
>
> - *If the former staff position was below director level, the user unit refers the candidate's name to the Director, Human Resources Division (BPHR), who checks that they had no performance, disciplinary, or other related problem while working in ADB. ….:*

28. The Bank contends that the PAIs have been applied appropriately to Ms. D's circumstances and argues that:

> *"[i]n practice, former staff are considered to have "performance issues" if they were terminated for "unsatisfactory performance" or were not confirmed after the one year probationary period"* (para. 20) and *"[i]f BPMSD cannot confirm that the prospective*

consultant has "no performance issues", ADB will not further pursue the application." (para. 21).

29. The Bank submits that "*the policy on the non-recruitment of former staff members with performance, disciplinary or other related issues whilst at ADB has been in place for many years, and at least since 1993. Para. 44 of PAI 2.01 reflects a policy for managing the potential risks associated with allowing former staff with performance or disciplinary issues whilst at ADB, and considering that previous relationships may not act in ADB's best interests, or who may be disruptive or may act in a manner that has implications for ADB's reputation. …. ADB retains the prerogative to prescribe the terms and conditions of consultant selection and engagement*."

30. The Bank contends that, consistent with para. 44 of PAI 2.01, Ms. D's name was referred to BPMSD when she was proposed as a team member for a firm that had submitted a proposal to provide the Bank with consulting services. BPMSD was unable to establish that Ms. D had "*no performance issues*" while employed at the Bank as she was not confirmed at the end of her one-year probationary period. Accordingly, the Bank asked the firm to replace Ms. D.

31. For these reasons, the Bank says that the PAIs were applied correctly in the evaluation of the firm's proposal for a contract of work with the Bank and they were also correctly applied to the particular circumstances of Ms. D.

32. While the Bank has provided detailed information to show that the PAIs were applied correctly to exclude Ms. D from eligibility for a consulting assignment, it then contends, that, in any event, Ms. D does not have standing before the Tribunal. The Bank further contends that Ms. D lacks standing to request the Tribunal to rule in relation to any future application she might make for a consulting assignment.

33. The Bank points out that Ms. D does not satisfy the grounds for standing in Article II of the Tribunal's Statute. Article II provides that the Tribunal:

> *"shall hear and pass judgement 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. The expression 'contract of employment' and 'terms of employment' include all pertinent regulations and rules in force at the time of the alleged nonobservance…*" (art. II (1)).

34. The Bank contends that Ms. D has no standing before the Tribunal because her claim in respect of the application of the PAIs does not relate to non-observance of a 'contract of employment or terms of appointment' of a former staff member. This is because, the Bank contends, the PAIs did not form part of Ms. D's contract of employment or terms of appointment with the Bank. The Bank also contends that the PAIs are not "pertinent regulations or rules" applicable to her contract of employment or terms of appointment.

35. The Bank submits that the only possible claim governing Ms. D's contract of employment arises from the decision not to confirm her appointment at the end of the probationary period. On this issue, the Tribunal determined in Decision No. 95 that there was no merit in her claim that proper procedures had not been followed or that the decision was arbitrary, pre-motivated, unjustified or distorted. In these circumstances, the Bank contends, the PAIs did not form part of the relationship between the Bank and Ms. D. Accordingly, the Bank contends that Ms. D cannot meet the conditions for standing before the Tribunal set out by Article II.

36. The Bank points out, that to ensure clarity in the future, PAI 2.01 is now expressly part of a staff member's terms of appointment with the Bank. On 31 March 2017, the revised AO 2.02 includes a new provision, para. 4.19 (iv), that provides: "*Former staff may not work as consultants for consulting services that ADB administers, in accordance with, and within the periods indicated in, ADB's Project Administration Instructions 2.01*."

37. For present purposes, the Bank contends that the PAIs did not regulate or govern the employment relationship between the Bank and Ms. D (para. 32 and 33). Therefore, the Bank submits that the conditions for standing set out in Article II have not been satisfied by Ms. D.

Finally, the Bank contends that Ms. D has not exhausted all her remedies as required by Article II, section 3 of the Tribunal's Statute.

IV. FINDINGS

Issue 1: Revision of Decision No. 95 and Decision No. 99

38. The principles of finality and *res judicata* of Tribunal judgments are set out in the Tribunal's Statute and are well recognized by previous decisions of this Tribunal and other comparable international administrative tribunals.

39. Article IX (1) of the Statute provides that judgments of the Tribunal *"shall be final and binding"*. The possibility of revision of a decision has been permitted under Article XI as an exception to the principle of finality:

> *"...in the event of the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and [the requesting] party."*

40. In summary, Article XI requires an applicant to show:

(i) the discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal;
(ii) when the judgment was delivered, that fact was unknown both to the Tribunal and to the applicant; and
(iii) the request for revision has been made within six months after the applicant acquired knowledge of the fact.

41. The jurisprudence of the Tribunal has been consistent in declining to review its earlier judgments where the Applicant fails to meet the conditions set out in Article XI. In particular,

this Tribunal has refused a request for review where the applicant fails to adduce a new and relevant fact that was not known to either the Tribunal or applicant at the time of the judgment.

42. The Tribunal in Decision No. 99, para. 4 confirmed that Article XI:

> "*has to be construed very strictly (…). It is the party who requests the revision, i.e. the Applicant, who has the burden of proving that his or her request fulfills these conditions*." (Citing *Lim (No. 2),* Decision No. 81 [2007], VIII ADBAT Reports. See also, *Hua Du (No. 2)* Decision No. 102 [2013], IX ADBAT Reports, para. 7; *Kalyanaraman (No. 3),* Decision No. 100 [2013], IX ADBAT Reports, paras. 6 and 9).

43. The Tribunal has also observed that:

> *"[w]hat the Applicant is asking the Tribunal to do is to review its decision with which [the Applicant] is not satisfied, on the basis of the same facts and arguments, by alleging mistakes of law and mistakes in the appraisal of facts, which are not permissible grounds of review."* (See *de Alwis (No. 2),* Decision No. 66 [2004], VI ADBAT Reports p. 35, para. 17).

44. In *Lim (No. 2)* this Tribunal considered that:

> *"The general impression that one gets from the Application under consideration is that it is argumentative. The Applicant is questioning the decision of the Tribunal rather than pointing out any newly discovered facts which might influence the decision. Not only have no newly discovered facts been brought on the records but no date regarding the acquisition of such knowledge has been mentioned so that we might decide as to whether the Application has been filed within the prescribed time. On the merits of the case, it would be extremely inappropriate for the Tribunal to enter into an argument with the Applicant on matters already decided."* (See *Lim (No. 2) supra,* para. 5).

45. This approach is confirmed in the jurisprudence of other Tribunals, including the World Bank Administrative Tribunal (WBAT). In *Van Gent (No. 2)* the WBAT found that:

> *"No party to a dispute before the Tribunal may, therefore, bring his case back to the Tribunal for a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations. The Tribunal's judgment is meant to be the last step along the path of settling disputes arising between the Bank and the members of its staff."*
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> "*The limited powers of revision of a judgment authorized by Article XIII of the Statute cannot be used as a cover for a party to appeal what it considers an unfavorable or unsatisfying decision by the Tribunal."* (*Van Gent (No. 2),* Decision No. 13 [1983]**,** WBAT Reports, p. 7 paras. 21 and 29).

46. Ms. D essentially repeats the allegations that she has already made to the Tribunal in her application for review of Decision No. 95: that untrue information was provided by her CD that could be challenged successfully if oral evidence of her Task Managers were to be admitted; and that the PDP processes were not followed. In its Decision No. 95 and Decision No. 99, the Tribunal denied admission of additional oral evidence on the ground that Bank officials had properly considered other relevant evidence and material. In Decision No. 95, the Tribunal found that the Bank had conducted its PDP processes properly. As the Applicant had not produced any fact unknown to the Tribunal or the Applicant at the time of the judgment in Decision No. 95, that by its nature might have had a decisive influence on that judgment, the request for revision was denied in Decision No. 99.

47. For the purposes of the present request, Ms. D has again failed to satisfy the conditions for revision under Article XI. The Tribunal's reasons in Decision No. 99 for declining her request to review Decision No. 95 are replicated in this, her third, recourse to the Tribunal.

48. In this request, Ms. D has repeated her request for oral testimony to be taken from her Task Managers, a request that was made in her Application leading to Decision No. 99. As the

Tribunal notes in Decision No. 99, the Applicant admits that she had requested the ADB to contact the Task Managers *"from the very beginning of the Administrative Review in 2010. However, no action has ever been taken'.* In that case, the Applicant conceded that she had made her request to the Bank from before her first Application in 2011. In this case, Ms. D's request for oral testimony should be denied by this Tribunal for the same reason; she has repeatedly made a request for an oral hearing and it has twice been denied by the Tribunal. Ms. D's request will be denied a third time because judgments of the Tribunal are final and binding and can be revised only if a fact is discovered that might decisively influence the earlier judgments. No such fact has been adduced by Ms. D.

49. The Tribunal also observed in Decision No. 99, with respect to admission of a voice recording, that the Applicant *"cannot seek to introduce this as a new fact since she has acknowledged 'I have kept the voice recording on this meeting'"*. The purported new fact was thus in her possession well before her original Application was made.

50. For these reasons, Ms. D has failed to meet the conditions set by Article XI because she has not produced any fact, that was unknown to her or the Tribunal at the time of the judgments in Decision No. 95 and Decision No. 99, that might decisively influence the outcomes of those judgements. This conclusion is consistent with the fundamental principle of the rule of law which is that of the finality of judgments. It is in the public interest to have certainty in law and judgments of the Tribunal are subject to revision only if other legal conditions are fulfilled. Additionally, the Tribunal agrees with the World Bank Administrative Tribunal in *Van Gent (No. 2) supra* that the power of revision under Article XI cannot be used as a cover for an unsatisfied litigant.

51. The logical consequence of denying Ms. D's request to reopen Decisions No. 95 and No. 99 is that Ms. D's request for an oral hearing must be denied as well.

Issue 2: Request for removal of restrictions

52. The second question for determination is whether Ms. D has standing before this Tribunal to request it to order removal of restrictions on her eligibility to apply for future work as a consultant or staff member with the Bank. The answer turns upon whether PAI 2.01 forms part of Ms. D's terms of employment or appointment under Article II of the Tribunal Statute. Article II provides that:

> *1. The Tribunal shall 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. The expressions "contract of employment" and "terms of appointment" include all pertinent regulations and rules in force at the time of alleged nonobservance, including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff.*
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> *2. For the purpose of this statute, the expression "member of the staff" means any current or former member of the Bank staff who holds or has held a regular appointment or a fixed-term appointment of two years or more, any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death, and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan or any staff benefit plan provided by the Bank.*

53. The Bank contends that, not only were the PAIs correctly applied to the firm's application and the eligibility of Ms. D to participate in it, but also that Ms. D has no standing to request the Tribunal to require the Bank not to apply the PAIs to her in the future. The Bank contends that the PAIs did not form part of the employment relationship between Ms. D and the Bank. Ms. D has made no submission on the question of standing.

54. It is notable also that Article II (1) of the Tribunal Statute states that the contract of employment or terms of appointment include *'pertinent regulations and rules in force at the time*

of the alleged nonobservance, including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff'.

55. A key question for the Tribunal is whether Ms. D's contract of employment included the PAIs. The Bank contends it did not. In light of the inclusion of regulations and rules within the contract of employment under Article II (1), the Tribunal concludes that the PAIs do form part of Ms. D's contract of employment.

56. This conclusion is supported by the analysis of the World Bank Administrative Tribunal (WBAT), in its case *de Merode*, WBAT Decision No. 1 (1981). The WBAT considered, at para. 18, that a staff member's individual letter of appointment represents but one element of the conditions governing the employment relationship between the Bank and the staff member:

> *[T]he fact that the Bank's employees enter its service on the basis of an exchange of letters does not mean that these contractual instruments contain an exhaustive statement of all relevant rights and duties. . . . The contract may be the sine qua non of the relationships, but it remains no more than one of a number of elements which collectively establish the ensemble of conditions of employment operative between the Bank and its staff members.*

57. The WBAT identified the "ensemble" of conditions of employment as comprising the Bank's written law, and, with certain limitations, the practice of the organization and general principles of law. The WBAT emphasized:

> *[T]he legal basis for the application to each employee of rules outside his own "contract" stricto sensu does not rest on those terms of the letter of appointment and the letter of acceptance which provide that the appointment is "subject to the conditions of employment of the Bank" and which mention specifically the Bank's policy in respect to dependency allowance, benefits, retirement, insurance, etc. True, one might say that, in accepting the appointment "offered" by the Bank, the staff member at the same time "accepted" as a whole the relevant rules and policies. The applicability of these to the*

> *employee is, however, the consequence of their objective existence as part of the legal system to which the staff member becomes subject by entering into a contract with the organization.* (Id., para. 29).

58. The Tribunal concludes that Ms. D's contract of employment is not confined to the '*four corners'* of her contract, and that the PAIs formed part of the '*ensemble of conditions*' that comprised the relationship between Ms. D and the Bank.

59. The next question is whether the PAIs have been applied correctly to Ms. D. The Bank has provided a detailed description of the PAIs contending they were applied correctly to Ms. D.

60. Ms. D contends to the contrary that she did not have a '*performance related issue'* that would render her ineligible for a consultant assignment with the Bank. Rather, she alleges she was forced to leave the Bank because of her Supervisor's *"improper motivations"*. In Decision No. 95, the Tribunal definitively rejected this assertion, finding that her allegations of improper motive, arbitrariness and abuse of discretion were "*baseless and without merit*". Ms. D has submitted no further contentions on the question whether the PAIs were applied correctly to her. Accordingly, the Tribunal finds that there is no basis on which to challenge the application of the PAIs to Ms. D's circumstances.

DECISION

For the above reasons, the Tribunal unanimously decides to:

1. dismiss Ms. D's request to revise Decisions No. 95 and No. 99;
2. conclude that Ms. D has standing under the Tribunal's Statute in relation to the application of the PAIs, but that they have been applied correctly;
3. deny Ms. D's request to have her employment and consultancy restrictions with the Bank removed; and
4. deny Ms. D's requests for relief.

Lakshmi Swaminathan

_____/s/_____
President

Gillian Triggs

_____/s/_____
Vice President

Anne Trebilcock

_____/s/_____
Member

Attest:

Cesar L. Villanueva

_____/s/_____
Executive Secretary

At Asian Development Bank Headquarters, 28 February 2018