**ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL**

**Decision No. 117**
(2 October 2018)

Mr. K
v.
Asian Development Bank

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

1. The Applicant seeks relief against the decision of 20 October 2017 taken by the President of the Asian Development Bank ("ADB" or "the Bank") denying his appeal against the decision to impose sanctions upon him, including dismissal, for having engaged in misconduct. The Applicant seeks reversal of that decision, or alternatively payment of separation pay, as well as moral damages, actual damages, regular visitor access to the ADB premises, "other relief deemed just and equitable under the circumstances," and reimbursement of legal consultation fees and other costs. Three cases which have features in common with the present Application were considered at the same session as the present one and examined separately on their own merits (see Ms. *J v ADB,* Decision No. 116, Ms. *L v ADB,* Decision No. 118, and Ms. *M v ADB,* Decision No. 119).

## I. THE FACTS

### Background

2. The Applicant joined the Office of the Auditor General ("OAG") of the Bank in 2007. In November 2011, he was promoted in that office to Senior Audit Officer, a national staff position, known as NS3, which qualified him for the privilege of purchasing a tax-exempt vehicle ("TEV"). Imposition of sanctions on the Applicant followed a Bank investigation into a scheme involving importation of tax-free vehicles. The finding of misconduct was based on a conclusion of the

Office of Anti-Corruption and Integrity ("OAI") that the Applicant had availed himself of the privilege of purchasing a TEV through fraudulent practices by misrepresenting that his purchase was within the tax-exempt limit.

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

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

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

a) Section 8 of the Staff Regulations, which recalls that the privileges granted to the Bank are in its interest, and not for the personal benefit of staff, and provides that they *"furnish no excuse to the staff members who enjoy them for non-performance of their private obligations";*

b) Administrative Order 2.02 on the Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members, dated 20 September 2011,[1] which sets out, under General Principles of Conduct, the expectations of staff members in relation to the privileges they enjoy under agreements entered into between the Bank and governments of ADB member States. Para. 4.3(i) provides that staff members *"shall avoid any action … which may reflect unfavorably upon their position as employees of an international organization."* Para. 4.3(ii) recalls that privileges enjoyed by staff under agreements

[1] This was replaced by later versions, in particular the current Code of Conduct contained in AO 2.02 of 31 March 2017.

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

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

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

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

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

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

8. The OAIS-LM would normally send the staff the RFEMV, a one-page form which included the "shipment value" of the vehicle, instructing him/her to return it to OAIS-LM for preparation of the Pre-Clearance Request to DFA. The covering email from OAIS-LM stated, *"Please make sure that the actual/official invoice of the car does not exceed the US $24,000 limit, otherwise filing of free entry request with DFA will be delayed."* In this particular case, no evidence was presented that the Applicant received such an email.

*Abuse of TEV privilege scheme uncovered by OAI*

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

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

11. The investigation found that both AAA and its representative had engaged in fraudulent practices. The OAI investigation concluded that the scheme was far-reaching, involving 33 Senior NS. The scheme had operated for more than six years before being investigated. As a result of the investigation, both AAA and "Ms. S" were subjected to sanctions publicized by the Bank.

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

*The Applicant's vehicle purchase and the OAI investigation into it*

13. After becoming eligible to benefit from the TEV privilege, the Applicant first inquired into prices of vehicles with one authorized importer of foreign-made vehicles, which informed him that several BMW models that he had identified all cost over the limit. He then consulted the TEV guidelines for NS3-NS6 and asked for a copy of the DFA Memo of 18 September 1997, receiving it from an OAIS-LM administrator (referred to as "Ms. C") on 29 March 2012. According to his Application, he concluded that, *"If the US$24,000.00 limit was to include the value of the options, accessories, freight and insurance, the US$24,000.00 limit is too low as to enable a qualified officer to purchase his desired vehicle under the ADB TEV Entitlement."* The Applicant also stated that a colleague who had used the TEV program referred him to Ms. S of the AAA car dealership. On 1 June 2012, Ms. S emailed the Applicant quotation for his chosen vehicle showing a "base cost" of EUR 18,800 and a "total price" of EUR 23,311. The Applicant claimed that Ms. S had confirmed his understanding that the car value entitlement limit covered only the base cost. Ms. S

sent him a revised quotation showing the total price as EUR 24,034.13, which however did not reflect a standard deduction of EUR 1000; on 14 June 2012, the Applicant paid the required 10 percent deposit to the car company abroad, thereby placing the order. After submitting the Request to Import a Tax-Exempt Vehicle, the Applicant received the order confirmation by email from Ms S on 20 June 2012; it showed the "base cost" as EUR 18,800.00 and the "total price" as EUR 23,015.13 (approximately USD 27,618.16). According to his Application, he printed the order confirmation, signed it and personally submitted it to Ms S. In mid-July, he paid the balance due on the vehicle.

14. Ms. S then prepared a fraudulent invoice for submission to OAIS-LM which showed the vehicle purchase amount as EUR 19,821.59, or USD 23,785.91. The OAIS-LM stamped the receipt of the fraudulent invoice, showing this USD total, on 25 July 2012. The RFEMV submitted to the DFA for this vehicle indicated a "shipment value" of USD 23,785.91 (RFEMV dated 15 August, received by DFA on 23 August 2012).

15. The Applicant's notations on his copy of the OAIS-LM fact sheet indicated that he had closely tracked the purchase and clearance procedure, checking off the steps as each was completed. However, in the investigation and in his Application he maintained that he had seen the fraudulent invoice, which he said had been part of a batch of papers shoved under his office door, only upon his return to the office from mission on 21 August 2012, and that he had not read the material at the time. On 27 August 2012, he was copied on an email sent by Ms. C of OAIS-LM, which attached the fraudulent invoice and stated, *"Hi, Lot, free entry request for filing at DOF tomorrow, please follow-up approval and update us of the status."* This email, sent by Ms. C from her Bank email account, had been addressed to "Lot" at a private email address rather than to a finance ministry address. The vehicle was imported using the TEV in September 2012, on the basis of the fraudulent invoice, a copy of which the Applicant had received after paying for the car in full.

16. On 11 December 2015, the OAI commenced investigations in relation to the allegation of the Applicant's possible integrity violation under the ADB's Anticorruption Policy and IPGs, and

of misconduct under AO 2.04. Following an interview on 14 December 2015, the OAI reported that the Applicant had stated the following sequence of events leading up to the importation of the vehicle in 2012:

a) he purchased his vehicle through Ms. S of the AAA firm;

b) he was aware of the USD 24,000 TEV limit from the beginning;

c) he conducted his own due diligence with OAIS-LM about the TEV limit before purchasing the TEV. On his request, a staff member from OAIS-LM had provided the Applicant with the 18 September 1997 DFA memorandum. The Applicant independently interpreted the TEV limitation as covering only the "base cost" of the car after reading the memorandum because, he said, it was "ambiguous" and did not define the "car value"; several national staff had purchased the same model, and therefore he assumed that it must be permitted; the TEV limit was "unreasonably low" if it were interpreted to refer to the total price of the car after considering inflation; and if his interpretation was wrong then the approval process would not have allowed his TEV importation. Therefore, he assumed the word "price" referred to "base price" of the car, excluding options, accessories, freight and insurance;

d) his understanding was confirmed by the vehicle dealer's agent, Ms. S;

e) he stated that he relied on the Bank's approval process and that he would have been informed by the Bank if the TEV importation was disapproved;

f) he did not verify his interpretation with OAIS-LM;

g) he was aware that the total payments he had made exceeded the TEV limit;

h) he believed he was still in compliance with the TEV limit because the limit applied only to the "base cost" of the car, excluding options, accessories, freight and insurance;

i) he was aware of the fraudulent invoice but had not noticed the price difference and he had not received the genuine invoice;

j) he had the impression that Ms. S was compliant because she had told him that some options cannot be availed of because this would exceed the limit.

17. The Applicant also provided investigators a number of documents, such as emails and bank records relating to his vehicle purchase, without objecting to their disclosure.

18. On 1 April 2016, at the conclusion of the investigation, the Applicant was provided the opportunity to comment on the draft OAI Report. He provided his comments on 11 April 2016, and they were taken into account in the final version.

*OAI Report*

19. On the basis of its investigation, the 18 April 2016 OAI Report found a preponderance of evidence that it was more probable than not that the Applicant had engaged in a fraudulent practice by his awareness of the discrepancy in the price paid for the TEV and the price shown on the fraudulent invoice, submitted on his behalf by AAA. The Applicant had misrepresented the values of the vehicle he had bought so as to knowingly and recklessly mislead ADB and subsequently the Philippine authorities to obtain the tax exemption for his vehicle importation. The OAI Report stated, *"it is not credible that the [Applicant] understood the TEV limit to cover the 'base price' [excluding options, accessories, freight and insurance] only."* It concluded that these actions amounted to a fraudulent practice as defined under section 2A of the Integrity Principles and Guidelines (IPG) and to misconduct under para. 2.1(d) of AO 2.04 regarding abuse or misuse of privileges accorded to staff.

**Disciplinary proceedings**

*Formal disciplinary proceedings*

20. On 7 June 2016 the Respondent initiated disciplinary proceedings against the Applicant, who received notification of this on 21 June 2016. The Applicant was charged with violations of several provisions: section 8 of the Staff Regulations, paras. 4.3(i), 4.3 (ii) and 4.8 (vi) of AO 2.02, and section 2A of the IPG, each cited in paragraph 4 of this judgment.

21. Staff of the Budget, Personnel and Management Systems Department ("BPMSD") held meetings with the Applicant and took submissions in relation to the formal disciplinary proceedings. The Bank noted in the notification that the charges against him were "especially

serious" considering the Applicant's position as a high-level officer in the Office of the Auditor General, which entrusted him with sensitive fiduciary responsibilities and necessitated high levels of trust. He was informed that the charge might warrant the imposition of dismissal. On 5 July 2016, the Applicant submitted a reply to the charge memo, denying the allegations in the OAI Report. He stated that he had acted in good faith and there was no malicious intent to defraud.

22. On 25 July 2016, a meeting was held between the Applicant, the Principal HR Specialist (Legal), and another ADB officer at the Applicant's request. The Applicant again denied the allegations, emphasized that he relied on the "system" and the "presumed regularity of the procedure," and asserted his good faith.

*Submission of legal opinion by the Applicant*

23. Next, the Applicant submitted to the Bank a legal opinion he had requested from a private law firm, dated 3 August 2016. The opinion took into account the relevant provisions of the HQA and the pertinent Memoranda, and as well the FAQ of the Philippine Bureau of Customs, on its website, regarding the import of vehicles. This was cited as referring to "the book value" as the tax basis for imported vehicles. According to the opinion, the "book value" excludes accessories, while the "dutiable value" includes the cost of insurance and freight. The legal opinion pointed out that the term "car value entitlement" in ADB documents was not defined. It suggested that under a principle of legal interpretation ambiguous terms are to be construed against the party having caused the ambiguity, and that the Applicant's interpretation should not be taken against him.

*Disciplinary measure imposed*

24. After reviewing the OAI Report, the Applicant's comments and written responses, the Director General, BPMSD sent a 15 September 2016 memorandum to the President recommending imposition of the following disciplinary measures on the Applicant:

a) dismissal for misconduct with immediate effect;

b) in the event that a tax liability for the TEV is later discovered or determined that requires ADB to address such liabilities, ADB reserves the right to recover the amount from the Applicant;

c) permanent ineligibility to work as a consultant or contractual employee employed by ADB or any ADB-financed activity; and

d) access to ADB premises only allowed with prior approval of Director, Human Resources Business Partners Division (known as BPHP).

25. The President adopted these recommendations.

**The Applicant is dismissed for misconduct**

*Notice of disciplinary measure*

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

**Appeals Committee**

*Appeals Committee Report*

27. On 20 October 2016, the Applicant lodged an appeal of the decision directly with the Appeals Committee ("AC") under AO 2.06 of 19 February 2013 on Administrative Review and Appeal Procedures (prior administrative review not being required for disciplinary measure cases). The AC, pursuant to AO 2.06 para. 13.2, which permits it to consider appeals jointly *"if they will concern the same subject matter",* examined his appeal together with three other appeals on the same subject.

28. On 30 October 2017, the Applicant received a copy of the decision of the President rejecting the appeal (No. 3b of 2016), together with the Report and Recommendation of the Appeals Committee (which was dated 11 October 2017 and had been sent on 25 October 2017 to the Applicant, who received it on 30 October 2017). The report revealed that the AC had requested additional documentation from the Bank, first in February 2017 and again in May 2017. According to the AC report, the last information it received was a memorandum from BPMSD on 26 May 2017, following the AC's request of 23 May 2017. When submitting the report to the President, the Chairperson of the Appeals Committee wrote, "*Due to the intricacies of the case, which required request for additional information, the very substantial amount of submitted documentation, and the amount of time necessary to consider this case, the Appeals Committee regrettably submits the attached reports longer than the foreseen 90 day-timeframe indicated in AO 2.06"*. Between the filing of the appeal and the submission of the AC report to the President almost one year had elapsed.

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

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

decision was not an abuse of discretion or discriminatory, and that the measures were proportionate to the seriousness of the misconduct.

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

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

33. On 20 October 2017, the President signed off on the AC's recommendations, thereby adopting them, without comment. The Applicant was informed of the decision to reject his appeal when he received notification on 30 October 2017.

34. While the appeal was pending before the AC, the Applicant received an Order of Payment for taxes owed on his vehicle. He paid the amount due in March 2017.

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

35. On 29 January 2018 the Applicant brought this Application to the Tribunal. The Applicant seeks:

a) reversal of the decision of the President of ADB imposing the sanctions, including dismissal for misconduct;

b) payment of separation pay in an amount equivalent to five (5) times the Applicant's annual salary;

c) regular visitor access to the ADB;

d) a declaration that he is free of any liability for taxes and duties with respect of the TEV importation;

e) payment of moral damages for loss of employment opportunities, sleepless nights, anxiety, mental anguish, besmirched reputation and social humiliation and the ill effect on his health because of this case, in an amount equivalent to five times the Applicant's annual salary;

f) payment of actual damages by way of reimbursement of legal consultation fees and other costs, including increased insurance and health policy premiums; and

g) other relief deemed just and equitable under the premises.

36. The Respondent filed its Answer on 2 April 2018. The Applicant's Reply was submitted on 18 May 2018, and the Respondent's Rejoinder on 19 June 2018. The Respondent maintains that the Application is without merit and should be dismissed, and that the Applicant is not entitled to any relief.

*Tribunal's request for additional information*

37. On 11 July 2018, following its consideration of the views of the parties and under Rules 10(1) and 11 of the Rules of Procedure of the ADB Administrative Tribunal,[2] the Tribunal sent the Respondent a "Request for Additional Information" in relation to other ADB staff mentioned in the Appeals Committee Report who had also been sanctioned. The information requested included a) position held; b) number of years of employment in the Bank; c) the number of vehicles purchased; and d) the penalties imposed upon the individual. On 16 July 2018, in response to the

[2] Rule 10(1) provides that "[i]n exceptional cases, the President [of the Tribunal] may, on his or her own initiative, or at the request of either party, call upon the parties to submit additional written statements or additional documents within a period which he or she shall fix. …" Under Rule 11, this may be required after the case has been listed.

Tribunal's request, the Bank submitted the information and requested that the Tribunal review the information *in camera*. The Applicant was provided a redacted version of the information. On 20 July 2018, Applicant's counsel commented on the additional information submitted by the Respondent.

38. At the conclusion of its session on 21 July 2018, the Tribunal decided it was necessary to seek additional information and views of the parties and requested additional information from the Bank in relation to the other 21 individuals referred to in paragraph 47 of the Respondent's Answer, covering the OAI investigation of the fraudulent TEV purchase and import scheme. The Tribunal directed the Bank to provide similar details for these individuals as for its 11 July request regarding the original 12, in a consolidated manner for all 33. Additionally, the Tribunal asked the Bank to furnish *in camera* any information on action taken by it regarding management and individual accountability of those officers responsible for processing the TEV privilege during the time of the fraudulent scheme. The Tribunal also asked the Bank to provide a copy of the final OAI Report covering AAA. On 2 August 2018, the Bank provided this information to the Tribunal along with a request that the Tribunal conduct its review *in camera*. Redacted versions of the documents were provided to the Applicant. The information showed that in relation to the 33 individuals, the Respondent had decided to:

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

39. Within the entire group, three staff members were found to have "engaged in obstructive practice"; of these, one was dismissed and two were demoted with a five percent salary reduction. Of those staff who had not retired, seven were designated as being in a position of trust, of whom

four were dismissed and three received a "mitigated sanction as a result of staff's cooperation" of demotion by one level with ten percent salary reduction.

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

40. In the 20 July 2018 correspondence from the Applicant's counsel, the Applicant submitted comments on the additional information provided by the Respondent on 16 July 2018. The Applicant's counsel noted that although the Respondent had alleged that the OAI had prioritized staff in positions of trust, there were other employees from the Treasury Department and the Controller's Department who were not investigated or sanctioned at the same time as the Applicant. The Applicant's counsel also objected to the Respondent's use and categorization of individuals holding a *"position of trust"*. The Applicant's counsel asserted that the Respondent's definition of "*position of trust*" is "*arbitrary"* and furthermore, *"all senior national officers are presumed to have sensitive fiduciary responsibilities. Thus, there is no need to further distinguish the senior national officers."* Counsel also contested the mitigating factors used and asked what was meant by "*consistently cooperated*" given that the Applicant *"cooperated during OAI investigations and voluntarily provided relevant information to Respondent Bank."* Counsel also contested using taking "*responsibility for his/her wrongful actions*" as a mitigating factor as it discourages staff from using all legal remedies available and that the *"Applicant would never take responsibility for the alleged falsification or misconduct."*

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

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

43. The Respondent also, while maintaining that its processes and procedures were not deficient such that it bears *"any responsibility for the actions of the Applicants",* explained to the Tribunal that is had approved *"several actions which were aimed at tightening the controls on the administration of the TEV privilege in order to minimize the risk of similar fraudulent acts occurring."* Those actions included transferring the responsibility for all processing and administration of the TEV privilege from OAIS-LM to the Bank's "Government Relations" section and revising processing procedures so that staff are now to submit all documents themselves.

44. On 10 August 2018, the Applicant, through his counsel, submitted his comments on the Respondent's consolidated information dated 2 August 2018. The Applicant noted that the additional information *"clearly proved undue bias and prejudice against Applicant resulting in discriminatory imposition of discipinary measure against Applicant".* One of the examples noted was that of the three individuals in positions of trust who were only demoted rather than dismissed, only two were noted by the Respondent as having "cooperated". Another example was that of three individuals who were noted by the Respondent to have engaged in "obstructive practices", none had been dismissed.

## II. FINDINGS

### Preliminary matters

*a. Confidentiality request*

45. The Applicant requests, pursuant to Practice Direction No. 3 (19 August 2005) of the Practice Directions of the ADBAT, confidentiality of his name, position, and department. The Bank opposes this.

46. The Tribunal's Practice Direction No. 3 provides for confidentiality only in relation to the Applicant's own name, or the name of any of his or her witnesses or any person cited in the pleadings. This Direction does not mention position or Department. As the Bank correctly notes, certain information about the Applicant's position in the Bank is central to aspects of the impugned decision. Taking all of the circumstances into account, the Tribunal takes the view that the Applicant's request for confidentiality with respect to his name, as well as the name of any persons cited in the pleadings, should be granted. However, since the department in which the Applicant served and the position he held were elements considered by the Bank when imposing sanctions upon him, and as the Applicant has challenged the proportionality of those sanctions and alleged discrimination, this aspect of his request is denied.

*b. En banc*

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

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

48. In his Reply, citing Rule 10 of the Rules of the ADBAT, the Applicant requested his review of documents which he maintains would show that he did not directly or indirectly participate in the alleged fraudulent acts and would prove that he was "discriminately charged of misconduct". Specifically, he has requested documents that were referred to in the Bank's Answer to his Application:

a) the report of irregularities by OAIS-LM to OAI leading to the investigation of the AAA car sales firm;

b) the result of the OAI investigation involving AAA;

c) documents provided by AAA that uncovered the misrepresented values of the TEV;

d) written explanations and statements made by staff interviewed by OAI regarding the TEV fraudulent scheme;

e) the written statement made by AAA's representative regarding the use of fraudulent and genuine invoices; and

f) the result of the investigation of other Senior NS (each of 33 individuals) who were "likewise implicated".

49. In its Rejoinder, the Bank asserted that such documents are not relevant to the inquiry presently before the Tribunal, arguing that the Applicant has failed to explain how the evidence on the record, which established a *prima facie* case, was insufficient to sustain the finding that he had committed misconduct.

50. The Tribunal notes that para. 9 of AO 2.04 on Disciplinary Measures and Procedures of 9 September 2010, applicable at the time, provides for restricted access to non-public information obtained during an investigation. This would preclude divulgence of the explanations and statements made by staff and of AAA's representative to the OAI investigators, and the report of irregularities to the OAI. Similarly, para. 8.1 of AO 2.04 states that only the President, General Counsel, Director General BPMSD and the Director of BPHR, or persons designated by one of them, may examine the investigative reports. Such reports would include documents and

statements underlying the report, as well as conclusions regarding other individuals. As part of the rules governing the Applicant's contract of employment with the Bank, the cited provisions of AO 2.04 provided the justification for the Respondent not to furnish him with copies of the information requested.

51. The Tribunal is empowered, under ADBAT Rules 10 and 11, to require a party to submit documents or evidence that might be pertinent to the issues posed when it considers this necessary for the proper examination of an application. The Tribunal obtained information from the Bank concerning individuals, other than the Applicant, who were also disciplined in relation to the fraudulent scheme up to February 2017. This was the time when the Appeals Committee obtained the information, as stated in its report concerning the Applicant's conduct. The Tribunal has also obtained, for its *in camera* review, information regarding the other individuals sanctioned, a copy of OAI's Report into AAA and its representative, and the Bank's institutional learnings and measures taken after the uncovering of the TEV privilege scheme. The Tribunal sought this information in order to examine the Applicant's claims of discrimination and disproportionality of the sanctions imposed upon him.

52. The Applicant also maintained in his Reply that the documents were needed in order to bolster his claim that he had no knowledge of and did not participate in the alleged fraud. The Tribunal does not see, however, how provision of such information could successfully rebut the existence of other evidence establishing a *prima facie* case of his misconduct, as discussed below.

**The Merits**

53. In the present case, the Applicant argued that the President erred in accepting the conclusion that the Bank had followed proper procedures, questioned the correctness of the Bank's application of the relevant ADB Administrative Orders, and alleged abuse of discretion, discrimination and imposition of disciplinary measures that were disproportionate to the seriousness of the misconduct. The Bank takes the opposite view.

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

54. The Tribunal's scope of review of an Application is settled:

> *…The Tribunal … can only say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed. [Lindsey,* Decision No. 1, [1992], I ADBAT Reports 5, para 12].

55. In disciplinary cases, the Tribunal examines:

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

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

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

*Allegations regarding due process*

57. The Applicant has raised several issues related to alleged violations of due process. First, he complains that the Bank made a recommendation before completing the investigation of the AAA agent, of the AAA firm itself, and of "all 30" ADB officers who were the subject of investigation. He also critiqued the OAI report for being incomplete due to its failure to consider *"the apparent breakdowns in OAIS-LM's critical processes related to TEV importation."* He also reproached BPMSD for declaring the legal opinion he had obtained from a private law firm to be "not relevant" and saw this as a failure to observe due process. For its part, the Bank argued that the Applicant was given a "meaningful opportunity to explain himself and to provide evidence in support of his defense" in both the investigation and the disciplinary proceedings.

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

(i) Conduct of the OAI investigation

*(a) Failure to interview witnesses*

59. The Applicant claims that due process was denied by the OAI's failure to interview witnesses from AAA and in particular the AAA representative. The Bank in response explains that

AAA did cooperate with the OAI and the OAI made attempts to contact the AAA representative but those efforts were unsuccessful. Nevertheless, the OAI appropriately considered the totality of evidence available to it to conclude, on a more probable than not basis, that the Applicant had committed misconduct.

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

60. The Tribunal finds that neither the OAI nor the AC could compel the AAA representative to participate in the investigation or other proceedings. AAA had dismissed Ms. S in June 2015 and had filed criminal charges against her well before the Bank's investigation of its own staff members began. The Tribunal, having seen evidence *in camera*, considers that the Bank made reasonable efforts to locate her; even in her absence, it took the measure of posting her name in connection with the fraudulent scheme and enabling other development banks to cross-bar her. While the Tribunal shares the AC's unanimous conclusion that it would have been preferable if Ms. S had been located and interviewed in order to complete the picture, such testimony was not indispensable to reaching a determination about whether or not the Applicant had himself engaged in misconduct. Even if the AAA agent had testified that she did not tell the Applicant that she was preparing a fraudulent invoice, this would not have relieved the Applicant of his own responsibilities as an ADB staff member. For the same reason, the investigation into the alleged abuse by other staff members of TEV privileges as possible misconduct is irrelevant to what the Applicant himself did. Therefore, no violation of due process occurred in relation to these aspects of the OAI investigation. The Tribunal concludes that the Applicant had a reasonable opportunity to show that he did not commit misconduct and that no due process violation occurred in the course of the investigation.

*(b) Prioritization*

61. The Applicant has also argued that he was denied due process because of improper prioritization of the investigation into his conduct, and of the ensuing decision to hold him liable for serious misconduct. He claims that the grouping and prioritization of some staff in positions

of trust, for purposes of investigation and sanctioning, prejudged the outcome in his case, since investigations of others accused of similar misconduct had not been completed by the time he was sanctioned.

***Finding (1)(i)(b): Prioritization***

62. The Tribunal finds that the Bank has shown that each staff member's conduct was assessed on a case-by-case basis. Moreover, as the Bank needed to investigate the conduct of a total of 33 persons, the Tribunal finds that it was reasonable for the Bank to proceed against some staff members before it had completed investigations and disciplinary procedures involving all of them. The Applicant was in a group of staff identified because of the positions they held and/or who had requested importation of more than one tax-free vehicle. By grouping and prioritizing certain cases, the Bank avoided causing undue delay in its investigation and discipline of the initial group of staff members. The initial group included the Applicant, who was not singled out. He has not convinced the Tribunal that he was prejudiced by prioritization, and the Tribunal sees no due process violation in this regard.

(ii) Disregard of the legal opinion from a private law firm

63. The Applicant has claimed that he was denied due process by the BPMSD's decision to consider as "not relevant" the legal opinion he had obtained on tax-exempt importation of vehicle by ADB staff. As indicated in the BPMSD's recommendation regarding disciplinary action, this opinion was, however, reviewed before reaching the conclusion that the Applicant should be dismissed for misconduct.

***Finding (1)(ii): Disregard of legal opinion***

64. The Tribunal sees no obligation on the part of the Bank to follow the opinion of an outside law firm, particularly on issues relating to its privileges and immunities as agreed with the host country. The Tribunal agrees that it was reasonable for the Bank to consider the opinion irrelevant

to the issue of misconduct, especially since it did not take into account the various provisions of the Staff Regulations or Administrative Orders governing staff obligations and disciplinary procedures. In conclusion, the Tribunal finds that there was no denial of due process in relation to the Bank's decision to disregard the legal opinion that it had considered before imposing the sanctions. By considering the information provided by the Applicant, the Bank met its due process obligation.

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

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

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

66. The Applicant refers to the lapse of more than a year between when he filed his appeal (20 October 2016) and when he received the AC report (dated 11 October and received on 30 October 2017). Although he has not specifically raised a claim on this issue, he has complained of the Bank's alleged "failure to follow procedures" and has made a plea for moral damages for, inter alia, "anxiety and mental anguish," as well as for "other relief just and equitable under the premises." The Bank does not dispute the delay in issuing the report, but contests any damages claimed by the Applicant.

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

67. The Tribunal notes that AO 2.06 of 19 February 2013 provides that the Appeals Committee

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

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

69. In explaining the reasons for failing to submit the report within the stipulated period, the AC referred to "*the intricacies of the case*" and the amount of documentation, including additionally requested information, and the time necessary to consider the appeal. The appeal was complex, justifying in the Tribunal's view a possible extension by the AC of the time limit, in order to grasp the relevant elements of the four cases, as permitted by its rules. But in the eyes of the Tribunal, the delay – exceeding by almost four times the normal time limit of 90 days - was excessive (cf. *BC v IFC*, WBAT Decision No. 427 [2010]). In the interest of transparency, the AC, while it might not be required to do so, should also have informed the parties of the new time limit it was providing for itself under para. 1.4(c) of its RoP.

*(b) Signatures on the AC report*

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

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

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

*Compensation*

72. With regard to the excessive delay in the AC report and the irregularities in signature, the Tribunal finds that, while they did not affect the outcome and thus did not amount to a denial of due process as a whole, the deviation by the Appeals Committee from its own rules warrants an award of some compensation to the Applicant for intangible injury.

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

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

74. The Applicant essentially argues that his actions did not legally amount to misconduct because:

(i) the TEV limit had a questionable legal basis and was ambiguous;

(ii) there was no evidence that he was a party to the fraudulent scheme; and

(iii) he acted in good faith - there was no reason for the Applicant to be diligent about the actions of AAA and its representative, since the presumption was that everything was in order.

75. The Bank asserts that the Applicant was aware of the TEV limit and that it would be unreasonable to interpret this to mean anything other than as referring to the full price he paid, including accessories and options, insurance and freight charges of the vehicle. The Bank also asserts that the Applicant was aware that the total cost of the vehicle exceeded the TEV limit and that a fraudulent invoice was used to facilitate the vehicle importation. Accordingly, the Bank asserts that the Applicant misused the tax privilege to his advantage through his reckless act or omission and, in so doing, placed the ADB's relationship with the host country in jeopardy. This constituted misconduct and warranted disciplinary measures under AO 2.04, para. 2.1.

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

76. The Applicant alleges that his dismissal was an abuse of discretion because it arose from him having availed himself of the TEV privilege, which he argues has a "questionable legal basis". In his view, the validity of imposing a USD 24,000 TEV limit on ADB NS's importation of an automobile is "questionable if not altogether illegal", as nowhere in the legal basis for ADB's TEV program is there a mention of a car value limit. He emphasizes that while the TEV purchase and/or importation is a creation of law, any condition placing a price cap agreed between departments of the Bank and DFA "does not rise to the level of law or enforceable rule". If there is no law or rule on the price limit of USD 24,000, the Applicant reasons, he has not violated anything. The Applicant also asserts that the lack of adjustment of the figure since 1997 did not preserve the privilege granted. The Bank contests these assertions.

77. In addition, the Applicant asserts that what constitutes the value of said TEV limit is ambiguous and has never been clearly defined in any of the TEV guidelines or Administrative Orders from the Bank implementing the program. He asserts that texts which are ambiguous should be construed in favor of the staff (see *S v. EPO,* ILOAT Decision No. 3701 [6 July 2016])

and notes in his Reply that the Bank has issued a new set of guidelines for the TEV and updated the request form to define the USD 24,000 price limit as "USD 24,000 C.I.F.". (emphasis supplied).

78. The Bank asserts that it was fully within the discretion of the Government to determine the appropriate conditions for the use of this privilege and that the Applicant's pleas of ambiguity as to the meaning of the cost limit and "car value entitlement" are not credible. The Bank maintains that the materials provided by the Respondent to eligible NS staff members were plain on their face: the cost limit was USD 24,000 and this amount was provided on the document entitled "ADB Tax-Exempt Vehicle Entitlement" and on the form entitled "Request to Import a Tax-Exempt Vehicle" (RFEMV). The Bank submits that whatever doubts the Applicant may have had about the meaning of "cost", he was responsible for seeking clarification of the term and was not free to interpret it however he saw fit. At a minimum, he should have made efforts to resolve any doubts by contacting OAIS-LM.

79. In its Rejoinder, the Bank notes that it does not bear the burden of disproving any unreasonable interpretation by staff of the meaning and applicability of its rules. The Respondent asserts that it is entitled to expect that staff will follow the rules and, if in doubt, seek clarification from the appropriate offices. The Bank relies on WBAT Decision No. 352, K, [2006], para. 40, in which the WBAT noted, "*the Bank would be ungovernable if staff members were allowed to construct post facto rationalizations for their disregard of the rules, and thereby be excused if the bank – totally unaware of these mental rewritings of the rules, and therefore not organized to monitor each individual's way of complying with his or her "conscience" – cannot disprove the rationalization.*"

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

80. The Tribunal finds, firstly, that there was a formal legal basis for the car value entitlement to be limited to USD 24,000. The DFA memorandum dated 18 September 1997, read with the Memorandum from the Office of the President of the Philippines dated 15 August 1973, granted

staff at NS3 and above the privilege of importing vehicles tax exempt, subject to a maximum car value of USD 24,000. The Bank accepted this limit as binding on it. Under Bank rules, employees must respect the limit fixed, regardless of whether or not they think, as did the Applicant, that the amount should have been raised since 1997. In addition, the Applicant's plea is contradictory, since he wants to avail himself of the privilege, while maintaining that the USD cap has no legal basis.

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

82. While the Tribunal does not consider the rules on the TEV ceiling to have been overly vague, it notes that the information the Bank made available to persons seeking to avail themselves of the TEV privilege should have been more explicit to provide better guidance. For instance, the heading, "ADB TEV Entitlement Form," suggests that an entitlement, rather than a privilege, is involved. On the other hand, the limit of USD 24,000 appeared clearly in the documentation available to the Applicant. Rather than seeking clarification from the responsible unit in the Bank as to what the cap included, the Applicant took it upon himself to interpret the meaning of the TEV limit as the "base price," i.e. something less than the full value of the car that included its options and accessories.

(ii) Was there a lack of evidence that he was party to the fraudulent scheme?

83. The Applicant asserts that his conduct was not within the scope of "misconduct" as contemplated by AO 2.04 as there is *"simply no evidence that [he] was party to a fraudulent scheme."*

84. The record established that the Applicant was not provided a copy of the fraudulent invoice until after he had paid the full price of the vehicle in July 2012. However, he did receive it on 21 August 2012, prior to the vehicle's delivery. He asserts that he had examined the contents only prior to his interview with OAI in December 2016, as he had been busy with work when he found the documents on the floor of his office upon returning from business travel. In addition, on 27 August 2012, he received an email regarding the processing of his RFEMV, to which a copy of the fraudulent invoice was also attached. The fact that this email, which asked for action by DOF on the tax-free importation of his car, was addressed by an OAIS-LM official (Ms. C) to a personal email address rather than an official government address, and that the invoice understated the price of the vehicle, should have alerted him that something was amiss with the transaction. Although he was a trained accountant, he did not heed this warning sign, and in the Tribunal's view such recklessness cannot be excused by invoking the pressures of his work or by the Bank's own shortcomings in relation to its supervision of the use of the TEV privilege.

85. The Applicant asserts that he has no knowledge of the scheme that Respondent refers to as having been uncovered by OAI, and that the statements made by the several staff interviewed by OAI should not be given credence. Whatever the possible merits of these claims, the Tribunal points out that they do not detract from what the Applicant himself did in relation to his own duties under staff rules.

86. The Applicant claims that his possession of the fraudulent invoice was insufficient proof to conclude either that he had knowledge of its contents or that he had consented to the submission of the "fraudulent invoice" to OAIS-LM. He maintains that he had no knowledge that a "fraudulent invoice" was submitted by the AAA representative on his behalf and that he never appointed her

as his representative authorized to act on his behalf. In his Reply the Applicant distinguishes his situation from the cases cited by the Respondent (eg. *Bristol*, Decision No. 75 [2006], VII ADBAT Reports 113), as he did not "certify" the information on the form as true and correct, or sign it. He reiterates that he had not submitted the form or the fraudulent invoice to OAIS-LM.

87. The Respondent asserts that the Applicant cannot disown the AAA representative's actions, as the Applicant was responsible for ensuring his own compliance with the relevant rules. Since the *"Applicant made no effort to disown [the representative's] actions at the relevant time, he cannot be permitted to do so now,"* the Bank argues. It points out that the Applicant was aware of the limit, and that his chosen vehicle exceeded it, and that he was in possession of the RFEMV which misrepresented the value of the purchase.

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

88. The Tribunal observes that the fact sheet (on which the Applicant had made notes) stated that the staff member was to "instruct" the vehicle supplier to ship the vehicle and was to send documents, including the sales invoice, to OAIS-LM for the filing of the TEV request. Although in practice AAA sent the documents to OAIS-LM for processing on behalf of the staff member, the Tribunal concludes that the Applicant bears ultimate responsibility for the submission (compare *Bristol*, *supra*, para. 29).

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

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

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

91. A misrepresentation *"that knowingly or recklessly misleads"* is an integrity violation (IPG, Section 2A). AO 2.04 of 9 September 2010, applicable in 2012, specifies that *"misconduct does not need to be intentional,"* and that it extends to reckless acts or omissions (para. 2.1). This includes abuse or misuse of privileges and immunities and *"making of knowingly false statements or willful misrepresentation or fraud pertaining to official matters…"* (AO No. 2.04, paras. 2.1(b) and (f)). The facts indicate that there was sufficient evidence to conclude that the Applicant engaged, if not knowingly, recklessly in relation to the purchase of his vehicle and that he was a party to the fraudulent scheme. He has not met his burden of proof to show that the misconduct was not fairly or properly attributed to him. The Tribunal is of the view that the finding of the Applicant's misconduct was justified as being more probable than not. On the evidence established, the Tribunal concludes that the misrepresentations, knowingly or recklessly, made by the Applicant, and by the AAA agent to the Applicant's benefit, were designed to induce the ADB to process and endorse his TEV application.

(iii) Did the Applicant act in good faith?

92. The Applicant maintains that the following facts prove that he acted in good faith and without malicious motive:

a) he obediently followed the procedure for the approval of his TEV application;

b) he complied with the TEV limit covering only base cost and his interpretation of the car value entitlement was the same interpretation as OAIS-LM had used in the approval of previous TEV applications for other senior national officers;

c) OAIS-LM processed the application without any objections – impliedly confirming his interpretation of the TEV limit;

d) he did not conceal what he paid for the total acquisition cost;

e) he did not sign the fraudulent invoice nor did he authorize AAA to submit the fraudulent invoice to OAIS-LM;

f) he did not have knowledge of the fraudulent invoice submitted to OAIS-LM at the time, and discovered only later that he had been given a copy.

93. The Applicant asserts that he relied on information provided to him by OAIS-LM and that this office had also referred him to the AAA representative. He conducted his own due diligence, obtained a copy of the 1997 DFA memorandum, and submitted an application for a vehicle model which the OAIS-LM had previously processed as being below the limit for other ADB national staff.

94. The Applicant also points out that having PSPs on Bank premises gave the staff a feeling of security, since the PSPs selected have complied with stringent ADB requirements. By using AAA, ADB staff was assured, he claims, that their TEV application would proceed in accordance with ADB requirements. Arguing that he had relied on previous action taken by OAIS-LM concerning the same type of vehicle, the Applicant maintains that this unit of the Bank *"cannot evade its liability or accountability by limiting its responsibility to merely relying on the documents submitted to it and being a mere facilitator of the ADB's TEV privilege."*

95. The Applicant also asserts that his reliance on the AAA representative's assurances that his interpretation of the TEV limit was correct should not be taken against him. The Applicant maintains that he was not required to clarify the basis of the TEV limit with OAIS-LM, and that it was instead the responsibility of the ADB to issue guidelines, policies and procedures relative to the TEV. *"Had OAIS-LM perform[ed] its obligation to inform the TEV applicants of the coverage of the TEV privilege, the Applicant would not have made an erroneous interpretation,"* he argues.

96. The Bank recognises that the responsibilities of OAIS-LM included "ensuring that the acquisition, registration and disposal of ADB official vehicles and TEVs belonging to ADB staff conform to government requirements." The Bank states on the other hand that the Applicant

cannot shift the blame for his own actions onto others, or avoid his own responsibility to alert OAIS-LM that the RFEMV did not reflect the true price of the vehicle.

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

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

98. However, having said that, staff are not relieved of their own responsibilities under relevant rules. Various Bank rules emphasize the importance of not abusing the privileges granted. The Applicant had a duty to follow the rules, seek advice from the proper authority, and present accurate information to the Bank. He was well aware that the full cost of the vehicle he had ordered exceeded the sum of USD 24,000 that had been set within the framework of agreements between the ADB and the host government. In addition, as a senior NS in the OAG, it was not reasonable for the Applicant to rely on the AAA representative rather than OAIS-LM to provide authoritative information on the scope of the ADB's tax-exempt vehicle privilege with the host country. The Tribunal also notes that the Bank did not require the Applicant to use AAA as his vehicle supplier. His Application also revealed his reluctance to accept the legitimacy of the limit imposed, since it did not permit him to purchase his vehicle of choice. The Tribunal concludes that this lent credence

to the Bank's position that the Applicant was willing to turn *"a blind-eye to the fraudulent acts orchestrated for the purchase of his vehicle".*

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

100. As the Bank has noted, fraud is not simply prohibited by its internal policies, *"it is a corrosive practice that profoundly undermines ADB's mission to eradicate poverty in Asia."* In this case, the misrepresentation also involved causing harm to the relationship between the ADB and the host Government. The Applicant was disciplined in the present case because it was found, on a preponderance of the evidence, after an investigation in which he had an opportunity to present his position, that he had possessed fraudulent documents enabling him to benefit from the TEV privilege for his vehicle purchase. These documents were intended to mislead OAIS-LM and the host Government. At the least, he had engaged in a reckless misrepresentation for his own benefit. In addition, there were also indications that it was more probable than not that he was well aware of the steps being taken on his behalf to evade the TEV limit. The evidence uncovered in the OAI investigation made out a *prima facie* case of fraud which the Applicant has not convincingly rebutted. He seeks excuses in his workload and official travel schedule, while attempting to shift the blame to others.

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

not successfully rebutted this evidence. For these reasons, the Tribunal finds that the Bank was justified in finding that the Applicant engaged in misconduct.

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

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

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

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

104. The Applicant contends that the sanction of dismissal was disproportionate to the conduct involved, essentially arguing that the fraudulent misrepresentation was not perpetrated by him, but rather by Ms. S of AAA and the OAIS-LM.

105. The Bank stated that while 33 individuals were found to have abused the TEV privilege, the sanctions imposed pursuant to AO 2.04 were assessed in light of the circumstances of each

case (para. 4.1 of AO 2.04) and of the criteria set forth in AO 2.04 para. 6.2. In this case, the Applicant's serious misconduct warranted the disciplinary measure of dismissal. The Respondent asserts that the issue before the Tribunal is not whether other staff members were properly sanctioned, but whether the President's decision to dismiss the Applicant in this case was an abuse of discretion, arbitrary, discriminatory, improperly motivated or a violation of fair and reasonable procedure.

106. The Bank maintained that it had assessed the relevant factors in this case, and appropriately applied them to the Applicant. It noted that the nature of the Applicant's post as Senior Audit Officer required him *"to safeguard vital aspects of the Respondent's financial and administrative operations. Instead of reporting the abuse of the TEV privilege to relevant authorities, Applicant took advantage of the fraudulent scheme… These acts were fundamental violations of the standards of integrity expected of him and the only conceivable disciplinary measure was to dismiss the Applicant."*

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

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

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

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

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

a) the degree to which the standard of conduct has been breached by the staff member;

b) the gravity of the adverse consequences and damage or potential damage to ADB, its staff or any third party;

c) the recurrence of misconduct by the staff member, particularly when there is a repetition of misconduct of a similar nature;

d) the official position held by the staff member and the extent to which the staff member was entrusted with responsibilities in matters to which the misconduct relates;

e) collusion with other staff members in the act of misconduct;

f) whether the misconduct was a deliberate act;

g) the personal circumstances of the staff member and the staff member's length of satisfactory service; and

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

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

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

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

113. As regards *"the official position held by the staff member"* and *"the damage or potential damage to ADB"* (AO 2.04, para. 6.2 (d) and (b)), the Applicant's conduct amounted to a fraudulent practice in violation of ADB rules in a way that jeopardized the reputation of the Bank and its relationship with the host government, as noted above. Although the fraud was not committed in relation to the Applicant's own work at the Bank, as a senior auditor he was expected to comply with the rules of conduct that involved invoking privileges that had been afforded to the Bank. There was a reasonable basis for the Bank to conclude that the *"breach of trust [was] so serious that continuation of the staff member's services [was] not in the interest of ADB."* (AO 2.04, para. 6.3). These elements were, in the Tribunal's judgment, legitimate factors for the Bank to weigh in deciding upon sanctions for the misconduct.

114. Turning to the question of the degree of cooperation, the Applicant has consistently maintained that there was no legal basis for the TEV limit, and therefore no misconduct on his part. The Bank took the view that the mitigating factor of cooperation had not applied in his case. In the same context, the Bank referred as well to whether staff members had consistently acknowledged their misconduct, although AO 2.04, para. 6(h) refers to this only in relation to an

admission prior to the date of its discovery (which applied to none of the 33 staff members investigated). The Tribunal infers that when it came to the Applicant, the Bank amalgamated its perception of his degree of cooperation in the investigation on the one hand and his refusal to admit to wrongdoing on the other hand.

115. The Tribunal finds that the Bank has seen a lack of cooperation in the Applicant's steadfast but erroneous belief that the USD 24,000 limit was without legal basis and that he had thus done nothing wrong. Yet he voluntarily provided documentation to the investigators (some of which was not in his favour, including bank statements), attended scheduled interviews and gave full statements. These displays of cooperation with the investigation should have been taken into account whether or not the Applicant maintained his innocence. However, in the Tribunal's view this cooperation would not have overriden the key criterion of the erosion of the Bank's trust in the Applicant, given his position on which the Bank reasonably relied. The sanctions imposed would still have been justified under the standard of whether or not the dismissal was "significantly" or "clearly" disproportionate (see *Abat* and *Planthara*, *supra*) to the misconduct established. However, taking this situation into account, the Tribunal finds a basis for some compensation for intangible injury to the Applicant.

116. The Tribunal also notes that the Bank failed to consider or mention any extenuating circumstances in this case, in which the Bank itself had allowed a process to flourish for at least six years without adequate supervision. The Tribunal finds that the Bank's own role in failing to monitor (as noted above) over a number of years should have been taken into account when assessing sanctions to be applied to each individual involved in the scheme. However, in light of the factors that were considered by the Bank, the Tribunal does not, within its scope of review, see a basis for invalidating the decision taken by the Bank in the case of the Applicant.

117. The Tribunal thus finds that the Bank legitimately took account of relevant factors of the nature of the misconduct, the evidence gathered, the position held, and the erosion of its trust in the Applicant given his position when deciding upon the disciplinary measures to be applied. The Tribunal concludes there was not a "clear disproportion" (see *Abat, supra*) between the gravity of

the offence and the severity of the penalties imposed on the Applicant. However, in relation to the Repsondent's non-consideration of certain mitigating factors (mentioned at paras. 115 and 116), the Tribunal has determined that some compensation for intangible injury should be awarded.

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

118. The Applicant further asserts that imposing the sanction of dismissal was discriminatory in his case. The grounds of the alleged discrimination in his Application were the prioritization of the first group of staff investigated and the emphasis the Bank had placed on the Applicant's position. With regard to information disclosed by the Bank in July 2018 regarding the circumstances and penalties imposed on the initial group of 12 staff members, the Applicant alleged that certain staff entrusted with sensitive fiduciary responsibilities had not been prioritized for investigation and sanction. He also argued that since all NS are presumed to have sensitive fiduciary responsibilities, it was discriminatory to further distinguish among them. Furthermore, after the Bank provided additional information in August 2018 regarding the penalties imposed on all 33 staff members, the Applicant alleged that it proved *"undue bias and prejudice against Applicant resulting in discriminatory imposition of disciplinary measure against Applicant and abuse of discretion."*

119. The Bank has denied that the disciplinary measure imposed was discriminatory. In its Rejoinder, the Bank stated that "*the appropriate disciplinary sanction to be imposed in each case was assessed in the individual facts and circumstances*". The Bank cited the decision in *Khelifati*, ILOAT Judgment No. 207 (1973) considerations, para. 7, in which the applicant challenged his dismissal when his colleagues had not been disciplined, even though all were found to have arrived at work drunk. The ILOAT rejected the Applicant's claim of unequal treatment, noting:

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

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

120. The Tribunal recalls that one of the elements of due process is fair and equal treatment, and that the imposition of a sanction may not be discriminatory [*Bristol, supra,* para. 45]. In the present case, all the staff members involved in the fraudulent scheme were, by definition of those entitled to avail of the TEV privilege, Senior NS. The disciplinary action was taken for the same underlying reasons, i.e. abuse of the TEV privilege, in all cases. There are two distinctions between *Khelafati* and the current case: first, the disciplinary action was taken for the same reason in all cases (abuse of the TEV privilege); and second, all those found to have committed misconduct were subject to some disciplinary measures. This leaves their different circumstances to be examined in relation to a claim of discriminatory dismissal. By definition of those entitled to avail themselves of this particular TEV privilege, all were national staff.

*Prioritization of those investigated*

121. The Applicant has raised the Bank's prioritization of the first group of persons to be investigated and sanctioned as a discrimination issue. With over 30 investigations undertaken by the Bank, the Tribunal holds there was nothing wrong in the Bank's decision to proceed against some individuals before completing the investigation into others. In light of the sensitive functions of auditing and treasury administration, the Bank had a reasonable basis for proceeding in relation to persons in such positions of trust. The fact that some persons who were later investigated were not dismissed is not proof of discrimination against those in the initial group, since each case was evaluated separately, with several factors coming into play. The Tribunal finds no improper discrimination against the Applicant on this basis.

*Position of trust*

122. The Applicant has also raised the Bank's reliance on his position to support of his claim of discrimination. The Tribunal finds that the Bank's reliance on these considerations was not discriminatory against the Applicant in relation to other NS for the following reasons. As the Bank stressed, the Applicant was a Senior Audit Officer *"entrusted with sensitive fiduciary*

*responsibilities over nine years. This position required him to be a model of integrity given his specific responsibilities. It was expected that he maintains the highest ethical standards, with a high degree of integrity and concern for ADB's interests."*

123. Moreover, the additional information supplied by the Bank to the Tribunal on 16 July 2018 and 2 August 2018 provided details in relation to all the persons disciplined, including other persons whom it had also considered to be staff in a "position of trust". With three exceptions, all of the other persons designated as holding "positions of trust" were dismissed for misconduct relating to abuse of the TEV privilege. The three holding such positions who were not dismissed were Senior Financial Control Officers whom the Bank saw as having cooperated with the BPMSD and who had consistently taken responsibility for their own actions. Those three staff members were sanctioned by demotion by one level with 10% salary reduction, conversion of TEV license plate to a green license plate, payment of taxes due, and permanent ineligibility to avail of the TEV privileges. They did not go unpunished. The important distinction between those three staff members and the Applicant was that the others had consistently taken responsibility for their actions whereas the Applicant has put forward his own theory about what the Bank rules should be and insisted upon it in claiming his innocence. In the particular facts and circumstances of the case, the Tribunal does not find the Applicant's dismissal for misconduct to have been discriminatory.

124. In summary, the Tribunal concludes that the imposition of the penalty of dismissal was not clearly disproportionate to the severity of the misconduct and was not discriminatory. The Applicant's claims on these points are rejected, as are his challenges to the other sanctions imposed.

**Relief**

125. For the reasons cited above, the Applicant's claim fails, but the Tribunal finds that he has sustained intangible injury in relation to the Respondent's breach of AO 2.06 in two particular matters and in relation to the Respondent's non-consideration of certain mitigating factors. In

accordance with Article X(1) of the Tribunal's Statute, the Tribunal has determined that compensation for intangible injury is to be awarded. In light of these determinations, the Tribunal considers it appropriate, under Article X(2) of the Tribunal's Statute, to award a portion of the Applicant's attorney fees.

## DECISION

For these reasons, the Tribunal unanimously decides to:

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

Lakshmi Swaminathan

/s/
President

Gillian Triggs

/s/
Vice President

Shin-ichi Ago

/s/
Member

Anne Trebilcock

/s/
Member

Chris de Cooker

/s/
Member

Attest:

Cesar L. Villanueva

/s/
Executive Secretary

At Asian Development Bank Headquarters, 2 October 2018