



**World Bank Administrative Tribunal**

**2010**

**No. 431**

**AY,  
Applicant**

**v.**

**International Bank for Reconstruction  
and Development,  
Respondent**

**World Bank Administrative Tribunal  
Office of the Executive Secretary**

**AY,  
Applicant**

**v.**

**International Bank for Reconstruction  
and Development,  
Respondent**

1. This judgment is rendered by the Tribunal in plenary session with the participation of Jan Paulsson, President, and Judges Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel, Francis M. Ssekandi and Mónica Pinto. The Application was received on 7 August 2009. On 22 December 2009 the World Bank Group Staff Association filed an *amicus curiae* brief supporting the submissions of the Applicant, which the Tribunal decided to accept as part of the record.

2. The Applicant claims that the decision to reassign her to a technical position and the decision shortly thereafter to conduct a Supplementary Performance Evaluation going back four years were *de facto* disciplinary measures and constituted an abuse of discretion.

#### FACTUAL BACKGROUND

3. The Applicant began her career at the Bank in 1991 as a Research Analyst. In 2000 she became Senior Water Resource Economist in the Europe and Central Asia Region (“ECA”) where she continued to serve until May 2007, when she took up the position of Senior Rural Development Specialist in the Latin America and Caribbean Region (“LAC”). She is currently Senior Rural Development Specialist in a different unit, the Quality Assurance and Compliance Unit in the Operations Policy and Country Services Department (“OPCS”), a position to which she was assigned in May 2009.

4. From October 2004 until May 2007, the Applicant acted as Task Team Leader (“TTL”) for the Albania Integrated Coastal Zone Management and Clean-up Project (“ICZMCP” or “Project”). The objectives of the Project were to establish an integrated approach to coastal zone management along the southern coast of Albania in order to protect coastal resources and promote sustainable development and management.

5. At the time the Applicant became TTL, preparatory studies for the Project were under way. Among other project activities, the Government of Albania was seeking to formulate a Southern Coastal Development Plan (“SCDP”). It was clear from the onset that the SCDP would require the removal or acquisition of several dwellings constructed by the urban poor and land developers along the coastline without the requisite permits and in defiance of health and safety regulations. Before the Project was initiated, the Albanian Government had developed its own system to regulate urban planning and demolish illegal structures.

6. The Applicant states that she and the Project staff took several steps to deal with potential demolition and to mitigate any related concerns including (i) reminding Government officials of the need (and obtaining commitments) to consider relocation and social consequences for those affected by demolition; (ii) conditioning contract approval on consultants’ agreement to abide by World Bank and Government agreements pertaining to demolition and consciousness of social impact; (iii) requiring updates from Government agencies; (iv) requesting review of Government policies, procedures, and safeguards on demolition; (v) assessing whether the Bank’s Policy on Involuntary Resettlement (“OP/BP 4.12”) should apply to demolitions (because of a possible link between the proposed Project and the Government’s ongoing demolition program); (vi) consulting with lawyers

on expropriation and restitution laws and on providing technical assistance to the Albanian Construction Police; and (vii) hiring international experts to review and assess issues relating to expropriation, demolition and illegal settlements.

7. The Applicant states that her “Project” or “Task” Team further sought to ensure that appropriate safeguards with respect to demolition and reputational risks were written into Bank documents and implemented. To this end, they obtained a Letter of Development Policy dated 21 April 2005 from the Albanian Government, by which the Government committed to adopting and adhering to an Environmental and Social Safeguards Framework (“ESSF”), as well as “adequate procedures and measures, including a resettlement policy framework for the entire Southern coastal zone” that would “meet the requirements of the World Bank Policy of Involuntary Resettlement [OP/BP 4.12].”

8. The Bank could not, however, enforce the commitments set forth in the Letter of Development Policy until the SCDP was financed and implemented. (This was ultimately not achieved until the summer of 2008). The Project staff considered whether OP/BP 4.12 applied to the Government’s demolition activities before the SCDP was implemented. OP/BP 4.12 regulates measures to protect inhabitants without title to land and aims to avoid or minimize involuntary resettlement under World Bank-financed projects, or otherwise to assist displaced persons. It does not, however, apply to “regulations of natural resources.” The Project staff determined that OP/BP 4.12 did not apply to independent Government demolition activities, taking the view that land use planning under the SCDP was a natural resource management activity. In reaching that determination they relied on the guidance of the Sector Manager (Social Development) who was considered to have

reliable knowledge because he had drafted OP/BP 4.12 and was familiar with its intent and application.

9. In early 2005 a Project Appraisal Document (“PAD”) was prepared. Its important purpose was to serve as the basis of the deliberations of the Bank’s Board of Executive Directors (“the Board”) for the evaluation and approval of the Project. It included project risks and other key features. The initial draft PAD that the Applicant prepared made no reference to an agreement by the Government to halt demolition in the coastal zone until specific procedural safeguards had been put in place. On 14 April 2005 the Sector Manager (Social Development) sent a message to the Applicant affirming “our position on the triggering of the Bank’s resettlement policy ... [the] ongoing encroachment removal is part of an ongoing national drive ... is not resulting from Bank-supported project ... [the] resettlement policy does not apply in this case.”

10. The 14 April message, which had also been copied to the Regional Safeguards Coordinator, the Sector Manager (Environment) and the Senior Social Scientist for the Project and to members of the Legal Vice-Presidency (“LEG”), who had apparently reviewed the language and endorsed the Bank’s position, contained text with the following inaccurate sentence:

The borrower has agreed that further encroachment removal will take place only after the criteria and procedures for identifying and assisting such vulnerable affected people are in place.

11. None of the e-mail recipients appears to have reacted to the error. The Applicant states that the Sector Manager (Social Development) in fact had not instructed the Project Team to seek a moratorium, even though he knew in early April that the Government had not agreed to one. In any event, she replied on 16 April 2005, as follows: “We will update

the PAD according to your suggestions, and will document confirmation from the [Government] on the points mentioned below in the minutes of negotiations.”

12. On 25 May 2005 the PAD was finalized following intensive preparation and consultation with various parts of the Bank. It included the inaccurate sentence that had been provided with the 14 April message. Members of the Project Team realized the inaccuracy prior to the Board presentation. At 11:59 p.m., on 20 June 2005, the night before the presentation to the Board, the Applicant circulated a “revised opening statement” to members of the Country Office and the Task Team containing the following sentence:

The Bank does not have a blanket agreement with the Government to put a moratorium on the application of the Urban Planning Law, which calls for removal of unauthorized encroachments in public space.

13. According to the Applicant, minutes before the Board presentation “her supervisors handed her a copy of her opening statement with the sentence in question crossed out.” She therefore read it out without the proposed revision.

14. It appears that after the Board meeting the Applicant did not seek to correct the PAD error during her review of the “Summary of Board Statement” as she believed that the Summary was intended to reflect what was actually said during the Board meeting.

15. A different controversy originated on 30 November 2005 when the Government informed the Bank that a new Project Coordinator was going to be hired. Project implementation in Albania was managed by Project Coordination Units (“PCUs”) integrated within the Albanian Government.

16. Around February 2006 the process of selecting a new Project Coordinator for the Project’s PCU started. The candidates were narrowed down to a short list in accordance with Bank procedure. An evaluation report was submitted to the Bank, seeking the Bank’s

“no-objection.” At the top of the short list was Jamarber Malltezi, a son-in-law of the Albanian Prime Minister.

17. Concerned by the potential perception of a conflict of interest and nepotism in the hiring of Mr. Malltezi, the Applicant in February 2006 sought the advice and counsel of the Regional Procurement Advisor and the Country Manager. On 9 February 2006 the Senior Procurement Specialist responding on behalf of the Regional Procurement Advisor stated:

With regard to possible nepotism, our position from [a] procurement point of view is as follows: If he is otherwise the most qualified (which should be carefully checked by the task team), that his selection is not biased by the influence in any manner of the Prime Minister directly or indirectly, that he will not be supervised directly or indirectly by the [Prime Minister], and that his fees will be reasonable and comparable with others in similar position[s], all of which should be confirmed by the implementing agency then we may have no basis to disagree with the proposed award.

18. Based on the advice received and its review of the situation, the Bank ultimately issued a conditional “no-objection” to the selection of Mr. Malltezi, subject to written confirmation from the Ministry of Public Works, Transport and Telecommunication (which was obtained) that the decision was

not [biased] or influenced in any possible manner, by the Prime Minister directly or indirectly to select Mr. Jamarber Malltezi as Project Coordinator. ... Mr. Malltezi will neither be supervised or report directly or indirectly to the Prime Minister, while working in this position and that his remuneration fee will remain reasonable and comparable with others in similar positions.

19. During Project implementation, the Bank provided technical and financial assistance to local government units on the southern coast as well as to the Albanian Construction Police by commissioning an aerial mapping survey in order to monitor land-

use planning and the issuing of construction permits, as well as to track illegal construction for the entire southern coast. The aerial mapping was to be repeated on a quarterly basis.

20. On 26 March 2007, acting without the knowledge of the Applicant, Mr. Malltezi transmitted Project-related aerial photographs revealing various illegal constructions in the Ionian coastal zone to the following Government officials: the Deputy Minister of Public Works, the General Director of the Construction Police, the Director of Urban Planning Policies Department, and the Director of the Construction Police for the town of Saranda.

Mr. Malltezi stated in his transmittal letter:

As you may see from these pictures, illegal constructions are still going on in the Ionian coast. Given the importance of the sustainable development in this area and its impact on the overall economic and tourism development of the country, with respect for the environment, kindly make sure to take the necessary measures and as fast as possible.

21. On 10 April 2007 the Construction Police informed the Minister of Public Works, Mr. Malltezi, and the Advisor to the Prime Minister, as follows:

The construction police department has administered all the necessary legal procedures pertaining to such instances, and the decisions for the demolition of these illegal constructions have been notified to the respective parties, giving them the possibility for appeal and submission of the documents that they have with regard to these constructions.

22. Between 17 and 20 April 2007, the Government demolished 15 buildings in the village of Jale in the Project area and approximately 35 other structures in the surrounding Project area.

23. On 20 April 2007 Mr. Malltezi informed the Applicant and the Task Team by e-mail of the 26 March and 10 April letters and the transmission of the aerial photographs. A package containing copies of these letters was not sent to the Country Office until 23 April 2007. On the same day, the Applicant and the Country Manager received a copy of a letter of complaint, forwarded by the Country Office, from a member of one of the affected



families regarding the demolition. It appears that although the issuance of a press release and a response to the letter was considered, neither was issued.

24. At this time, the Applicant was in the process of completing a transfer to LAC. In her final weeks at the ECA Sustainable Development Sector Unit, she dealt with the aftermath of the Construction Police demolitions. The Applicant and the Senior Social Scientist for the Project undertook a fact-finding mission and visited the areas of demolition between 3 and 5 May 2007. The scope of the mission was discussed and agreed to in advance with the Sector Manager (Social Development). They decided not to contact the people whose structures had been demolished.

25. On 9 May 2007 a former Project Team member took over the role of TTL. The Back-To-Office-Report (“BTOR”) of the fact-finding mission was finalized in late June 2007, when the Applicant was already working in LAC. The BTOR concluded, among other things, that the impetus for the recent “drive” of the Construction Police was the impending tourist season, and that

the removal of illegal buildings and encroachments from specific locations, including the current one at Jale beach, is not for the purpose of facilitating any Bank-financed physical investments or furthering the objectives of the ICZMCP.

26. The BTOR perpetuated the inaccurate reference to a commitment by the Government to a moratorium on demolitions:

The current demolitions ... raise the concern of lack of conformity with Government commitment that encroachment removal in the southern coast will take place only after criteria and procedures for identifying and assisting vulnerable affected people who lose their primary residence or main source of livelihood due to encroachment removal are in place. These systematic criteria and procedures have not yet been developed largely because this was envisaged as a task to accompany the [SCDP], which formulation is facing considerable delays.

27. In the Aide-Memoire to the BTOR the Government was urged to provide aid to mitigate the impact of the demolition on those affected and to stop further demolitions until demolition procedures and criteria were fully developed and agreed. These conclusions were formally communicated to the Government in early July 2007.

28. On 30 July 2007 and 13 August 2007 the World Bank Inspection Panel received requests for investigation of the Project in connection with the demolition that occurred within the Project Area stating that it was the result of the SCDP. In August 2007, a core team, composed of the Safeguards Coordinator for ECA, a Senior Operations Officer from the Quality Assurance and Compliance Unit of OPCS, and a Country Officer, was assigned to prepare the Management Response to the Request for an Inspection Panel Investigation (“2007 Management Response”).

29. The 2007 Management Response was prepared at a time of unusually high staff turnover. New staff members had assumed the positions of Task Team Leader, the Sector Manager (Environment), the Country Manager, and the Safeguards Coordinator in the preceding three months. Furthermore, several key managers were on leave during most of the preparation of the Management Response. It was thus, in the Applicant’s view, authored without adequate senior oversight, and those most closely involved with the project were not given a full opportunity to respond. The Applicant states that she was only shown drafts and provided comments and documentation when requested. Moreover, according to her, the commentary and documentation she provided were not always taken into account in the published Management Response.

30. In any event, the 2007 Management Response was issued on 17 September 2007. It was later criticized by the Inspection Panel (i) for stating that there was no link between

the Project and the demolition; (ii) for failing to mention the correspondence between the Project Coordinator and the Construction Police, which would have shown that aerial surveys financed by the Project had been used to identify illegal constructions; and (iii) for not addressing the inaccurate reference in the PAD regarding a moratorium on demolition.

31. On 1 November 2007 the Board authorized the Inspection Panel to conduct a full investigation. The Applicant was interviewed by the Inspection Panel on two occasions. The request for her first interview with the Inspection Panel stated that “Management indicated that [she had] worked on this Project,” and that the Panel “would like to meet with [her] ... to discuss some of the issues presented in the Request [for Inspection].” The Applicant states that, at the beginning of these interviews, the Chair of the Inspection Panel assured her that the purpose of the interview was “not to find anyone guilty” but rather to “assess how the Bank made key decisions.”

32. Before the Inspection Panel Report was finalized, a Corrigendum to the PAD was drafted to address the misrepresentation it contained regarding the existence of the moratorium (see paragraphs 10-14 above). Drafts of the Corrigendum were circulated as early as February 2008 but the Corrigendum was not issued formally until 2 September 2008 after obtaining clearance and authorization at the highest levels of the Bank.

33. After the Corrigendum was issued, the President of the Bank requested that LEG investigate the circumstances surrounding its issuance. The Applicant was interviewed in October 2008. Ultimately, a Legal Note, issued on 7 November 2008 by the acting General Counsel, noted that the Corrigendum contained inaccuracies and provided an insufficient explanation of the implications of the Albania PAD error and what remedial actions were taken in response. The Legal Note also explained, among other things, that

there was no “person or set of persons who in practice have been clearly accountable” for ensuring the accuracy of the PAD.

34. The Inspection Panel issued its Report on 24 November 2008. Although no individuals were named, the Report refers to lack of cooperation and transparency, obstruction of the Inspection Panel’s efforts to obtain information, and misrepresentation on the part of the Project staff. The Panel addressed a separate memorandum to the Executive Directors, chastising the Project staff for this conduct. The Panel specifically criticized in the Report:

Management’s decision not to apply the provisions of OP/BP 4.12 to the Government’s encroachment removal program implemented in the Project area, based on Management’s determination that this program is not directly or indirectly linked to the Project;

Management’s decision that OP/BP 4.12 does not apply to the removal of structures in the Project area as a result of regional zoning requirements related to the implementation of the SCDP;

Management’s representation in the Project Appraisal Document that there existed an agreement with the Borrower to provide a safeguard against a critical Project risk (identified in the same document), and information to the Board of Executive Directors regarding this matter; and

Management’s approach to Project supervision including in follow-up to the demolition of houses in Jale.

35. The Inspection Panel Report and the accusatory memorandum to the Executive Directors were published in their entirety on the Fox News website.

36. Subsequently, a Management Report and Recommendation in Response to the Inspection Panel Investigation Report (“2009 Management Report”) was prepared in late 2008 and issued on 18 February 2009. The Applicant participated in a few meetings to help develop a timeline of events. She was asked to make comments on a timeline of events the drafters created and communicated to staff by e-mail message on 10 December

2008 – with only one day to respond. During a lengthy meeting on 12 December 2008 with one of the Bank’s Managing Directors and more than twenty staff members, the Applicant provided documentation and accounts to supplement or correct certain statements made by other staff members involved in drafting the timeline.

37. In the evening of 17 December 2008 the ECA Regional Director of Strategy and Operations sent to the staff who had participated in the 12 December meeting the first draft of the 2009 Management Report. He explained that he did not solicit detailed comments on this section but asked that the recipients “flag any major issues.” He asked that the input be given by noon the next day. On 18 December 2008 the draft was sent to the Managing Director.

38. The authors of the 2009 Management Report had specified that it should not be used for accountability purposes. The errors identified by management in the 2009 Management Report as having been made by the Task Team include: failure to pursue vigorously a moratorium on demolition; failure to reach a common understanding and definitive agreement between the Task Team and Country Management Unit on the Project risks and means to address them during appraisals and negotiations; inclusion in the PAD of the inaccurate reference to a moratorium which amounted to misrepresentation of a critical aspect of Project design to the Board; failure to provide adequate guidance to the PCU regarding the transmission of aerial photographs financed by the Project; and failure to respond in a timely manner to the April 2007 demolition, which permitted public opinion to link the demolitions to the Project and the Bank. The 2009 Management Report also referred to performance failures by the Country Management Unit and ECA management.

39. In the meantime, in December 2008, the President had called upon the Department of Institutional Integrity (“INT”) to conduct an Accountability Review and a preliminary inquiry into the actions of Project staff as well as into the alleged misrepresentation to the Inspection Panel.

40. INT accordingly initiated a preliminary inquiry in January 2009. The Applicant was interviewed on 12 January 2009. The e-mail message inviting her to the interview informed her that “INT [was] conducting [a preliminary inquiry] into concerns of possible misconduct in relation to the Albania-Integrated Coastal Zone Management and Clean-Up Project.” It indicated that the Applicant had “been suggested to [INT] as someone who may be able to assist INT in determining some of the facts and circumstances” but did not notify the Applicant of any specific charges against her.

41. The investigator informed the Applicant during the interview that at this point “we are at the preliminary inquiry stage.” She continued:

However, it is important for you to know or to understand that since this interview is sort of part of the preliminary inquiry, any statements made by you today or any documents you provide to us becomes part of the investigative record. Accordingly, that information, what you say here today, or if you give us any documentation, could be used in making a determination as to whether there is sufficient basis to merit an investigation into either your actions or actions of any other staff member, and to issue the corresponding written notice of allegations required under Staff Rule 8.01.

42. On 13 January 2009 the Applicant submitted additional information to INT that, in her view, was relevant to INT’s inquiry.

43. On 9 February 2009 Fox News published an article with the title “World Bank Spent More Than a Year Covering Up Destruction of Albanian Village.” On 11 February 2009 it published a follow-up article discussing the different investigations ordered by the

Bank's President. It stated that the President was angry and embarrassed, and was deciding "whose heads are going to roll."

44. INT briefed the Managing Director on the findings of its Accountability Review and preliminary inquiry. In a memorandum dated 26 February 2009, entitled "Accountability Review and Preliminary Inquiry Findings regarding Staff Conduct in the Albania-Integrated Coastal Zone Management and Clean-Up Project" and identified as "Draft For Discussion Purposes Only" ("Draft INT Report"), INT stated that it had found evidence to indicate that at least eight staff members and managers, including the Applicant, had engaged in actions or inactions which were indicative, to varying degrees, of poor performance. INT suggested a range of remedial actions in proportion to the degree of poor performance, including placing staff on Performance Improvement Plans or reassignments, further training, addressing the deficiencies in the individual Overall Performance Evaluation ("OPEs") and factoring in the deficiencies when assessing the Salary Review Increase ("SRI") ratings. INT stated that it had not at that stage found any evidence of ill-motive, or a willful or conscious intent to mislead, on the part of staff. INT had, however, identified some performance concerns that might be sufficiently egregious to constitute possible misconduct and indicated that it would look further into these matters.

45. With regard to the Applicant in particular, INT noted six possible performance-related issues, namely: the Applicant's "[i]nclusion of [the] erroneous statement in [the] PAD without careful review"; "[f]ailure to correct [the] PAD error during and after [the] Board Meeting"; "[f]ailure to prepare Aide-Memoires"; "[i]nclusion of erroneous statement regarding existence of [a] moratorium in BTOR of [f]act-[f]inding mission in

May 2007 regarding demolitions”; “[f]ailure to understand significance of PCU correspondence to Construction Police”; and “[f]ailure to respond to letter from the family of one of the Requestors.”

46. In March 2009 the Managing Director met with the Vice President of Human Resources (“HRSVP”) and other members of senior management to discuss what performance measures were appropriate in light of both the preliminary findings of INT’s Accountability Review and preliminary inquiry as well as the errors identified in the 2009 Management Report. It was decided that Supplementary Performance Evaluations should be undertaken, where appropriate, to amend performance records of Project staff with regard to the Albania Project for the relevant years, with the Managing Director as the formal decision maker, and that it was in the Bank’s interest that the staff in question be reassigned. In the end, six individuals, including the Applicant, were reassigned to technical or non-managerial positions. In addition, Supplementary Performance Evaluations were undertaken for eight staff members, including the Applicant, in order to amend their performance records for the periods concerned.

47. In the beginning of April 2009, at a meeting with the Managing Director, the Applicant states that she was informed that, as a result of the Management Response to the Inspection Panel Report and the ongoing INT investigation, she was being removed from her position and reassigned to a corporate position for two to three years. She was also told that the Bank would issue a Supplemental Performance Evaluation for the years 2005 through 2007. The Applicant states that she asked to see the INT Draft Report after the Managing Director cited the INT investigation as a basis for the actions taken, but her



request was denied because it contained numerous names and was thus confidential. The Managing Director did not offer the Applicant a redacted copy of the Draft Report.

48. In a letter to the Applicant dated 10 April 2009 the Managing Director confirmed that the Applicant would receive a Supplemental Performance Evaluation and that she would be reassigned “to a corporate position at [her] current level for a regular three-year rotation period.”

49. Subsequently, on 28 April 2009, the Managing Director sent her a letter purporting to be the “Supplementary Performance Evaluation,” stating:

As the Task Team Leader (TTL) for the Project you were responsible for its preparation in 2005 and then for its supervision until your reassignment to another position in mid May 2007. A review of your performance in this project found the following specific performance deficiencies relative to your responsibilities as the Task Team Leader:

Failure to prepare proper and accurate Project documentation. ...

Inclusion of the erroneous statement referring to the moratorium on demolitions in the PAD without careful review. ...

Failure to understand significance of PCU communications to the Construction Police and the potential for reputational risk for the Bank caused by the perceived conflict of interest in the appointment of the PCU Coordinator. ...

Inclusion of erroneous statement regarding the moratorium in the BTOR of the Fact-Finding mission in May 2007 regarding demolitions and failure to respond to the letter from the family of one of the Requestors.

50. The Applicant was not given an opportunity to discuss the specific allegations or to sign off on the letter as she would with a normal OPE. On 13 May 2009 the Applicant submitted a lengthy response in which she set forth her views about the allegations, and

pointed out what she perceived to be numerous factual inaccuracies in the charges against her. Her reassignment went into effect on 15 May 2009.

51. Regarding the concerns as to possible misconduct referred to in INT's memorandum of 26 February 2009, INT informed the Applicant on 26 June 2009 that:

INT did not find evidence of misconduct .... There was no indication of either ill-motive or a willful or conscious intent to mislead by staff.

Based on the totality of the facts and circumstances found during the preliminary inquiry, INT has determined that further proceedings under Staff Rule 8.01, including formal investigation, were not warranted with regard to the conduct of any staff member or manager. No record of any proceedings under Staff Rule 8.01 with regard to this preliminary inquiry will be noted in your personnel file.

52. The notice also stated that INT had "identified certain acts or omissions of staff members that could be indicative of poor performance" and that "[c]onsistent with INT's practice, management was briefed about possible performance concerns."

53. As agreed with the Bank, the Applicant filed an application with the Tribunal on 7 August 2009, contesting the Managing Director's (i) 10 April 2009 reassignment decision and (ii) 28 April 2009 "Supplementary Performance Evaluation."

54. As part of her pleas, the Applicant requests the Tribunal: (i) to reinstate her to her previous position as a Senior Rural Development Specialist in LAC, or to any equivalent position in the Region; (ii) to declare the 28 April 2009 Supplementary Performance Evaluation null and void and to have all record of negative amendments to her 2005 to 2007 performance evaluations stricken and removed from her personnel file; (iii) to prohibit the Bank from issuing negative statements regarding any alleged misconduct relating to the Project or the proceedings and investigations arising therefrom if and when in receipt of any internal or external inquiries regarding the Applicant's history or qualifications for other positions of employment; (iv) to ensure that any adverse impact on

pay, benefits, or other forms of compensation arising out of the investigation or Supplemental Performance Evaluation be reversed, and that the Applicant be made whole with interest; (v) to issue an apology and public retraction within the Bank, publicizing INT's findings that absolved the Albania Project staff of misconduct; (vi) to cease and desist from further penalization and negative publicity with regard to the Applicant's involvement with the Project; (vii) to award an amount deemed appropriate by the Tribunal to compensate the Applicant for her stress and suffering and the damage to her professional reputation and career; and (viii) to award her legal fees, which amount to \$47,533.87.

#### THE CONTENTIONS OF THE PARTIES

55. The Applicant's main contentions are that: (i) she is not guilty of the alleged failures and inactions in the Project; (ii) she did act in accordance with her TTL responsibilities and fulfilled all her duties; (iii) her reassignment and the evaluation letter were, in fact, disciplinary measures subject to and imposed in violation of Staff Rule 8.01 ("Disciplinary Proceedings"); (iv) even if the Tribunal decides that the Applicant's reassignment and written censure did not constitute disciplinary measures, they should still be quashed because the Bank did not follow the requirements of the Principles of Staff Employment, the Staff Rules, or Tribunal precedents for such administrative actions.

56. The Bank responds that: (i) the Applicant's argument that the Bank's decisions were arbitrarily based on unfounded allegations of deficient performance is entirely without merit; (ii) the reassignment and the Supplementary Evaluation decisions were not the equivalent of disciplinary sanctions but a legitimate exercise of managerial discretion; and (iii) the Applicant was afforded due process with regard to both decisions.

## THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

57. The demolition carried out in April 2007 and the perception of its link to the Project were serious matters with the evident potential of harming the Bank's reputation. Nevertheless, attributing individual responsibility must be carried out with respect for the principles of due process, transparency, and fairness, so as to ensure that any effects on individuals were justified by the facts as assessed by legitimate standards.

*The reassignment decision and the Supplementary Performance Evaluation*

58. The Applicant views both her reassignment and her Supplementary Performance Evaluation as disciplinary measures. She states that both "reassignment" and "written censure" are listed as such under Staff Rule 8.01. She contends that the reassignment to a "technical" position interrupted and interfered with her advancement in terms of responsibilities, possible future promotions, and career prospects. She states that the two full pages and six detailed paragraphs of severe criticism, applying to only one of the many projects on which the Applicant worked during the years in question, suggest that the 28 April 2009 letter constituted punitive written censure and not the ordinary performance evaluation it purported to be. Furthermore, such lengthy criticism by someone at the top level of Bank management, rather than the supervising manager, certainly punishes the Applicant, undermines her laudatory reviews for multiple years' worth of work on other projects, and acts as a figurative red flag to anyone considering the Applicant's candidacy for future positions.

59. The Bank denies that the Applicant's reassignment and Supplementary Evaluation were the equivalent of a disciplinary sanction. It claims that the Applicant's reassignment was a discretionary decision taken in the Bank's interests in accordance with Staff Rule

5.01, paragraph 2.03, following management's determination that both the Applicant and the Bank would benefit from the transfer of the Applicant from a leadership position as TTL to a policy-oriented position where she could apply the skills and knowledge she acquired through her work in the ECA and LAC Regions. Furthermore, the Bank states that it reasonably determined that it was necessary to supplement the Applicant's performance record regarding only the Project in view of the information that had come to light. It adds that the Managing Director was constrained to carry out the Supplementary Performance Evaluation since all staff in the Applicant's ECA line-management during the relevant time periods were themselves involved in and bore varying levels of responsibility for errors made in the Project.

60. The Tribunal has held previously that

decisions such as those relating to ... reassignment and transfer, are discretionary decisions for the management of the Bank, and are subject only to limited review by the Tribunal. (*Sengamalay*, Decision No. 254 [2001], para. 29.)

61. In examining whether the Applicant's reassignment and Supplementary Performance Evaluation were disciplinary measures (*de facto* or not) triggered by the Fox News articles, the Tribunal observes that, although in some respect they took the form of administrative measures, other factors support the conclusion that they were disciplinary.

62. On the one hand, it might seem that since there was no finding of misconduct by INT there was no possibility of disciplinary measures, or any need to follow disciplinary procedures. The reassignment decision and the Supplementary Performance Evaluation that followed the Draft INT Report were not taken on the grounds of misconduct, as none had been found. Nor did the 2009 Management Report, on which the decisions were also

based, reach a finding of misconduct. It too, like the Draft INT Report, spoke only of a number of serious performance failures identified in the Project.

63. On the other hand: (i) it was as a result of the alleged “misrepresentation to the Panel or to the Board” that the President announced on 1 December 2008 that “[i]n accordance with our internal processes, we will investigate this matter fully, and, if warranted, take appropriate action”; (ii) INT, the entity chosen to undertake misconduct investigations, and not Human Resources (“HR”), was chosen to conduct an individual review of the performance failures in the Project; (iii) the scope of INT’s Accountability Review, as described in its Draft Report, was to examine “alleged misrepresentations to the Inspection Panel and events surrounding the preparation, Board presentation and supervision of the Project” and to undertake “a preliminary inquiry under Staff Rule 8.01 to determine whether there is sufficient evidence to warrant misconduct investigations of staff members involved in the Project”; (iv) the adverse decisions were issued soon after the publication of negative articles in the press which suggests that they were responsive to pressure to take disciplinary measures; (v) the decisions were taken on the basis of preliminary findings of a draft report, before INT had concluded its inquiry and had determined that there was insufficient basis for the initiation of a misconduct investigation, which suggests that quick action was being taken to punish staff for deficiencies in the project; and (vi) INT continued its inquiry even though the failures had been characterized as performance concerns and had been referred to HR and management.

64. These factors support an inference that the Applicant’s reassignment and Supplementary Performance Evaluation were disciplinary measures. Even if the decisions are understood as administrative measures taken in the exercise of discretion, the Tribunal

will verify if management exercised such discretion properly. (*See e.g. Gyamfi*, Decision No. 28 [1986], para. 39; *Niedzviecki*, Decision No. 189 [1998], para. 17.)

65. According to the Tribunal's jurisprudence, reassignment decisions may be substantively flawed if the Bank fails to take into account all relevant factors. In *Niedzviecki*, Decision No. 189 [1998], the Tribunal quashed a decision in which the applicant had been reassigned from a managerial to a non-managerial position because the Bank had considered only his managerial inadequacies in a very complex and comprehensive project, while giving no weight or consideration to any of the strongly positive assessments of his most recent managerial accomplishments. In the present case, while the Bank based its decision to reassign the Applicant on her performance failures in the Project, the Bank gave little, if any, weight to the Applicant's consistently good past and subsequent performance evaluations thus failing to take into account all relevant factors. (*See e.g. Niedzviecki*, Decision No. 189 [1998], para. 20.)

*Due process*

66. The Tribunal has long maintained that

The determination whether a staff member's performance is unsatisfactory is a matter within the Respondent's discretion. The Administration's appraisal in that respect is final, unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure. (*Saberi*, Decision No. 5 [1981], para. 24.)

67. According to the Bank, the Applicant's alleged performance failures were identified generally in the Inspection Panel Report, the 2009 Management Report, the Legal Note and more specifically in the INT Draft Report. The only formally identified failures that led to the Applicant's reassignment and her Supplementary Performance

Evaluation are those specifically mentioned in the Managing Director's letter of 28 April 2009, under the following four headings:

- (i) Failure to prepare proper and accurate Project documentation;
- (ii) Inclusion of the erroneous statement referring to the moratorium on demolitions in the PAD without careful review;
- (iii) Failure to understand significance of PCU communications to the Construction Police and the potential for reputational risk for the Bank caused by the perceived conflict of interest in the appointment of the PCU Coordinator;
- (iv) Inclusion of erroneous statement regarding the moratorium in the BTOR of the Fact-Finding mission in May 2007 regarding demolitions and failure to respond to the letter from the family of one of the Requestors.

68. The Tribunal has stressed the importance of respecting the requirements of due process, even where decisions are taken in the exercise of managerial discretion (such as discretionary reassignment and performance appraisal decisions). In *Garcia-Mujica*, Decision No. 192 [1998], para. 19, the Tribunal stated that with regard to discretionary decisions

a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work.

And in *K. Singh*, Decision No. 188 [1998] it held in para. 21:

Two basic guarantees are essential to the observance of due process in this connection. First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second the staff member must be given adequate opportunities to defend himself.

69. The Tribunal must accordingly examine whether the Bank afforded the Applicant adequate notice of the performance concerns and a meaningful opportunity to defend herself before the adverse decisions affecting her employment were taken.



70. *Inspection Panel Report and Legal Note.* These documents do not mention the Applicant specifically and could not be viewed as giving notice of specific performance failures on her part that could lead to an adverse decision against her. The Applicant was interviewed by the Inspection Panel, but there is no evidence that in that interview she was responding to specific allegations regarding her performance. The Report was critical of the Bank's actions or inactions with regard to the Project, but did not name particular individuals or assign responsibility for specific failings.

71. Similarly, the Legal Note prepared by the acting General Counsel did not address the responsibility of specific individuals for the errors in the Project, and indeed stressed that it focused only on the circumstances surrounding the correction of the PAD.

Moreover, the Legal Note observed the following:

PADs are typically drafted and edited by several staff working on a project team, with division of labor among the various sections. Experience suggests that in practice there may be no clearly accountable person who ensures final quality-control of the document. More systematic checks and robust quality control mechanisms might inspire greater confidence that future errors of this nature would not arise. The fact that as far as we know this is the first instance of correction of a PAD substantive error subsequent to Board approval does not mean that no other PAD may contain a similar infirmity.

72. Furthermore, inasmuch as it was concerned with the Corrigendum to the Board, the Legal Note did not deal with her role in the events surrounding the issuance of the Corrigendum after the Applicant had left ECA and moved to LAC. In sum, the Legal Note did not put the Applicant on notice as to specific performance failures on her part that would lead to an adverse decision.

73. *2009 Management Report.* The 2009 Management Report which responded to the Inspection Panel's findings was one of the main bases for the decisions. Although it acknowledged a number of errors during Project preparation, Board presentation and

Project supervision, as well as in the preparation of the 2007 Management Response and the issuance of a Corrigendum to the PAD in September 2008, it did not assign individual responsibility. It used expressions such as “Task Team,” “ECA Management” and “Country Management Unit.” Even though the Bank claims that the 2009 Management Report was one of the “inputs” taken into account for the reassignment and the Supplementary Performance Evaluation decisions, it concedes that that Report was not intended to determine individual accountability of staff members for failures and errors.

74. The Tribunal finds that the Applicant was neither given adequate and specific notice as to alleged failures, nor was warned that the findings of the 2009 Management Report would be used in considering adverse measures. Therefore she could not have been reasonably expected to give responses to defend herself against such allegations. In addition, the Applicant was not afforded a meaningful opportunity to comment on the Report. Given the limited number of meetings held to discuss the Report and the great number of issues to be covered in those meetings as well as the large number of participants, they could not have been considered sufficient to discuss specific allegations against staff members which would lead to adverse actions against them. Although views were solicited, insufficient time was allowed for staff to comment before the Report was sent to senior management. There is no evidence that detailed comments were incorporated. In fact, a communication by the ECA VP to staff explaining that an effort was made to incorporate as many comments as possible to a timeline of events suggests that not all comments and responses of staff were incorporated and that in any event they were collected in haste. The Applicant plausibly observes that many of her suggested corrections were not incorporated in the Report. In addition, the Regional Director of

Strategy and Operations, when distributing the first draft of the Report for comments, asked that such comments not be detailed, but that the recipients “flag major issues,” and staff had less than a day to submit such comments. Furthermore, in a review meeting of the draft only a core team was invited to participate.

75. The Tribunal perceives troubling haste in the preparation of a report of such a serious nature, and a lack of opportunity for staff to give detailed and personalized responses. While this might be understandable in a report of a general nature which does not seek to attribute individual responsibility, this Report and the staff members’ participation in it could not have satisfied the due process requirements of proper notice of individual performance deficiencies, nor encompassed a proper opportunity to defend oneself. The Tribunal finds that this Report could not have formed a proper basis for the adverse decisions taken against the Applicant regardless of their nature as administrative or *de facto* disciplinary measures.

76. *INT Draft Report.* The INT Review was considered as the sole exercise intended to examine the individual accountability of staff. It should therefore have complied with the requirements of due process. It did not.

77. In its Draft Report, INT explained that it responded to the President’s request to conduct an Accountability Review and a preliminary inquiry with regard to alleged misrepresentations to the Inspection Panel, and in connection with events surrounding the preparation and supervision of the Project (including the presentation to the Board). The Tribunal accepts that it was reasonable for INT to initiate a preliminary inquiry under Staff Rule 8.01 to see if credible evidence justified the initiation of a misconduct investigation of staff members involved in the Project. The Draft Report shows that in conducting its

preliminary inquiry, INT examined many documents relating to operation policies and procedures, as well as the Report of the Inspection Panel and the management responses thereto, the Legal Note and the OPEs of staff members and managers. INT also interviewed many staff involved in the Project and enlisted an experienced Bank Lead Environment Specialist to provide an assessment of the Bank's Safeguard policies and procedures. To the extent that INT was operating as an objective finder of fact recording information from documents, witness testimony, and expert opinions, with the aim of determining whether there was sufficient basis to initiate a misconduct investigation, such inputs were properly considered and recorded by INT in its Draft Report. The Draft Report shows, however, that INT's review did not consist solely of the recording of incidents and the related testimony of staff, but went on to include an assessment of actions or inactions of staff members in relation to the Project as indicative of poor performance.

78. The Tribunal finds that there was a conflation of procedures, that of misconduct investigations to be conducted by INT according to Staff Rule 8.01 and according to its guidelines, and that of performance evaluation to be conducted by management and HR. In its jurisprudence, the Tribunal has been critical of such merging of procedures because it tends to result in disregard of due process requirements. (*See e.g. Husain*, Decision No. 266 [2002] at para. 43 *ff.*; *de Raet*, Decision No. 85 [1989], para. 62).

79. The Tribunal finds further that INT should have concluded its inquiry at the time of identifying the performance matters and should have referred them to the appropriate managers, HR, or both, for follow-up and resolution in a non-disciplinary context. As its 2008 Staff Guide states: "INT does not participate in, recommend, or autonomously take

administrative action or impose disciplinary measures.” This practice and duty of INT has also been recently noted by the Tribunal in *BB*, Decision 426 [2009], paras. 60-62.

80. In the current case, INT proceeded with three actions which were apparently contradictory – in the aggregate if not in isolation – to its mandate and procedure under the Staff Rules. First, it attached an Appendix to its Report providing additional detail and conclusions regarding the performance concerns identified with respect to each of the staff members in question. It also suggested that under the Bank’s performance management framework a range of remedial actions be applied

in proportion to the degree of poor performance, including but not limited to, placing the staff member on a Monitored Work Program or a Performance Improvement Plan, reassignment, further training, performance counseling or admonishment, addressing the deficiencies in the OPE, and/or factoring in the deficiencies when assessing the SRI rating.

81. With regard to the Applicant, INT referred to six possible performance-related issues (see paragraph 45 above).

82. Secondly, after registering its findings, conclusions and recommendations regarding the performance concerns, INT did not at that time issue a final report. Instead it issued in February 2009 its Draft Report which was labeled “Draft for Discussion Purposes Only” and included apparently “preliminary” findings which it then sent to management for consideration in taking appropriate remedial actions against staff.

83. Thirdly, even though INT had admitted that its findings were related to performance concerns, its Draft Report envisaged the possibility of further investigation of such concerns to see if they might also be sufficiently egregious to justify a full investigation for misconduct as defined in Staff Rule 8.01. In June 2009, INT concluded its preliminary inquiry and informed the Applicant that it had not found evidence of

misconduct, but had noted certain performance concerns of which it had notified management. It did not specify whether these concerns related to her or to others.

84. INT's procedure, in addition to deviating from its regular process and mandate under the Staff Rules, raises a number of concerns. The result of the Bank's conflation of an administrative/performance review procedure with the disciplinary procedure of a preliminary inquiry is that the affected staff, including the Applicant, were not given proper notice of the allegations, accusations or imminent adverse actions against them, nor an adequate opportunity to be heard before an adverse decision was taken in their case.

85. First, when invited by INT to testify, the Applicant was asked to be interviewed as someone who may be able to assist INT in determining some of the facts and circumstances and was not told that she was the subject of the preliminary inquiry. Because she was treated as a witness, she was not allowed to take the transcript of her interview with her and was not allowed to see the preliminary findings of INT as registered in its Draft Report of 26 February 2009 and to comment on them, as they were subject to confidentiality restrictions. Then, the Bank objected to the production of INT's Draft Report until the very end of the proceedings before the Tribunal when it agreed to the Applicant's *in camera* review of the document attached to its Rejoinder. Had these findings been the result of an administrative procedure rather than a confidential INT preliminary inquiry, the Applicant would have been given the opportunity to comment on them and her comments might have been taken into account by management and HR before adverse decisions were made. In this case, INT's preliminary inquiry findings were considered by management and HR without the Applicant having been allowed to explain and defend herself. Additionally, the Tribunal finds merit in the Applicant's claim that

because the analysis of alleged individual staff behavior in the Draft Report was redacted, she was still being deprived of the opportunity of reviewing in full INT's observations which might have assigned responsibility for the actions in question to other Project Team members.

86. What is even more troubling is that INT not only admitted in its Draft Report that "addressing these performance concerns in the misconduct context may be impeded in light of the evidentiary standards established by the World Bank Administrative Tribunal" but also that "[t]he preliminary inquiry's findings were constrained, to some extent, by evidentiary issues related to the credibility and reliability of staff testimony, the confidentiality of Inspection Panel proceedings, and other issues." This can be reasonably taken to mean that the credibility and reliability of witnesses examined, as well as confidentiality issues, might put into question INT's findings in general. In addition, a footnote in the Draft Report shows that INT forwarded to management on 13 February 2009 a paper titled "Evidentiary Concerns" discussing in detail these problems of evidence in INT's investigation. As this document was never provided to the Applicant or to the Tribunal to examine its effect and weight on INT's findings, the Tribunal can only draw an adverse inference as to the accuracy of the INT's findings as a basis for the Applicant's reassignment and subsequent Supplementary Performance Evaluation, and conclude that these decisions were substantively flawed.

87. The Tribunal is also troubled by the haste and lack of transparency that seemed to characterize the INT process, similarly to the problem related to the preparation and issuance of the 2009 Management Report. As the Tribunal found in *Prasad*, Decision No.

338 [2005], para. 60, “[p]rocedures or investigations that may end up being surreptitious cannot be upheld as proper and rightful.”

88. The Tribunal recalls its finding in paragraph 84 above. The Bank has not provided a persuasive explanation why management could not wait for INT to complete its preliminary inquiry into the concerns of staff conduct in the Project and take corrective actions, if necessary, at a later point. The Tribunal finds that the haste and lack of transparency with which the Applicant was treated compounded the due process violation in her case.

89. *Other inputs.* The Bank has stated that input was received from OPCS and HR on accountability and job roles. The Bank focused on comparing the customary areas of responsibility of a TTL with the areas where Project errors were made. The record does not show that the Applicant was provided with a copy of this analysis before decisions were made. Again, documentation on which the Bank relied to take the decisions were provided to her only at the time of the proceedings before the Tribunal – another instance of violation of due process.

90. *The actual Supplemental Evaluation Process.* The violation of due process described above led to the adverse decisions of reassignment and the issuance of a Supplementary Performance Evaluation. Furthermore, the so-called process of the Supplementary Performance Evaluation, which followed the Management Report, the INT findings and the Managing Director’s decision, and which, according to HRSVP, was governed by Staff Rule 5.03 which generally sets out the Bank’s performance management process, also presented significant flaws. The process followed in the Applicant’s case did not comply with the requirements of this Staff Rule. Furthermore, the letter of 28 April



2009 had already informed her that her OPE would be amended in any event and that this letter along with her comments would be put in the Applicant's file without any further action regarding her OPEs. This does not amount to a serious consideration of the Applicant's presentation of her case but rather indicates that the Applicant was allowed to provide her comments only to preserve the appearance of due process.

91. Without prejudice to what the outcome of a fair and serious assessment would have been, the Tribunal finds that due process was not respected and the Applicant was thereby deprived of the chance of disproving the doubts raised with respect to her performance.

*Concluding determinations*

92. In considering the appropriate remedies in this case, the Tribunal cannot overlook certain circumstances that are established by the Applicant's own statements. By her own admission, the Applicant gave a presentation to the Board which included a statement she knew to be inaccurate. Furthermore, it is a matter of record that the Applicant continued to refer to an agreement which she knew did not exist and allowed reports to be issued (e.g., the PAD issued on 25 May 2005 and the BTOR of 27 June 2007) that repeated this inaccuracy.

93. Taking account of these circumstances, the remedies shall be as follows. The Applicant is entitled to a fair and serious assessment that complies with the Staff Rules and provides her the full opportunity to disprove the Bank's adverse conclusions regarding her performance and to explain the account of relevant events contained in her own statements. Accordingly, the Tribunal decides that the Supplementary Performance Evaluation shall be

rescinded. The reassignment decision by the Bank shall be allowed to stand, but shall be overturned or confirmed by the Bank according to the outcome of this new assessment.

94. Furthermore, as the Applicant has succeeded in demonstrating that the Bank committed a series of errors, and thereby violated her rights, in virtually every step it took to assess and evaluate her performance leading to the challenged decisions, she will be awarded costs.

#### DECISION

The Tribunal decides that:

- (i) the Supplementary Performance Evaluation of 28 April 2009 is rescinded and any reference to it will be removed from the Applicant's personnel file;
- (ii) the Bank, within six months of receipt of this judgment, shall undertake a new assessment of her performance in relation to the Project in accordance with paragraph 93 above;
- (iii) the Bank shall pay a contribution of \$35,000 towards the Applicant's attorney's fees; and
- (iv) all other claims are dismissed.

/S/ Jan Paulsson

Jan Paulsson  
President

/S/ Olufemi Elias

Olufemi Elias  
Executive Secretary

At Washington, DC, 23 March 2010