



World Bank Administrative Tribunal

2010

No. 430

**BF,
Applicant**

v.

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

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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 24 July 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 accepted as part of the record.

2. The Applicant claims that the decision to reassign her to a non-managerial 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 joined the Bank in August 1984 as an Economist. By 1997 she had attained the rank of Country Director. Between April 2003 and December 2007 she served in the Level GI position of Director and Regional Coordinator for Southeast Europe in the Bank's Eastern Europe and Central Asia ("ECA") Region and was based in the Bank's Headquarters in Washington, D.C. In January 2008 she was appointed Country Director for Central/South Europe and the Baltic Countries. She held that position until her

reassignment effective 15 May 2009 to the non-managerial Level GI position of Senior Advisor in the Finance and Private Sector Development (“FPD”) Network Anchor.

4. The present controversy arises in connection with the Applicant’s involvement in the Albania Integrated Coastal Zone Management and Clean-Up Project (“ICZMCP” or the “Project”), and more particularly one of its major components, known as the Southern Coast Development Plan (“SCDP”).

5. One of the complexities of the Project related to land use planning in Albania and the Government’s ongoing practice of involuntary demolitions to control unregulated construction. Since the fall of the Communist regime in the early 1990s, irregular land subdivisions and construction had become a serious problem. The Government had implemented an encroachment removal program prior to the Bank’s involvement in the Project.

6. As Country Director for the Western Balkans, the Applicant initiated discussions in 2003 with the Government and the political opposition. In March 2004 she chaired a Project Concept Note Meeting where it was stated that the coastal zone management component of the Project would “inevitably require some removal of illegal and semi-legal constructions, and that project preparation should plan appropriately for this, respecting Bank safeguards”

7. In February 2005 e-mail messages among the “Project” or “Task” Team members, on which the Applicant was not copied, reflect discussions about a possible link between the proposed Project and the Government’s ongoing demolition program which could trigger the Bank’s Policy on Involuntary Resettlement (OP/BP 4.12). That Policy promulgates 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. OP/BP 4.12 does not, however, apply to “regulations of natural resources.” An important question to be resolved by the Project Team was the extent to which OP/BP 4.12 would apply to the Project’s components.

8. The Applicant states that throughout 2004 and the spring of 2005, during trips to Albania, she discussed with various Government officials and representatives of the sizeable Greek minority living on Albania’s southern coast the need to halt the Government’s ongoing demolition program until the SCDP would come into force. The Applicant believed that a short-term moratorium on the ongoing demolitions on the southern coast was required until a Letter of Development Policy was in place which would set out the long-term resettlement strategy, and bridge the gap until the SCDP (which restates that policy) would come into force. At the time, it was envisioned that the SCDP would come into force within six months of the presentation of the Project (“Project presentation”) to the Bank’s Board of Executive Directors (“the Board”) in June 2005. (In the event, adoption of the SCDP was delayed until the summer of 2008.) The Applicant maintains that no Albanian Government official expressed disagreement with her request for a short-term moratorium.

9. It appears that as of March 2005 it had become clear to the Task Team that the Government was not prepared to suspend its ongoing demolition program, as evidenced by e-mail communications that month among members of the Bank’s Legal Department (“LEG”) and the Task Team discussing ways of dealing with the Government’s refusal to suspend demolitions. In particular, the Country Lawyer sent an e-mail message on 20 March 2005 to a senior environmental lawyer stating matter-of-factly that “the Albanian

Government refuses to put a freeze on all demolitions, which we had agreed on as a requirement for us to move forward during our last conference call.” The Applicant was not copied on these e-mail messages.

10. On 29 March 2005 a meeting took place, following the completion of a Legal Consultant’s draft report on Albanian land laws and demolitions, to discuss how to ensure that the Project would comply with Bank operational policies, which were deemed critical to ensuring that potentially adverse environmental and social consequences from Bank projects are identified, minimized and mitigated (“Safeguards Meeting”). The Applicant, the Task Team, and members of LEG attended the meeting. According to the Applicant, no one informed her during that meeting that the Government had not consented to a moratorium on demolition. The Applicant states that, to the contrary, the ongoing demolition was discussed extensively and that it was agreed that there was no need to trigger OP/BP 4.12 for the SCDP component of the Project. The Sector Manager (Social Development) who, as it happened, was the author of OP/BP 4.12, was apparently tasked to follow up on the issue with the Task Team and to provide guidance that reflected the Bank’s position on the applicability of OP/BP 4.12 to the SCDP.

11. On 7 April 2005 the Applicant chaired a Decision Meeting for the Project. The meeting concluded that OP/BP 4.12 would not apply to activities under the SCDP, taking the view that land use planning under the SCDP was a natural resource management activity excluded from the policy.

12. Following a Project Appraisal mission that took place between 12 and 20 April 2005, the Task Team obtained a written commitment from the Albanian Government (“Letter of Development Policy”) to adopt and adhere to an Environmental and Social

Safeguards Framework (“ESSF”) which established procedures relating to land acquisition and involuntary resettlement. However, the commitments set forth in the Letter of Development Policy could not be implemented until the SCDP was put in place.

13. Meanwhile, starting in March 2005, Team members were circulating drafts of the Project Appraisal Document (“PAD”), a particularly important document which was to serve as the basis for the evaluation and decision of the Board. On 14 April 2005 the Sector Manager (Social Development) sent an e-mail message to the Task Team Leader (“TTL”) affirming “our position on the triggering of the Bank’s resettlement policy” and stating that 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.” He proposed draft language for the PAD with reference to the Government’s demolition program, which, he stated, the Senior Social Scientist for the Project had reviewed. He also stated that two members of LEG had “endorsed the position.” That language included the following inaccurate statement:

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.

14. The message was copied to the Country Lawyer and other members of LEG, including two Chief Counsel, the Regional Safeguards Coordinator, the Sector Manager (Environment) and the Senior Social Scientist for the Project. None of the e-mail recipients appears to have reacted to the error, even though several Team members, and LEG, knew at this point that the Government had not agreed to suspend its ongoing demolitions (see paragraph 9). The TTL proceeded to copy this sentence verbatim into the final text of the PAD.

15. Between 23 and 24 May 2005, the dossier for the Board Meeting scheduled for 21 June 2005, including the PAD and legal documents, was reviewed and cleared by the Sector Manager (Environment) and the Senior Country Officer, acting on behalf of the Applicant who was travelling at the time. LEG appears to have claimed that it cleared only the legal documents – i.e. the Credit Agreement – but not the PAD. None of the documentation made reference to the fact that the Government had refused to suspend its demolition program. On the contrary, the Project documentation submitted to the Board continued to include, under “project risks,” the erroneous statement that the Government had agreed to a moratorium on the demolitions.

16. On 20 June 2005, the day before the Board presentation, two Executive Directors issued written statements supporting the Project but also noting:

The Bank should make adequate arrangements with the [Government of Albania] that those who lose their primary residence or sources of livelihood due to encroachment removal action by the government should find alternative shelter and adequate source of income following such government action. In this regard, we welcome the [Government of Albania’s] decision to halt further encroachment removal until proper criteria and procedures for assisting such vulnerable families and individuals are established.

17. The Applicant reviewed the draft PAD. She states that she relied on the inaccurate language in the PAD which included the false statement quoted above at paragraph 13 to confirm her understanding that a written moratorium had been secured by the Project Team for the Project zone. A Task Team member raised the issue of the inaccurate statement in the PAD with the TTL the evening of 20 June 2005. At 11:59 p.m. the same evening, the TTL circulated a “revised opening statement” to members of the Country Office and the Task Team – but not to the Applicant – 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.

18. The Applicant affirms that she was unaware of this amendment. She states that on the day of the Board presentation, the issue of the inaccurate PAD statement was not raised at the pre-Board meeting that she attended. In any event, it is a matter of record that the final opening statement was read to the Board by the TTL without the sentence quoted above in the preceding paragraph, and the Board approved the Project on this basis.

19. On 14 July 2005 a draft summary of the Board Meeting discussions was circulated and cleared by the Task Team members and the Applicant as an accurate record of what happened in the meeting. Thereafter, and until 2008, no further action was taken to correct the inaccurate statement in the PAD.

20. The Project became effective in November 2005. The SCDP became effective in the summer of 2008.

21. Project implementation in Albania was managed by Project Coordination Units (“PCUs”) integrated within the Albanian Government. Around February 2006 the Albanian Ministry of Public Works began the process of selecting a new Project Coordinator for the Project’s PCU. One of the candidates short-listed by the Government was Jamarber Malltezi who was also the son-in-law of the new Albanian Prime Minister. On 9 February 2006, upon the request by the TTL of the advice of the Regional Senior Procurement Advisor, a Senior Procurement Specialist clarified the requirements for the position and added:

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) ... his selection is not biased by the influence in any manner of the Prime Minister directly or indirectly ... he will not be supervised directly or indirectly by the [Prime Minister] and ...

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.

22. It appears that the Task Team believed that any issue of nepotism or conflict of interest could be resolved, and believed that Mr. Malltezi was the best out of the three candidates on the short-list. As part of the clearance process, assurances were obtained from the Government that (i) the selection was not influenced by the candidate's relation to the Prime Minister; (ii) that he would not be supervised directly or indirectly by the Prime Minister; and (iii) that the PCU Coordinator's compensation would be reasonable and comparable to others similarly situated. Mr. Malltezi's selection was nevertheless met by critical reaction in the Albanian press.

23. The Applicant was not copied on any of the e-mail messages regarding the recruitment of Mr. Malltezi. Nor did she receive any relevant press clippings from the Albanian press. She states that she was first informed about the matter only in early September 2007, when homeowners in the village of Jale, in the Project area, raised the issue in the context of their complaint about demolition to the World Bank Inspection Panel. Upon inquiring with the Country Manager and with Procurement staff in Washington about the selection process and selection criteria applied by the Government and by the Bank, the Applicant determined that there were no grounds to dismiss Mr. Malltezi at that stage (one and a half years after his appointment) since he had been selected competitively, in accordance with Albanian laws, and in full conformity with Bank procurement rules and guidelines.

24. In the first two years after the Project's approval by the Board, no demolition of illegal housing by the Government occurred on the southern coast. Between January and March 2007, private investors approached the Applicant and other Bank representatives

with an interest in developing the southern coast of Albania for tourism. The Applicant instructed the Country Office to discourage the Government of Albania from engaging in any such activities with the investors due to a lack of transparency, as well as financial reasons, and to continue instead to develop the SCDP.

25. The Applicant explains that during the course of Project implementation, and in line with Project implementation objectives, the Bank provided technical and financial assistance to local government units on the southern coast of Albania as well as to the Albanian Construction Police by commissioning aerial surveys and mapping in order to monitor the development of the coast.

26. On 26 March 2007 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 made the following statement 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 sustainable development in this area and its impact on the overall economic and tourism development of the country ... kindly make sure to take the necessary measures and as fast as possible.

27. On 10 April 2007 the Construction Police responded, stating that it

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.

28. 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.

29. On 20 April 2007 Mr. Malltezi informed the TTL and the Task Team of the correspondence between him and the Construction Police. On 21 April 2007 the TTL sent a response to Mr. Malltezi referring to the text of the PAD and stating: “most likely we will be asking the Government for an explanation on why the agreements reached under the Project are not being followed.” A package containing copies of these letters was sent to the Country Office on 23 April 2007. On the same day the Country Manager and the TTL also received a letter, forwarded by the Country Office, from a member of a family whose house had been destroyed in Jale. The Country Manager asked that a press release be drafted to convey the Bank’s position on any demolition and the Bank’s policy on these issues, so as not to give the impression that the Bank supported the demolition. In the end, the Task Team sent no response to the complainant, and no press release was issued. The Applicant was not copied on any of the communications of the Task Team or correspondence of the PCU with the Construction Police, nor was she shown a copy of the letter of complaint.

30. Between 3 and 5 May 2007, a fact-finding mission to the Project area took place. The TTL and a Senior Social Scientist for the Project visited the site of the demolitions but did not contact any of the homeowners whose houses had been destroyed. This mission was organized by the Sustainable Development Sector; the Applicant was unaware of it. She was not copied on the Terms of Reference and no Back-to-Office-Report (“BTOR”) was issued following completion of the mission.

31. While in Albania for a country visit, between 18 and 19 June 2007, the Applicant first found out that the demolitions had occurred two months earlier. Apparently due to the Applicant's insistence, the Team belatedly issued on 27 June 2007 a BTOR of the fact-finding mission. The BTOR did not make any reference to the correspondence between Mr. Malltezi and the Construction Police. The Applicant remained unaware of the correspondence. Furthermore the BTOR stated that:

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.

32. The Applicant states that, until December 2007, she was never informed by Country Office staff or Task Team members about the correspondence between Mr. Malltezi and the Construction Police.

33. On 30 July 2007 the Inspection Panel received a request for investigation of the Project, alleging that demolitions had occurred as a result of the Project. A Response from management was required within 21 working days. 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 the Operations Policy and Country Services Department ("OPCS"), and a Country Officer met to discuss the Response ("2007 Management Response"). Other Task Team members also provided input. This was, however, at a time of unusually high staff turnover (the TTL, the Sector Manager (Environment), the Country Manager, and the Safeguards Coordinator had apparently changed in the preceding three months). Furthermore, because the Response was prepared

in the month of August, all key managers were on leave for most of the period: the Vice President of ECA (“ECA VP”), the Regional Director of Operations and Strategy, the Sector Director of the merged Environment and Infrastructure Departments, the Sector Manager (Rural) and acting Sector Manager (Environment), and the Applicant.

34. The 2007 Management Response was issued on 17 September 2007. It denied any link between the demolitions and the Project, either directly or indirectly, stating that the demolitions could not have been carried out as part of, or as a result of, the Bank-financed SCDP because the SCDP had not been prepared yet. The Response also noted that the Task Team had determined that OP/BP 4.12 did not apply to ongoing demolitions in the Project area, nor to demolitions resulting from regional zoning requirements related to the implementation of the SCDP.

35. The Response did not make any mention of the correspondence between Mr. Malltezi and the Construction Police, which would have shown that aerial surveys financed by the Project had been used to identify illegal constructions. It also did not mention the moratorium supposedly accepted by the Government.

36. On 1 November 2007 the Board approved the Inspection Panel’s recommendation to proceed to an investigation. From December 2007 to February 2008, the Inspection Panel interviewed Task Team members, as well as members of Country, Sector and ECA management.

37. In January 2008 the Applicant assumed her new post as Country Director for Central/South Europe and the Baltic Countries. The Applicant states that on 13 February 2008 she was interviewed by the Inspection Panel during which interview she found out that no agreement with the Government to halt demolitions had ever been obtained. In

February 2008, a first draft of a Corrigendum to the PAD was prepared and submitted to the Managing Director of the Bank in early March 2008 along with other documents. The Applicant states that she had insisted on the prompt issuance of the Corrigendum, but the Managing Director of the Bank and the ECA VP decided not to issue it earlier due to the ongoing Inspection Panel investigation. The Corrigendum was ultimately issued on 2 September 2008. The late issuance of the Corrigendum resulted in concerns and questions from some Board members, as well as in criticism by the Inspection Panel.

38. On 10 September 2008 a General ECA Regional meeting was held, chaired by the Regional Director of Operations and Strategy and attended by the ECA VP and the acting General Counsel, in order to discuss the timeline of Project events in light of the latest revelations.

39. On 7 November 2008 pursuant to a request by the Bank's President, the Bank's acting General Counsel issued a Legal Note which reviewed the circumstances surrounding the issuance of the Corrigendum. According to the Legal Note, 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.

40. The Inspection Panel Report dated 24 November 2008 was distributed to the Board on 1 December 2008. It concluded that a series of serious errors had been committed during the Project preparation, the Board presentation and Project implementation. Notably, the Panel 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 [was] not directly or indirectly linked to the Project;

Management's decision that OP/BP 4.12 [did] 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.

41. The Inspection Panel also sharply criticized Management's failure (i) to disclose to the Panel the correspondence between Mr. Malltezi and the Construction Police preceding the demolition (which in the Panel's view established a clear link between the Project and the demolition), (ii) to respond to or visit with the affected families, (iii) to address the matter in the Albanian press, and (iv) to issue promptly a written Corrigendum to the PAD. The Inspection Panel Report was accompanied by a memorandum by the Panel's Chairperson which criticized the difficult investigation process and alleged deliberate misinformation, including misrepresentation of facts by staff, reluctance to provide information and lack of transparency on Project-related information.

42. The Inspection Panel Report was followed by a statement from the Bank's President dated 1 December 2008, expressing his serious concerns about the findings of "misrepresentation to the Panel or to the Board" and announcing a full investigation of these matters.

43. Following issuance of the Inspection Panel Report, a new team consisting of the new Country Director, a Lead Country Officer and the new Sector Manager (Environment)

was assigned to draft the Management Report and Recommendation in Response to the Inspection Panel Report (“2009 Management Report”).

44. The drafters explained later that they had assumed that the purpose of the Management Report was to identify mistakes made so as to draw the appropriate lessons. The main input sought by the drafters of the 2009 Management Report was restricted to comments on a timeline of events that the drafters had created and shared with staff by e-mail on 10 December 2008. Staff were allowed only one day to respond.

45. On 12 December 2008 one of the Bank’s Managing Directors chaired a six-hour “Roundtable” meeting during which further Project-related questions were discussed with staff involved in the Project.

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

47. The 2009 Management Report was finalized on 9 January 2009 detailing a series of errors committed during the Project design, presentation to the Board and Project supervision – as well as during the Inspection Panel proceedings. With regard to Country and Sector Management, it noted the failure to exercise responsibility in a consistent manner and to provide adequate oversight to the Task Team, the failure to correct the inaccurate PAD reference to a moratorium during the Board meeting of 21 June 2005, poor judgment in the selection of Mr. Mallezi as Project Coordinator, and failure to respond in a timely manner to the April 2007 demolitions, thus allowing public opinion to associate

the demolitions with the Project and, thus, the Bank. It also discussed failures by the Task Team. The Inspection Panel Report and the 2009 Management Report were discussed by the Board on 17 February 2009. The 2009 Management Report was issued the following day.

48. In the meantime, on 11 January 2009 the Applicant received a request for an interview from an investigator of the Department of Institutional Integrity (“INT”) “in connection with a preliminary inquiry INT is conducting into concerns of possible misconduct in relation to the Albania-Integrated Coastal Zone Management and Clean-Up Project,” stating that the Applicant had “been suggested to us as someone who may be able to assist INT in determining some of the facts and circumstances.” On 23 January 2009 the Applicant was interviewed by INT and provided further information to INT on 7 February 2009.

49. 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” which alleged that Bank officials had “misled and stonewalled” the Inspection Panel and deliberately lied to the Board. It also noted how “the Bank is showing no signs of addressing anything head on.” On 11 February 2009 Fox News published a follow-up article discussing the different investigations ordered into the matter by the Bank’s President. It mentioned that the President was embarrassed and angry, and was deciding “whose heads are going to roll.”

50. An announcement on the Bank’s Intranet, dated 17 February 2009, stated that

[T]he President has asked the World Bank’s Department of Institutional Integrity (INT) to lead an Accountability Review into alleged misrepresentation by Bank staff to the Inspection Panel and internal events surrounding the Project preparation, Board presentation, and Project supervision, and will take appropriate corrective action.

51. 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 that it considered to be proportionate to the degree of poor performance, including placing staff on Performance Improvement Plans or reassignment, further training, addressing the deficiencies in individual Overall Performance Evaluations (“OPEs”), and factoring in the deficiencies when assessing the Salary Review Increase (“SRI”) ratings. However, 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 identified some performance concerns that might be sufficiently egregious to constitute possible misconduct, and expressed its intent to look further into these matters.

52. With particular regard to the Applicant’s actions or inactions in connection to the Project, INT noted two possible performance-related issues: the Applicant’s “[f]ailure to identify and correct the PAD error prior to submission to the Board” and her “[a]lleged direction to omit correction in the opening statement regarding PAD error and failure to follow up regarding the PAD error.”

53. 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 the preliminary findings of INT's Accountability Review and preliminary inquiry, as well as the errors identified in the 2009 Management Report.

54. During this meeting it was also decided that Supplementary Performance Evaluations should be undertaken, where appropriate, to amend performance records with regard to the Albania Project for the relevant years. It was also decided that the Managing Director would act as the formal decision maker and that it was in the Bank's best interest that the staff in question be reassigned. As a result, six individuals, including the Applicant, were reassigned to technical or non-managerial positions. In addition to the reassignments, Supplementary Performance Evaluations were undertaken for eight individuals, including the Applicant, "to amend their performance records for the periods concerned regarding their performance on the Project."

55. On 25 March 2009 the Applicant met with the Managing Director. In that meeting, the Applicant states, the Managing Director mentioned the ongoing INT Accountability Review and stated that INT was looking into possible misconduct of staff involved in the Project, and informed the Applicant that she would be reassigned with immediate effect to a non-managerial post in FPD.

56. In an e-mail message to the Managing Director on 3 April 2009, the Applicant requested an opportunity to review the "INT Report" and pointed out her concerns about the fact that decisions were being made that seriously affected her career and reputation in the Bank without affording her the opportunity to provide comments on the allegations and to correct possible misunderstandings. The Managing Director responded by e-mail the same day, denying that things had been rushed or were not transparent.

57. On 13 April 2009 the Applicant received the Managing Director's decision of 10 April 2009, which stated:

As we have discussed, management has decided that you will be reassigned in the interest of the Bank Group as provided by Staff Rule 5.01, section 2.03. Your reassignment will be to a corporate position at your current level for a regular three-year rotation period. You will be provided specific information regarding your reassignment by April 30, 2009, and your reassignment will be effective May 15, 2009.

As also discussed, your Overall Performance Evaluations for 2005-2007 will be amended through a Supplemental Performance Evaluation, which will be provided to you shortly.

58. On 28 April 2009 the Managing Director sent a two-page letter to the Applicant entitled "Supplementary Performance Evaluation." Referring to the 2009 Management Report and to its conclusion that "a series of unacceptable errors was committed throughout the project cycle," as well as in the preparation of the 2007 Management Response and the 2008 issuance of the Corrigendum to the PAD, the Managing Director wrote that the Applicant, as Country Director for Albania at the time of the Project preparation and implementation until the end of 2007, had been "overall responsible" for the Bank's activities and portfolio in Albania. The Managing Director stated that a review of the Applicant's performance in respect of the Project had revealed the following performance deficiencies:

Failure to follow upon the issue of existence or not of a moratorium following the Board presentation. ...

Failure to identify potential conflict of interest and serious reputational risk to the World Bank entailed in the hiring of the PCU manager. ...

Failure to safeguard and manage damage to the Bank's reputation following reportage on the demolitions in Albanian newspapers.

59. The Managing Director explained that the purpose of the letter was to update the Applicant's performance record and amend her OPE for the period concerned (2005-2007)

in light of the new performance assessments, and to provide her with an opportunity to submit comments to be made part of the OPE. The letter, along with the Applicant's comments, would be placed in her personnel file as a Supplemental Performance Evaluation for the period concerned. On 8 May 2009 the Applicant provided a 12-page, single-spaced letter containing detailed comments to the Managing Director's letter. She also asked, "as a preliminary matter," to be provided with the Staff Rules or other documents "explaining the procedure and/or criteria for a 'Supplementary Performance Evaluation' so as to help me understand this process and my rights as an affected staff member."

60. On 26 June 2009 about five months after her interview with the investigators, the Applicant received a notice from INT stating that "[b]ased on the preliminary inquiry findings ... 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." 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."

61. On 1 July 2009 the Applicant received a letter dated 29 June 2009 from the Managing Director which informed the Applicant that, based on her comments to the notice of "Supplementary Performance Evaluation" of 8 May 2009, the Managing Director's letter of 28 April 2009 would be revised, and that a copy of the revised letter would be placed in the Applicant's personnel file. The Managing Director's letter of 29 June 2009 added that "Management's supplemental evaluation of your performance on the

[Project] in 2005-2007 was based on multiple inputs, which were assessed in the context of your responsibilities as Country Director.”

62. On 2 July 2009 the Applicant requested INT to provide her with any report it used when, as stated in its notice of 26 June 2009, it had “briefed” management about “possible performance concerns” regarding unidentified staff. On 5 July 2009 INT denied the Applicant’s request, citing the involvement of “multiple staff members” and confidentiality constraints.

63. As agreed with the Bank, the present Application was submitted directly to the Tribunal on 24 July 2009. The Applicant is contesting the Managing Director’s (i) 10 April 2009 reassignment decision and (ii) 28 April 2009 “Supplementary Performance Evaluation.” As part of her pleas, the Applicant requests (i) rescission of the Bank’s 10 April 2009 reassignment decision and immediate reinstatement to a managerial position in Headquarters similar to her prior position; (ii) rescission of the Bank’s 28 April 2009 “supplemental performance evaluation” and removal of any reference to it from her personnel file; (iii) a formal written apology from the Bank and a corresponding Intranet announcement to all staff and an appropriate notification to the Board; (iv) three years’ salary as compensation for the Applicant’s moral injury and personal distress, as well as harm to professional and personal life and reputation; (v) legal fees and costs incurred as a result of these Tribunal proceedings, which amount to \$93,060.27; and (vi) any other relief deemed fair and appropriate by the Tribunal.

THE CONTENTIONS OF THE PARTIES

64. The Applicant’s main contentions are that (i) her abrupt reassignment to a non-managerial position clearly amounted to a *de facto* disciplinary action for her alleged

failures as Country Director in the Project; (ii) she was denied due process; (iii) even if the reassignment decision was taken in the exercise of managerial discretion, it was based on an unfair and non-transparent process, was arbitrary and unreasoned, possibly improperly motivated, and based on gross errors of fact; (iv) the Bank's criticisms of her "failures" in the Project were based on a gross misappreciation of facts, and on the Bank's failure to assess the responsibilities of staff, especially those in the Task Team and LEG, on which the Applicant, as Country Director, must reasonably rely; (v) she always acted in line with her duties as Country Director; and (vi) the retroactive amendment of the Applicant's OPE was based on an erroneous appreciation of facts, and in any event, the Bank does not have legal authority to amend her 2005-2007 OPEs retroactively.

65. The Bank responds that (i) the Applicant's reassignment was not the equivalent of a disciplinary sanction but a legitimate exercise of managerial discretion; (ii) the Applicant was afforded due process; and (iii) the Applicant's Supplementary Performance Evaluation for the period 2005 through 2007 reflects a fair appraisal by management of her performance in the Project as it was reasonably based on multiple sources of information newly obtained by the Bank as a result of the Inspection Panel Report.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

66. 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 guarantee that any effects on individuals were justified by the facts as assessed by legitimate standards.

The reassignment decision

67. The Applicant claims that her abrupt reassignment to a non-managerial position was a disciplinary measure and not a routine discretionary administrative decision “in the interests of the Bank Group.” The Applicant states that she was being sanctioned for her alleged failures as Country Director in the Project. In particular, she points out that her reassignment (as well as her Supplementary Evaluation) were decided immediately following the publication of two press articles by Fox News. Obviously, she states, the President and senior management felt that in order to counteract any accusations of a cover-up, or at least any public perception that the Bank was making light of the scandal, swift and visible action needed to be taken. Thus they took action punishing her and seven other staff members. She also states that comments made by the Managing Director to her clearly showed that the reassignment was a punitive measure.

68. The Bank denies that the Applicant’s reassignment was the equivalent of a disciplinary sanction. On the contrary, the Bank claims, the Applicant’s reassignment was a managerial discretionary decision taken in the Bank’s interests in accordance with Staff Rule 5.01, paragraph 2.03 which states that “[t]he Vice President, Human Resources ... may reassign a staff member within the Bank or [the Multilateral Investment Guarantee Agency] when the interests of the Bank Group require it.” The Bank states that the decision was taken in response to the substantial errors uncovered by the Legal Note, the Inspection Panel Report, the 2009 Management Report, and INT’s Accountability Review and preliminary inquiry, in order to protect the Bank’s interests and reputation. The Bank reconsidered the Applicant’s managerial abilities in light of the Project’s failings and

determined that it would be more appropriate for the Applicant to assume a technical position for a three-year rotation period.

69. The Tribunal has previously held 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.)

70. In examining whether the Applicant's reassignment was a disciplinary measure (*de facto* or not) triggered by the Fox News articles, the Tribunal observes that, although in some respects it took the form of an administrative measure, other factors support the conclusion that it was disciplinary.

71. On the one hand, it might seem that since there was no finding of misconduct by INT there can be no issue of a disciplinary measure being imposed or any need to follow disciplinary proceedings. The reassignment decision that followed the Draft INT Report was not taken on the grounds of misconduct as none had been found. Nor did the 2009 Management Report, on which the reassignment decision was 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.

72. 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, was chosen to conduct an individual review of the failures in the Project, and not Human Resources ("HR"); (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 (Disciplinary Proceedings) 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.

73. These factors support an inference that the Applicant’s reassignment decision was a disciplinary and not an administrative measure. Even if the decision is understood as an administrative measure 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.)

74. 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,

there is evidence of a strong managerial record during the Applicant's 12 years as Country Director. Indeed, all the Applicant's OPEs of record, including those relating to her most recent post as Country Director for Central/South Europe and the Baltic Countries, contain a great number of "Outstanding/Best Practice" and "Superior" ratings for her results and behavioral assessments, as well as her managerial behaviors. They list instances of positive feedback from her peers and supervisors commending her strategic skills, innovation, managerial and leadership skills, devotion to the institution, close watch on work program deliverables and painstaking mentoring of country managers. Favorable approval ratings are also shown in the Applicant's staff surveys and in many write-in comments contained in her 360 Degree Feedback Report. It appears that the Bank failed to take into account all relevant factors by giving considerable weight to the alleged failures in the Project and very little weight to the prior and subsequent positive evaluations and successes of the Applicant as a manager. (*See Niedzwiecki*, Decision No. 189 [1998], para. 20; *Prasad*, Decision No. 338 [2005], para. 46.)

75. Instead, the Bank appears to have attributed great importance to the Applicant's 2008 OPE which, as it admits, contained no signatures. It was not completed by the end of the applicable deadline and thus was closed by the system. The Tribunal finds that the Applicant's 2008 OPE was not only a draft, but did not even contain an actual assessment of her performance, as her supervisor admits. Furthermore, even if it had been finalized in its existing draft version, it had never been given to the Applicant for comment. The Tribunal concludes that the admitted weight given by the Bank to this OPE in deciding to reassign the Applicant "in the interests of the Bank" constituted an additional flaw. (*See also Sengamalay*, Decision No. 254 [2001], para. 45.)

76. Furthermore, the Tribunal cannot fail to express its discomfort with the ambiguities of the Bank's posture vis-à-vis the Applicant, which bespeaks haste and a lack of confident understanding of the Staff Rules. On the one hand, the Bank purports to have acted under Staff Rule 5.01, paragraph 2.03, authorizing reassignment "when the interests of the Bank Group require it." This type of determination with regard to a Director is unlikely to be questioned by the Tribunal; managers at this level must accept the need to retain the continuing subjective confidence of the Bank's leadership. But on the other hand, the Bank repeatedly referred to its decision as part of a series of "performance measures" to be taken in light of "substantial errors and performance shortcomings." Charges of "errors" and "shortcomings" imply particularization. If such performance issues are identified by an investigation which does not afford due process, the premise that the Bank is displeased with a particular staff member's performance loses plausibility. This unease is compounded by the consideration that in this case no less than six staff members at different levels suffered the same fate, following generalized findings of failure. The Tribunal also notes that the performance of other managers and staff who had clear responsibilities under the Project appears not to have been called into question by the Bank.

Due process

77. 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.)

78. 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 mentioned in the Managing Director's letter of 28 April 2009, under the following three headings:

- (i) Failure to follow up on the issue of existence or not of a moratorium following the Board presentation;
- (ii) Failure to identify potential conflict of interest and serious reputational risk to the World Bank entailed in the hiring of [Mr. Malltezi];
- (iii) Failure to safeguard and manage damage to the Bank's reputation following reportage on the demolitions in Albanian newspapers.

79. The Applicant has developed extensive refutation. Broadly speaking, she affirms that (i) she was led to believe, on the basis of information upon which she was entitled to rely, that there was an agreement with the Albanian Government, and therefore had no reason to pursue the issue of failure to secure it; (ii) she was never informed of the selection of Mr. Malltezi until 18 months after the event, and even then was assured that he had been cleared by the Bank's Procurement Unit; and (iii) she was not informed of the correspondence between Mr. Malltezi and the Construction Police that is alleged to have prompted the demolitions. This correspondence, in her view, established at least a perception that the World Bank was behind the demolition and moreover made the allegations by the affected Albanian homeowners, the Albanian press, and even by the Albanian Government officials all the more serious. The Applicant expresses frustration and disbelief that she was not informed of these important events as they occurred, particularly as she was regularly in contact with the Country Office on other matters, and

faults the Task Team and the Country Office's lack of effective communication and judgment.

80. Even in cases where decisions taken result from the exercise of managerial discretion (such as discretionary reassignment and performance appraisal decisions), the Tribunal has stressed the importance of respecting the requirements of due process. 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.

81. 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.

82. *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 that could lead to an adverse decision.

83. The Applicant was interviewed by the Inspection Panel but there is no evidence that she was responding to specific criticism of her performance. Nor were specific areas of her responsibility mentioned in the Report. The Report was critical of the Bank's

actions or inactions with regard to the Project, but did not name particular individuals or assign particular responsibility for specific failings.

84. 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.

85. The Legal Note thus did not put the Applicant on notice as to specific performance failures on her part that would lead to an adverse decision. Nor is there evidence that the Applicant was interviewed as part of the acting General Counsel's review.

86. *2009 Management Report.* The 2009 Management Report which responded to the Inspection Panel's findings was one of the explicit bases for the challenged decisions. Although it acknowledged a number of errors in the Project 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 the Report was not intended to determine individual accountability of staff members for failures and

errors. Its lead drafter explicitly stated to the Managing Director in an e-mail message dated 24 April 2009 that

it was not within the scope of the Management Response to the Inspection Panel Report to determine accountability or to make judgments about individual responsibility for errors. *That would take a different type of investigation* to adjudicate conflicting recollections and a process that allows staff facing possible career consequences or disciplinary actions to respond directly to concerns about their performance and present additional information and explanations. Indeed it was our understanding that a separate accountability review would be carried out to determine what happened where questions arose of responsibility for errors. (Emphasis added.)

87. The Tribunal finds that the Applicant was not 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 employment actions against her. 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 and the great number of issues to be covered, they could not have been considered sufficient to discuss specific allegations against staff members which would lead to adverse actions against them. Although input was solicited, very little time was allowed for staff to comment before the Report could be forwarded 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 pointed out that a correction that she had requested regarding the fact that it was the ECA VP, and not herself, who had struck the corrective sentence from the opening statement before the Board was not incorporated

in the Report. In addition, the Regional Director of Operations and Strategy, 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. Only a core team was invited to participate in the meeting to review the draft.

88. 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 general report 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.

89. *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.

90. 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 determine whether there was credible evidence to warrant 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 a great number of 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 information was 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.

91. 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 a 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.)

92. 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.

93. 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.

94. With regard to the Applicant, INT referred to two possible performance-related issues (see paragraph 52 above).

95. 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.

96. Thirdly, while 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 the concerns related to her or to others.

97. 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.

98. 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.

99. 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.

100. 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.”

101. The Tribunal recalls its finding in paragraph 97 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.

102. *Other inputs.* The Bank has stated that input was received from the Operational Policy and Country Services Department and HR on accountability and job roles. The Bank focused on comparing the customary areas of responsibility of a Country Director with respect to 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 Tribunal proceedings, raising another instance of violation of due process.

103. *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 her 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.

104. Without prejudice to what the outcome of a fair and serious assessment would have been, the Tribunal concludes 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

105. The failure to secure an explicit agreement by the Government of Albania to respect a moratorium on demolitions led to very serious consequences. Yet it could easily have been averted by any number of staff who might have noted the discrepancy between reports and reality. It is a typical example of what might have been done with perfect hindsight. The fact that the unfortunate consequences were not avoided has not been shown to be directly attributable to the Applicant. Indeed, the frustrating conclusion may be that individual accountability is diluted, in some instances to the vanishing point, as a consequence of the diffuseness of responsibility that seems to have characterized the Bank's performance, an indicative instance of which is given in the passage from the Note prepared by the acting General Counsel quoted in paragraph 84 above. This is a recurrent issue of organization for which the Bank's central management bears responsibility. Nevertheless the Applicant, an officer of the Bank operating on the basis of confidence in her ability to oversee significant operations as Director for a number of countries in this Region, must face the reality of being to some extent held accountable for the setbacks in

her domain, irrespective of conclusive proof of fault and causation. For this reason the Tribunal will not order a rescission of the decision to reassign her.

106. Compensation will, however, be awarded to the Applicant for the flaws in the process by which her performance was judged as deficient in an amount that reflects the fact that she has been neither dismissed nor demoted and suffered no direct financial prejudice. In addition, because the actual Supplementary Evaluation was carried out without regard to the observance of due process requirements, it shall be rescinded.

107. 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 Supplemental Performance Evaluation relating to the Applicant dated 28 April 2009 is hereby rescinded and any reference to it will be removed from the Applicant's personnel file;
- (ii) the Bank shall pay the Applicant compensation in the amount of \$120,000, net of taxes;
- (iii) the Bank shall pay a contribution of \$75,000 towards the Applicant's attorneys' fees; and
- (iv) all other pleas are dismissed.

/S/ Jan Paulsson

Jan Paulsson
President

/S/ Olufemi Elias

Olufemi Elias
Executive Secretary

At Washington, DC, 23 March 2010