



World Bank Administrative Tribunal

2011

No. 450

**BM,
Applicant**

v.

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

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

**BM,
Applicant**

v.

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

1. This judgment is rendered by a Panel of the Tribunal, established in accordance with Article V(2) of the Tribunal's Statute, composed of Florentino P. Feliciano (a Vice-President of the Tribunal) as President, Jan Paulsson and Zia Mody, Judges.
2. The Application was received on 19 July 2010. The Applicant was represented by Robert Clayman and Angela Serranzana of Guerrieri, Clayman, Bartos & Parcelli, P.C. The Bank was represented by David R. Rivero, Chief Counsel (Institutional Administration), Legal Vice Presidency. The Applicant's request for anonymity was granted on 14 December 2010. On 31 January 2011 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.
3. The Applicant claims that the decision to reassign him to a non-managerial position and the decision shortly thereafter to conduct a Supplementary Performance Evaluation were *de facto* disciplinary measures and constituted an abuse of discretion.

FACTUAL BACKGROUND

4. The Applicant joined the Bank on 28 December 1998 as an Economist in the Middle East and North Africa ("MNA") Region. He was then selected for three successive field-based assignments in the MNA and Europe and Central Asia ("ECA")

Regions: in Egypt as Country Economist (1999-2001), Yemen as Senior Country Economist (2001-2004), and Albania as Country Manager (2004-2007). He returned to Headquarters in June 2007 and was selected competitively for the position of Director, Strategy and Operations in the MNA Region on 16 July 2007, a position he held until 15 May 2009 when he was reassigned to the non-managerial Level GI position of Senior Advisor in the Economic Policy and Debt Department (“PRMED”) in the Poverty Reduction and Economic Management (“PREM”) Network Anchor.

5. 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”).

6. One of the complexities of the Project related to land use planning in Albania and the Albania Government’s (“Government”) ongoing practice of involuntary demolitions to control unregulated construction. This practice sought to address the problem of illegal and irregular land subdivisions and construction since the fall of the Communist regime in the early 1990s. The Government had implemented an encroachment removal program prior to the Bank’s involvement in the Project.

7. The Project had been discussed with the Government a long time before the Applicant started his position in Albania. A so-called Project Concept Document was approved by the Bank on 2 March 2004. As with all Bank-financed projects, the borrower (here, the Government) retained primary operational responsibility for the Project. On the Bank’s side, the Sector Unit had primary oversight, specifically the Task

Team Leader (“TTL”) and her Task or Project Team (which consisted of eight other staff members), as well as two Sector Managers and one Sector Director.

8. During the preparation of the Project, the Task Team discussed the Government’s practice regarding involuntary demolitions and 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. The Applicant did not take part in these discussions.

9. In March 2005, the Task Team entered into negotiations with the Government regarding implementation of Project components. At that time, 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. The Applicant explains that he was not informed of these discussions and was not copied on these e-mail messages.

10. On 29 March 2005 a meeting took place 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 Country Director, the

Task Team, and members of LEG attended the meeting. The ongoing demolition was discussed and it was agreed that there was no need to trigger OP/BP 4.12 for the SCDP component of the Project. The Applicant explains that because he had no operational responsibility for the Project and because most of the preparation work took place at the Bank's Headquarters in Washington, he was not invited to attend or participate in this meeting.

11. On 7 April 2005 during a Decision Meeting for the Project, it was 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. On 21 April 2005 the Task Team obtained a written commitment from the Government ("Letter of Development Policy") to adopt and adhere to an Environmental and Social Safeguards Framework ("ESSF") which established procedures and safeguards 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. Moreover, as the Applicant observes, even though the Government committed to adopting such procedures, including a resettlement policy framework for the entire zone, the letter made no mention of the demolition program.

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 of Executive Directors ("the Board") on the financing of the Project. During the course of the PAD's preparation, the following inaccurate statement was included in the PAD:

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 Country Lawyer and other members of LEG, including two Chief Counsel, the Regional Safeguards Coordinator, the Sector Manager (Environment) and members of the Task Team did not react to the error nor corrected it, even though several Task Team members, and LEG, knew at this point that the Government had not agreed to suspend its ongoing demolitions. Other staff members were unaware that the Government had declined to halt the demolition program. The Applicant states that he was also asked to review the draft PAD, but only with an eye to providing guidance on economic and political matters within his expertise. As the Bank later confirmed, the Applicant had no operational responsibility for identifying and correcting errors in the PAD, or for Board approval generally.

15. The PAD was finalized on 25 May 2005 after 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 Country Director who was travelling at the time, as well as the Chief Counsel for LEG. (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. A Task Team member raised the issue of the inaccurate statement in the PAD with the TTL the evening of 20 June 2005. Thereafter, the TTL 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.

18. However, it is a matter of record that, when the Board met to vote on the approval of the Project on 21 June 2005, 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 the basis of the PAD which represented that the Government had agreed to halt demolitions. The Applicant was not present at the Board meeting, as he was not involved in the preparation phase of the Project, the finalization of the PAD, or its approval.

19. The Project became effective in November 2005. The Applicant explains that during 2006 and 2007, actual implementation progressed but was delayed mainly due to the formation of a new government in September 2005, changes in the Government Project implementation team, weak capacity in line ministries, difficulties faced by Government consultants in completing the SCDP on time, and difficulties in understanding and adhering to the various policies of the Bank (including social and

environmental safeguards and procurement policies). The Task Team prepared four Implementation Status Reports (“ISRs”) from 2005 to 2007 which the Sector Manager (Environment) approved in accordance with Bank procedures. The Applicant also provided comments and directions to the team. The SCDP finally became effective in the summer of 2008.

20. Project implementation in Albania was managed by Project Coordination Units (“PCUs”) integrated within the Government. As the Applicant explains, accountability for all stages of the Project cycle (from preparation to supervision to closing) rested first with the Government’s PCU and then with the Sector Unit according to the Bank’s operational policy and guidelines. The Sector Manager retained responsibility for clearance of all Project-related activities as well as overall responsibility for quality. The complexity of the Project and the involvement of many ministries and agencies in its implementation required the selection of a Project Coordinator for the Project’s PCU to be responsible for the coordination and monitoring of implementation of the activities related to the Project. The PCU worked under the supervision of the Project Authorizing Official (“PAO”) which in this case was the Deputy Minister of the Albanian Ministry of Public Works, Transport and Telecommunication, and with oversight by the Task Team.

21. On 30 November 2005 the Government informed the Task Team that it was hiring a new PCU Coordinator as well as other PCU staff. In accordance with the Bank’s procedures, the Ministry created a short-list of candidates. An evaluation committee prepared a report which was submitted to the Task Team in early February 2006 for the purpose of obtaining a no-objection from the Bank. 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 8 February 2006 the TTL, copying the Applicant, sought the advice of the Regional Senior Procurement Advisor, who was also at the time the Acting Director, Operations Policy and Services, on “possible nepotism and conflict of interest.” On 9 February 2006, and responding on behalf of the Acting Director, Operations Policy and Services, 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. 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. On 20 February 2006 the Task Team summarized discussions with the Government officials on the selection process and on the provision of additional qualifications and safeguards required by the Acting Director in order to reconfirm the Bank’s position with the Government. The Acting Director also asked for a detailed evaluation of curricula vitae which the Task Team had done before issuing a no-objection. 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. Based on the guidance of the Acting Director, the TTL issued the no-

objection to the contract of Mr. Malltezi. Mr. Malltezi's selection nevertheless met with critical reaction in the Albanian press.

23. The Applicant points out that the contract between the Government and the PCU Coordinator specified the services, fees and terms, reporting lines, performance standards and other details. In accordance with the contract and its attached terms of reference, the PAO had the overall responsibility of supervising the work of the PCU and the PCU Coordinator, with oversight by the Task Team. The Task Team conducted regular reviews of the PCU activities and its staff as part of its supervision missions. Until the fourth ISR, the Task Team rated the management of the Project as moderately or fully satisfactory.

24. The Applicant, who had been copied on the communications of the TTL with the Acting Director, states that he was informed by the TTL on 20 February 2006 that the contract had been cleared a week earlier, based on the guidance of the Acting Director. Because of this clearance, the Applicant understood that the Bank had judged that no conflict of interest existed with regard to the appointment of Mr. Malltezi. The Applicant points out that he had no operational accountability for the clearance of the contract, the provision of the no-objection, or the staffing of the Project.

25. 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. In March 2006, the Government passed a law legalizing certain illegal buildings ("Legalization Law"). However, illegal construction in the coastal zone was not legalized. Nonetheless, the news of the Legalization Law encouraged illegal construction in the coastal regions, as it

was hoped that eventually the Government would legalize those buildings as well. The Applicant states that the Bank had warned the Government of this possibility.

26. Between January and March 2007, a private investor expressed to the Government interest in developing the southern coast for tourism and real estate purposes. The Applicant and the Task Team consulted extensively with senior managers in the ECA Region (including the Vice President, the Chief Economist and the Country Director) as well as with various units and departments in the Bank and colleagues from the International Monetary Fund (“IMF”) and the International Finance Corporation (“IFC”). Concerns about the proposed investment were expressed to the Government, particularly with regard to the economic and financial impact of the proposal and the lack of transparency. The Applicant and the Task Team urged the Government to continue the work on finalizing the SCDP before giving concessions or licenses on the coast. The Government and the private investor, however, declared their intention to go ahead with the proposed investment and, in early March 2007, incorrectly asserted that they had the backing of the Bank and IFC. On 12 March 2007, upon the direction of the Applicant and senior managers, a press release was issued denying any backing by the Bank of this project or other investments on the coast by the Bank. The investor nevertheless continued its discussions and proposals with the Government.

27. 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.

28. 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.

29. On 10 April 2007 the Construction Police responded to Mr. Malltezi's letter, stating that all the necessary legal procedures pertaining to such instances had been administered and that the respective parties had been notified of the impending demolitions, giving them the possibility for appeal and submission of the documents that they have with regard to these constructions.

30. Between 17 and 20 April 2007, the Government demolished 15 houses in the village of Jale in the Project area. The occupants claimed that Albanian officials had informed them that the demolition occurred because the houses had been constructed without building permits. They sent a letter of complaint written by one of those affected by the demolition to the Bank's Department of Institutional Integrity ("INT") and then to the Country Office in Tirana. The letter made clear that the occupants were under the impression that they were covered by the Legalization Law. They claimed that a Bank official visited the damaged houses on 21 April 2007 and documented the demolition with photographs.

31. On 20 April 2007 Mr. Malltezi informed the TTL and the Task Team of the correspondence between him and the Construction Police. A package containing copies of these letters was sent to the Country Office on 23 April 2007. On the same day the Applicant and the TTL as well as the Sector Manager (Environment) and the Country Lawyer also received the letter from the occupants of the demolished houses, forwarded by the Country Office.

32. From 11 April until 1 May 2007, the Applicant was first on annual leave and then on mission in Washington. He had delegated full authority during his absence to a Senior Operations Officer and to a Senior Country Operations Officer. He states that, when he became aware of the demolitions (on or about 23 April 2007) he distributed this information to all appropriate colleagues in the Bank (the Task Team, Sector Managers, Safeguards colleagues, the Country Lawyer, communication colleagues and the Acting Country Manager).

33. Upon receiving the letter from the occupants of the demolished houses, the Applicant explains that he asked that a press release be issued to “refute that a [World Bank] official has been to the place and use it as an opportunity to express to the [public] our position with regard to the demolishing of houses.”

34. The TTL advised the Applicant, as well as the Sector Manager (Environment), among others, that the Task Team was investigating the facts and would report to management on the situation in Jale, and would request guidance on how to proceed. The Senior Social Scientist emphasized to the Task Team the need “to think this through and get proper counsel before any press releases or any of us speak or write in the public domain”

35. In an e-mail message dated 24 April 2007, copied to the Task Team, the Applicant agreed that it would be wise to get all the facts but stated that the Task Team should then “draft a press release to state the Bank’s position on these issues.” He added “[i]t is important to convey the Bank position on any demolition and our policy on these issues. We do not want to leave an impression that the World Bank supports this.”

36. The Applicant explains that under existing regional practices and policies, for any project-related issue, the Task Team drafts an appropriate response and seeks the clearance of his or her Sector Manager and other Sector colleagues, which, depending on the issue, may include staff overseeing Procurement, Disbursement, Safeguards, communications departments and LEG. He states that only after all the proper clearances are obtained would the press release go to the Country Manager and Country Director for approval and issuance.

37. Between 3 and 5 May 2007, a fact-finding mission to the Project area was organized by the Sustainable Development Sector Unit. It was determined that the press release and the responses urged by the Applicant would be drafted from the field and sent to LEG and the Country Manager for clearance. The TTL and the 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. On 8 May 2007, following the Applicant’s request, the Senior Social Scientist forwarded to the TTL a first draft of the press release to be revised and forwarded to the Sector Manager, Social Development, the Applicant and LEG for their comments and clearance.

38. The Applicant states that on 12 May 2007, he arranged a meeting with the Task Team, the Minister of Public Works, Transport and Telecommunications and key

Government officials involved in the Project implementation to debrief them on the fact-finding mission and to clarify the Bank's position regarding demolitions. The Applicant adds that the Minister stressed that he understood that there was no link between the demolitions and the Project. According to the Applicant, the Minister also claimed that only a few kiosks that had recently been built on the beach to benefit from legalization were removed, and that no houses were demolished. The Applicant states that he and the Task Team advised the Government to halt demolitions and to take immediate measures to compensate those impacted. They requested that the Government provide mitigation measures to all eligible people to allow them to restore their livelihoods. According to the Applicant, the Minister agreed to look into these issues and to inform the Bank. Apparently, the Applicant and the Task Team also confirmed to the Minister that he would receive a report on the fact-finding mission together with an aide-memoire with recommendations.

39. On 7 June 2007 the Senior Social Scientist had forwarded to the Applicant her draft press release providing her understanding that the TTL would be forwarding the final version to him with her modifications. She pointed out that the press release was very late at that point and might cause more problems. The Applicant points out, however, that since the end of his tenure as the Country Manager in Albania the Bank had never issued a press release or a response to the letter complaining of the Jale demolitions despite the Applicant's numerous phone calls and e-mail messages reminding the Task Team to do so prior to leaving his position. The Applicant states that INT, which had also received the letter, neither issued a response nor referred the matter

to the Country Office. The Applicant also points out that the Bank never took any adverse action against any member of INT for failure to act in this respect.

40. The Applicant's last day as Country Manager in Albania was 16 June 2007. He states that prior to leaving his position, he met with his successor to brief her fully on all ongoing matters, including the situation in Jale. He states that he made it clear to her that a press release should be issued as soon as the Task Team had completed its fact-finding mission and report.

41. The Applicant was transferred to the ECA PREM Network from 17 June to 16 July 2007 when he assumed the position of Director, Strategy and Operations, MNA.

42. On 27 June 2007 the Task Team issued a Back-to-Office Report ("BTOR") of the fact-finding mission and the Mission's Aide-Memoire and submitted them to the Country Director. These reports were forwarded to the Government by the Country Office on 3 July 2007.

43. The BTOR did not make any reference to the correspondence between Mr. Malltezi and the Construction Police. 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.

44. On 30 July 2007, six weeks after the Applicant had left the Albania Country Office, 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, and a Country Officer met to discuss the Response (“2007 Management Response”). Other Task Team members also provided input. This was, however, a time of unusually high staff turnover and because the Response was prepared in the month of August, all key managers were on leave for most of the period.

45. 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 at that time. The Response also noted that the Task Team had correctly determined that OP/BP 4.12 applied only to possible land acquisitions for the purpose of infrastructure investments financed by the Bank but 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.

46. 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.

47. 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. The Applicant states that he was unaware of the request for an Inspection Panel investigation and was not involved in the preparation of the 2007 Management

Response. He first learned about the request for an investigation on 6 February 2008, when the Panel asked to interview him. The Applicant was interviewed by the Inspection Panel on 14 February 2008. He forwarded additional relevant documents to the Inspection Panel after the interview.

48. During the Inspection Panel's preliminary investigation, the panel discovered the erroneous statement in the PAD on the Government's supposed moratorium on demolitions and brought it to the attention of the TTL in September 2007 and ECA management in early 2008. In February 2008, a first draft of a Corrigendum to the PAD was prepared. The Corrigendum was ultimately issued on 2 September 2008 after being cleared by senior management. The late issuance of the Corrigendum resulted in concerns and questions from some Board members, as well as in criticism by the Inspection Panel because it erroneously stated that the Bank informed the Inspection Panel of the error in the PAD and that the Panel requested the issuance of the Corrigendum.

49. In response to a request by an Executive Director, the President of the Bank asked the Acting General Counsel to undertake a review of the circumstances surrounding the issuance of the Corrigendum. The Applicant was invited to a meeting on 10 September 2008 to discuss the clearance of the PAD and the issuance of the Corrigendum. He states that as the meeting focused on what happened the night before the Board meeting where the Project was approved and on the Board meeting itself, and as he had no involvement in the preparation of the PAD or the Corrigendum, and had not been present at the Board meeting, he had little to contribute to this meeting.

50. On 7 November 2008 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. However, the Legal Note pointed out that although the Corrigendum had been cleared at the highest levels of management, misgivings had been expressed over the insufficient explanation and the highly unusual nature of the document (due in part to late summer vacation and travel absences that lessened the scrutiny that such a document would have been expected to receive). The Legal Note also underlined the "need for managers – including senior managers – to review the sufficiency of their internal clearance processes for Board documents, particularly when they are acting for each other. Senior management review constitutes the final step before a communication/document is sent to the Board."

51. 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.

52. The Panel noted that the Bank had failed to supervise the Project as required under the Bank's policy on Supervision OP/BP 13.05 mainly because the Task Team's fact-finding mission ended up not "finding" some of the most important facts that explained the events which led to the inspection and may have led to a problematic Management Response. 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 to the Executive Directors 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.

53. 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.

54. Following issuance of the Inspection Panel Report, a new team under the direction of one of the Bank's Managing Directors, 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”). The Applicant states that the drafters of the Management Report did not share drafts with or involve some staff (including the Applicant) who had knowledge about the Project and related events during 2004-2007.

55. 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 institutional 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 who were involved in the Project by e-mail on 10 December 2008. Staff were allowed only one day to respond. The Applicant states that, despite the rushed circumstances, he provided the drafters of the 2009 Management Report with corrections and additions for the purpose of ensuring its accuracy.

56. On 12 December 2008 the Managing Director chaired a six-hour “Roundtable” meeting during which further Project-related questions were discussed with staff involved in the Project. The Applicant states that on 9 December 2008, he asked for a copy of the Inspection Panel Report, but was told by one of the drafters of the 2009 Management Report (the Lead Country Officer) that it was confidential. He states that he was only given a copy three hours into the meeting of 12 December 2008. He states that because he had no involvement in the preparation of the PAD and its presentation to the Board, the drafting of the fact-finding mission report, or the issuance of the Corrigendum, he did not have much to contribute to the meeting. However, he informed those present about

the strategic importance of the Project, the impact of the change in government on Project implementation and the possible role of private investors in the demolitions and steps taken by the Country Office including issuance of a press release in March 2007 on the subject.

57. In the evening of 17 December 2008 the ECA Regional Director of Strategy and Operations sent the first draft of a section of the 2009 Management Report to the staff who had participated in the 12 December meeting, including the Applicant. 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. Following the 17 December 2008 communication, the Applicant was excluded from the distribution list on correspondence and meetings related to the drafting of the 2009 Management Report. On 18 December 2008 the first full draft of the 2009 Management Report was forwarded to the Managing Director and to other staff members who were present at the 12 December 2008 meeting.

58. The 2009 Management Report was finalized on 9 January 2009, distributed to the Board on 12 January 2009, and forwarded that same day to the entire team of staff involved in the Project, without a copy to the Applicant. It detailed 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. Malltezi 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 Management Report drew a number of lessons with regard to similar projects going forward. The Management Report did not assess or determine individual accountability. 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.

59. In the meantime, in December 2008, the President had called upon INT to conduct an Accountability Review and a preliminary inquiry into alleged misrepresentations to the Inspection Panel and events surrounding the preparation of the Project, its presentation to the Board and its supervision. On 21 January 2009 the Applicant received a request for interview from an INT investigator “in connection with a preliminary inquiry in review of 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.” On 23 January 2009 the Applicant was interviewed by INT. Subsequently, he forwarded to INT some of the e-mail messages relevant to the questions raised during the interview.

60. 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.”

61. 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.

62. On the 17 February 2009 meeting, when the Board of Executive Directors discussed the Management Report, the President informed the Board that “Management will report back to the Board on the results of the accountability review, once finalized, following a complete investigation by [INT], and with full respect for due process under the Staff Rules system.”

63. At a meeting scheduled for 26 February 2009, INT briefed the Managing Director on the findings of its Accountability Review and preliminary inquiry. In a memorandum of the same date, 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.

64. With particular regard to the Applicant's actions or inactions in connection to the Project, INT noted three possible performance-related issues: the Applicant's "[f]ailure to identify and correct the PAD error prior to submission to the Board"; "[f]ailure to provide oversight to PCU activities"; and "[f]ailure to respond to letter from the family of one of the [complaining occupants of demolished houses]."

65. 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. During the March meetings, senior management determined that INT had erroneously found the Applicant accountable for the preparation or clearance of the PAD, and dismissed those allegations. It was 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, it was also decided that Supplementary Performance Evaluations should be undertaken for eight individuals, including the Applicant, "to amend their performance records for the periods concerned regarding their performance on the Project."

66. On 26 March 2009 the Applicant met with the Managing Director. In that meeting, according to the Applicant, the Managing Director abruptly informed him that management had decided to remove him from his current managerial position and to reassign him to a non-managerial position in one of the Bank's networks based on INT's findings regarding the Project. The Applicant alleges that she stated that the Draft INT Report pointed to lapses in management for which he was responsible as Country Manager for Albania. She also conveyed that these decisions were final and that it was the management's prerogative to reassign him based on INT's inquiry. She added, so the Applicant alleges, that the Bank wanted to show the public that it takes action. The Applicant also claims that the Managing Director told him that he could not have access to the Draft INT Report even if information regarding other staff was redacted. According to the Applicant, the Managing Director did not explain why this decision was being taken against him, as he was never advised that his performance as Country Manager was at issue, and thus was never given the opportunity to respond to any allegations.

67. 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.

68. The Applicant states that this was the first time he had been made aware that a Supplementary Performance Evaluation would be issued for his work in Albania. On 13 April 2009 the Applicant received a copy of the Management Report with a file containing the documents that the drafters of the Report had forwarded to INT. The Applicant met with the Managing Director on 14 April 2009. He requested clarifications about the reassignment decision and its basis as well as the findings of INT. He pointed out that he had noticed several mistakes in the analysis and conclusions of the 2009 Management Report. According to the Applicant, the Managing Director asked him to contact the drafters of the 2009 Management Report. The following day the Applicant sent a letter to the Managing Director discussing the meeting of the previous day and seeking the same clarifications requested at the meeting as well as clarifications on the process and rationale of the "Supplementary Performance Evaluation."

69. On 20 April 2009 the Applicant met with the drafters of the 2009 Management Report and shared with them his concerns about factual errors in the 2009 Management Report. The drafters acknowledged some of these errors in e-mail messages that same day. On that day the Applicant sent an e-mail message to some of the drafters of the 2009 Management Report, copying the Managing Director, correcting the inaccurate and incomplete information in it, expressing concern that he had not been involved in the process of its preparation and surprise that some of the documents provided to the drafters of the Report had not been forwarded to INT. When the following day the Applicant forwarded to the Managing Director the responses of the drafters of the 2009 Management Report acknowledging the mistakes in the Report, the drafters were instructed not to send further responses to the Applicant because Human Resources

(“HR”) had recommended that the drafters “refrain as the Bank should respond with a single voice.”

70. 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 Manager for Albania at the time of the Project preparation and implementation until mid-2007, had participated in the Project negotiations and had been responsible for providing oversight to the PCU activities as well as for overall portfolio management. The Managing Director stated that a review of the Applicant’s performance in respect of the Project had found the following performance deficiencies relative to his job responsibilities as Country Manager:

Failure to provide oversight to PCU activities. ...

Failure to respond to the letter from the family of one of the [occupants of demolished houses]. ...

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

71. The Managing Director explained that the purpose of the letter was to update the Applicant’s performance record and amend his OPE for the period concerned (2005-2007) in light of the new performance assessments, and to provide him 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 his personnel file as a Supplemental Performance Evaluation for the period concerned.

72. On 4 May 2009 the Managing Director informed the Applicant that he would be reassigned to PRMED in the PREM Network Anchor as a Senior Advisor.

73. On 7 May 2009 the Applicant provided a nine-page, single-spaced letter containing detailed comments to the Managing Director's letter and affirming that the measures taken against him violated the Staff Rules, Bank policies and principles of fairness, transparency and due process. He also provided detailed responses to the alleged deficiencies in his performance and urged management to reconsider its actions and withdraw the 28 April 2009 letter.

74. On 26 June 2009 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."

75. The notice further stated that:

Based on the totality of the facts and circumstances 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.

76. On 29 June 2009 the Managing Director responded to the Applicant's 7 May 2009 letter and noted that "[w]e have carefully reviewed your comments and will place them in your personnel file, together with my letter dated April 28, 2009, in the form of Supplemental Performance Evaluation for the 2005-2007 performance review period. The fact that we have not responded to each of the comments should not be construed as

an acceptance of each point you have made.” 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 Manager.”

77. The Applicant felt that given the gravity of the measures imposed on him it would be possible that the Bank would further violate his rights in the future, up to and including termination of his employment with the Bank. He believed that he would lose his immigration status as a G-4 visa holder and his right to remain in the United States and would have to relocate to his war-torn home country in Africa. In order to secure stability for his family, the Applicant submitted an application for a Permanent Resident status which was approved on 17 December 2009. He claims that as a result of his change of status, he lost all his expatriate benefits, such as education grants for his three children, family home leave and domestic employee holding a G-5 visa and had to repay the amount of the education grant the Bank had paid at the beginning of the academic year to the private school in which his three children studied. He also incurred related costs and fees.

78. The Applicant filed an Appeal with the Appeals Committee on 9 June 2009. (The Appeals Committee was replaced by Peer Review Services (“PRS”) with effect from 1 July 2009). A hearing was held on 1 December 2009. The Appeals Committee Panel concluded that the Bank: used a reasonable and observable basis when it reassigned the Applicant and when it issued the Applicant a retroactive Supplementary OPE; followed the appropriate procedures consistent with its Staff Rules; and acted without improper motivation. Accordingly, the Panel recommended that all claims in the Applicant’s

Appeal be denied. On 17 February 2010 the Vice President, Latin America and the Caribbean Region, acting instead of HRSVP and the Managing Director, who were disqualified from reviewing the recommendations, accepted the Panel's recommendations.

79. The Applicant filed an Application with the Tribunal on 19 July 2010. The Applicant contests: the Managing Director's 10 April 2009 reassignment decision from the position of a Director, Strategy and Operations in the Middle East and North Africa Region to a non-managerial position; (ii) the amendments to his Performance Evaluations for 2005-2007 through the 28 April 2009 "Supplementary Performance Evaluation"; and (iii) the "denial of relief from the Appeals Committee upon his application in that forum." As part of his pleas, the Applicant requests (i) reinstatement to his previous position as Director, Strategy and Operations, MNA Region, or "to any equivalent or higher managerial position in the Bank's Operations"; (ii) rescission of the Bank's 28 April 2009 "Supplemental Performance Evaluation" and removal of all records of negative amendments to the Applicant's 2005-2007 Performance Evaluation; (iii) "a public apology and retraction within the Bank, publicizing that INT cleared the Albania Staff, and the Applicant, specifically, of misconduct"; (iv) prohibition of the Bank "from issuing negative assessments regarding any alleged misconduct or poor performance relating to the Albania project or the proceedings and investigations arising therefrom if and when in receipt of any internal or external inquiries regarding the Applicant's history, performance or qualifications for other positions of employment"; (v) that the Bank cease and desist "from further penalization, retaliation and negative publicity with regard to the Applicant's involvement with the Albania project"; (vi) three years' net salary as

compensation for the substantial damage to his career prospects within and outside the Bank and for his and his family's anxiety, stress, and disruption caused by the Bank's actions; (vii) "[e]ither restoration of his expatriate benefits or compensation in the amount of at least \$850,000 the loss of same (education and home leave benefits), which resulted from [the Applicant's] conversion from G-4 to US permanent status triggered by the contested decisions"; (viii) legal fees and costs incurred as a result of the proceedings before the Appeals Committee, the Tribunal and the US Citizenship and Immigration Services, which amount to \$99,611.32; and (ix) any other relief deemed fair and appropriate by the Tribunal.

THE CONTENTIONS OF THE PARTIES

80. The Applicant refers to two recent judgments in which the Tribunal ruled that in making decisions adverse to two staff involved in the Project, the Bank violated due process, namely *BF*, Decision No. 430 [2010] and *AY*, Decision No. 431 [2010]. The Applicant's main contentions are that (i) because the due process violations committed against the Applicant in this case involve facts identical to those in the Tribunal's recent related rulings, the same result is required here. In this respect, the Applicant claims that: (a) the INT investigation upon which the Bank's actions against the Applicant were taken was conducted in violation of the Bank's own Staff Rules; (b) even if viewed as administrative measures, the Bank's actions failed to provide the requisite due process; (ii) the Applicant's extensive documentation proves that none of the Bank's allegations against the Applicant have merit; (iii) the Bank's actions against the Applicant were improperly motivated and discriminatory, as the evidence shows those with actual accountability for those failures have gone unpunished, and in some case have been

rewarded; (iv) the Applicant's punishment of reassignment to a non-managerial position was completely disproportionate to his alleged wrongdoing; and (v) the Applicant was seriously defamed by the Bank's senior management, damaging his reputation.

81. 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's Supplementary Performance Evaluation for the period 2005 through 2007 reflects a fair appraisal of his 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; (iii) the Applicant was afforded due process; and (iv) the Applicant's claim that the reassignment decision and Supplementary Performance Evaluation necessarily caused him to give up his G-4 visa status is disingenuous and devoid of merit.

THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS

82. Many of the claims raised by the Applicant in the current case and the evidence presented to support them are identical with those raised and examined by the Tribunal in the applications of staff members in *BF*, Decision No. 430 [2010] and *AY*, Decision No. 431 [2010]. In as much as its previous findings were final, the Tribunal will recall these findings where applicable. At the same time, the Tribunal will take into consideration any new evidence and the specificities in the Applicant's case and will address them separately.

83. 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

84. The Applicant claims that his abrupt reassignment to a non-managerial position had no proper basis and was a disciplinary measure and not a routine discretionary administrative decision “in the interests of the Bank Group.” He points out that the Bank was well aware of the events that had taken place in Albania two years previously, and the Applicant’s involvement in those events. He claims that his superior performance as Director of Strategy and Operations before his reassignment makes it difficult to see how reassigning him to a non-managerial position was in the best interests of the Bank. The Applicant states that it was clear that management’s actions in reassigning him were based on pressure from Bank leadership that someone be demonstrably punished in response to the negative media reports. In fact, he points out, shortly after the Fox News reports, the Managing Director asked INT to brief her on its preliminary findings, which formed the principal basis for the disciplinary actions against the Applicant. The phrase “interests of the Bank” was intended to distract from the violation of Staff Rules and principles of due process and fairness.

85. The Bank denies that the Applicant’s reassignment was the equivalent of a disciplinary sanction, insisting that it was a managerial discretionary decision taken in the Bank’s interests in accordance with Staff Rule 5.01, paragraph 2.03. The Bank states that the decision was taken in response to the substantial errors uncovered by the Inspection Panel Report, the 2009 Management Report, and INT’s Accountability Review and preliminary inquiry involving a project in the country for which the Applicant had

managerial responsibility, 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.

86. 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.)

87. 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.

88. 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.

89. 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; (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.

90. 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.)

91. 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, the evidence shows that that the Applicant maintained an excellent record of performance and achievements throughout his career with the Bank. His managers often classified his performance as “Outstanding/Best Practice” and “Superior” in all areas of evaluation and recognized the Applicant as “an outstanding manager of people,” “all around top performer,” who has shown “outstanding leadership qualities,” and a “tireless drive for results” and had exceeded “highest expectations.” Equally positive comments and ratings described his performance for the two years before the reassignment in his most recent position as Director of Strategy and Operations, MNA. 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 staff member and as a manager. (*See Niedzwiecki*, Decision No. 189 [1998], para. 20; *Prasad*, Decision No. 338 [2005], para. 46.)

92. As in the case of his Country Director, 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 manager who is delegated responsibility for portfolio management in the country is unlikely to be questioned by the Tribunal. 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. In this respect, the Applicant has raised the issue of discriminatory treatment to which the Bank has not provided any response.

Due process

93. 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.)

94. According to the Bank, the Applicant’s alleged performance failures were identified generally in the Inspection Panel Report, the 2009 Management Report, and more specifically in the Draft INT Report. The only formally identified failures that led to the Applicant’s reassignment and his Supplementary Performance Evaluation are those mentioned in the Managing Director’s letter of 28 April 2009, under the following three headings:

- (i) Failure to provide oversight to PCU activities;
- (ii) Failure to respond to the letter from the family of one of the [occupants of the demolished houses];

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

95. The Applicant claims that the allegations are directly contradicted by the facts, as well as the Bank's operational policies. He points out among other things that (i) as he had no operational responsibility for clearing Project staffing issues he had no authority over the appointment of Mr. Malltezi and that, when he interacted with the Task Team, the Bank had already cleared Mr. Malltezi's selection; (ii) that according to the Project contract and Bank policy the responsibility for the supervision of Mr. Malltezi and the PCU rested first with the Government and then with the Task Team and the Sector Unit, as he had no operational responsibility for oversight of PCU activities; (iii) he undertook all measures in his power to see that a proper response to the correspondence from the occupants of the demolished houses was issued; and (iv) he strongly and repeatedly urged the Task Team, the Acting Country Manager, the Country Lawyer and communications colleagues to gather the facts, respond to incoming letters and issue a press release refuting the statement that a staff member had been to the site and explaining the Bank's position with regard to the demolitions. The Applicant points out that he took all these measures to safeguard the Bank's reputation despite the fact that he was frequently on leave or mission during April, May and June 2007. However, he points out that in accordance with Bank's policy and practices, he could not respond to the media and other stakeholders himself. It was the Task Team's responsibility to draft a response and seek the clearance of the appropriate Sector Manager, as well as that of the Procurement, Disbursement, Safeguards and communications departments and LEG, as appropriate, before forwarding the response to the Country Unit who would then seek clearance by the Country Director. He claims that while the processes were still underway, he ended his

tenure as a Country Manager. He contends that the responsibilities of that position fell to his successor who never followed up.

96. 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.

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

98. *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. Because, as the Applicant explains, he was not involved in Project preparation, the clearance of the PAD and the issuance of the Corrigendum, he had virtually no input into the Inspection Panel Report and the Legal Note. The Inspection Panel's interview with him did not include any discussion of any

failures or criticisms of his performance, and he was not involved at all in the drafting and issuance of the Legal Note.

99. *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.

100. 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 him. Therefore he could not have been reasonably expected to give responses to defend himself against such allegations. In addition, the Applicant along with his other colleagues in the Project 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. Only a core team was invited to participate in the meeting to review the draft. As the record shows, the Applicant had even less opportunity to comment on the Report than the staff members in the related cases as he was excluded from the drafting process after 17 December 2008. When he finally had the chance to review the Report in March 2009, he pointed out errors some of which were recognized in correspondence with the drafters of the Report. These errors were not corrected and correspondence was terminated upon order from senior management.

101. 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.

102. *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.

103. 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.

104. 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.)

105. 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.

106. 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.

107. With regard to the Applicant, INT referred to three possible performance-related issues.

108. 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.

109. 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 him or to others.

110. 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.

111. 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 he was the subject of the preliminary inquiry. Because he was treated as a witness, he was not allowed to take the transcript of his interview with him 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, which, the Tribunal notes, only became available to the Applicant in the course of the present proceedings. 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 his 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 himself.

112. 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.

113. 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.”

114. The Tribunal recalls its finding in paragraph 110 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 his case.

115. *Other inputs.* The Bank has referred in the proceedings before the Appeals Committee to input received, in addition to his OPEs, from the Operations Policy and Country Services Department and HR on accountability and job roles. 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 was provided to him only at the time of the Tribunal proceedings, raising another instance of violation of due process.

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

117. 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 his performance.

The Applicant's claim concerning the loss of his expatriate benefits

118. The Applicant has requested either restoration of his expatriate benefits or compensation in an amount resulting from the loss of such benefits as a consequence of his change of status from a G-4 visa holder to a US Permanent Resident which, he claims, was triggered by the contested decisions. The Tribunal notes the Applicant's admission that he was eligible to convert to a US Permanent Resident since 1997. He did not change his status because of the benefits he received as an expatriate. This shows that he was well aware that an application for a change of status would result in the loss of such benefits. The Applicant should have also known that if he changed his mind later such benefits could not be restored under the Bank's governing policy on regulation of expatriate benefits which the Tribunal has upheld in its jurisprudence (*Wahie*, Decision

No. 93 [1990], para. 40). Even though the Applicant expressed fear of the Bank's possible future adverse action against him (i.e. termination of employment) in relation to his performance in the Project, this never happened – nor has he shown that he was threatened with it. On the contrary, the record shows that the Bank clearly communicated to him the adverse measures against him without making any mention of termination. Furthermore the record shows that before applying for his change of status, INT had informed the Applicant that its preliminary inquiry had not found evidence of misconduct and that no further proceedings would follow. The Tribunal finds that the contested decisions of reassignment and the retroactive Supplementary Performance Evaluation did not trigger the loss of his expatriate benefits. His actions relating to the conversion of his and his family's immigration status were a matter of his personal decision and cannot be attributed to any fault of the Bank. Therefore his claim in this respect is denied.

Concluding determinations

119. That the unfortunate consequences of the demolition were not avoided has not been shown to be directly attributable to the Applicant. In his case too, 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 under its policies and practices. This is a recurrent issue of organization for which the Bank's central management bears responsibility. While the Tribunal will not order a rescission of the decision to reassign the Applicant, it will award him compensation for the flaws in the process by which his performance was judged as deficient. The amount of compensation reflects the fact that he has been neither dismissed nor demoted and suffered no direct financial prejudice. In addition,

because the actual Supplementary Performance Evaluation was carried out without regard to the observance of due process requirements, it shall be rescinded.

120. Furthermore, as the Applicant has succeeded in demonstrating that the Bank committed a series of errors, and thereby violated his rights, in virtually every step it took to assess and evaluate his performance leading to the challenged decisions, he 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 \$100,000, 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/ Stephen M. Schwebel
Stephen M. Schwebel
President

/S/ Olufemi Elias
Olufemi Elias
Executive Secretary

At Washington, DC, 25 May 2011