

**JUDGMENT, CASE No. 88**  
**IRENE GUIMARÃES ALTAFIN ET AL V. IDB**

The Administrative Tribunal of the Inter-American Development Bank Group, composed of Judge German Leitzelar V., President; Judge Alberto Wray, Vice-President, Justice Désirée Bernard, Judge Edith Brown Weiss, Judge Mónica Pinto, Judge Hugo Lorenzo, and Judge Shoschana Zusman Tinman, considered the case following the procedures established in the Tribunal's Rules of Procedure.

Ms. Irene Guimarães Altafin et al., (hereinafter "the Complainants") were assisted by Alexander Philippe Haines, Barrister. The Inter-American Development Bank (hereinafter "IDB," "the Bank," or "the Respondent") was represented by Cynthia A. Colaiacovo, Esq.

**I. BACKGROUND:**

1. On **February 7, 2014** twenty nine (29) Brazilian local staff filed a Complaint against the IDB before this Tribunal. The twenty nine staff (Complaints) are Mesdames & Messrs. Irene Guimarães Altafin (1), Maria Cristina Mac Dowell Dourado de Azevedo (2), Patricia Goes Bakaj (3), Regina Lucia Amaral Barros (4), Simone Bauch (5), Wesley Nogueira Bazilio (6), Angela Maria Bloomfield (7), Luciana Botafogo Brito (8), Claudete Camarano (9), Claudia Patricia Campos (10), Fernanda do Vale Caribe (11), Fatima Cartaxo (12), Paulo Eduardo Cavalho (13), Marcia Silva Casseb (14), Marco Aurelio Castro (15), Creuzamar Matos Costa (16), Aderbal Jose Curvelo (17), Claudia Veiga Da Silva (18), Ana Lucia Paiva Dezolt (19), Renata Lourenco Moretto (20), Claudia Regina Borges Nery (21), Marcisgley Vieira Perez (22), Vanderleia Radaelli (23), Marilia de Souza Santos (24), Luciano Schweizer (25), Dalve Soria (26), Katia de Oliveira Sousa (27), Andrea Tessitore (28), Haroldo dos Santos Vieira (29).
2. The above persons appeared in the Conciliation Committee Request of January 9, 2013.
3. Complainants claim that the Bank's denial to revise the staff salaries as requested by the Staff Members amounts to breach of: (a) section 3.02 of PN-7.02 of the Bank's manual as the Bank set salaries in Brazil by not applying the 75<sup>th</sup> percentile; (b) the principle of equality of treatment; and (c) the Staff Members' contracts of employment with the Bank.
4. Complainants requested this Tribunal to grant the adjustment of the Brazilian local staff's salaries by correctly applying section 3.02, PN-7.02 of the Bank's Manual and to grant compensation for any losses attributable to the Bank did not apply the 75<sup>th</sup> percentile in Brazil, and its refusal to correctly revise the salaries when made aware that it was in violation of PN-7.02. They further requested to be awarded damages for breach of contract and reasonable legal costs incurred in remedying the Bank's unlawful conduct.
5. On **April 3, 2014**, Counsel for the Complainants informed the Tribunal's Executive Secretariat that Regina Lucia Amaral Barros and Angela Maria Bloomfield had requested to be taken off the Complaint because they had been offered retirement packages and had agreed not to make any claims against the Bank.
6. On **June 13, 2014** the Bank filed a Motion to Dismiss the Complaint in its entirety.
7. On **July 16, 2014** Complainants filed their comments on Bank's motion to dismiss.
8. On **April 23, 2015** the Bank filed its Answer of Respondent together with annexes.
9. On **June 17 and 18, 2015**, the Complainants' Counsel and a Complainants' representative, inspected, in the Bank's Administrative Tribunal office, the 30 Confidential Annexes relied upon by the Bank in its Answer to the Complainants' Complaint.

10. Complainants filed a Replication on **July 6, 2015**. Fatima Cartaxo and Marco Aurelio Castro withdrew from the case as they have left the Bank and signed “recibos.” The number of signatories to this submission has therefore been reduced to twenty-five.

11. The Bank filed a Rejoinder on **July 28, 2015**.

12. The evidence was received on **March 30 and 31, 2016**, including the statements of the witnesses and Complainants. The parties commented on the evidence. The Tribunal heard oral argument on **October 18, 2016**.

## **A. JURISDICTIONAL ISSUES**

### **i. Respondent’s arguments on Motion to Dismiss:**

13. The Bank considers that the Complainants failed to exhaust all administrative remedies required for the Tribunal’s jurisdiction as their actions did not amount to an appropriate escalation of matters within the Bank’s internal grievance system.

14. According to Respondent, as stated in section 504 of PE-326 “an employee stationed in a Country Office shall first present a matter to the Representative” and, thereafter, matters shall be processed in accordance with section 502(b):

“The employee may request a review of his/her case to the Human Resources Manager and if the matter has not been resolved to the satisfaction of the employee within **twenty (20) working days** of its receipt by the Human Resources Manager, the employee may make application to the Conciliation Committee for relief.” (Emphasis added).

15. In this case, the local staff members at the Brazil country office represent that they initiated the grievance process by submitting the May 2011 letter to Mr. Fernando Carrillo-Florez, the Bank’s Country Office Representative at the time. According to the Bank, the submittal to the Ms. Bock-Valotta, Human Resources (HR) General Manager on August 14, 2012 should not be considered valid, as it did not amount to an appropriate escalation of matters within the Bank’s internal grievance system, as determined in PE-326 that describes the procedures for staff members to bring their employment-related grievances to the Conciliation Committee.

16. On August 30, 2012, HR General Manager denied the review of the said salary requested. The HR Manager further stated: “[T]he Bank is currently performing a salary survey for Headquarters and all Country Offices. The company selected through a competitive bidding process to perform the survey is the Hay Group. This new survey will represent an additional opportunity to determine the competitiveness of Bank salaries in Brazil with a different consulting company. The results of this salary survey will inform a new salary structure, to become effective January 15, 2013; which will be presented to the Board for its approval during the upcoming 2013 budget discussions.”

17. The Bank claims that, if Complainants were not satisfied with the communication they received, they should have raised the matter with the Conciliation Committee within 20 working days, in accordance with section 502(b) of PE-326.15. According to the Bank, the Complainants did not comply with this procedural requirement as well, as they filed a Complaint with the Conciliation Committee on January 9, 2013, almost 90 business days after receiving the August 30, 2012 communication from the HR Manager.

18. Further, claims prior to May 2011 letter should not be entertained as the statute of limitations has expired.

19. Additionally, according to the Respondent, Complainants’ employment histories with the Bank are distinct, the nature of their grievances varies and they should not be accepted by the Tribunal as eligible to file their claims as a class.

20. In order for claims to be joined and for Complainants to form a class they must belong to a group of similarly-situated persons and the issues in dispute must be common to all members of the class. According to the Bank, this is not the case here.

21. The Bank sustains, therefore, Complainants failed to meet the requirements for admissibility of a Complaint as established in PE-326, and the Tribunal's Statute and Rules of Procedure and this Honorable Tribunal should dismiss- *prima facie*- this case in its entirety.

**ii. Complainants' arguments on Respondent's Motion to Dismiss:**

22. Complaints sustain that according to Staff Rule PE-326, paragraph 501, the Staff Members have 90 working days to file a complaint. January 9, 2013, date at which the Staff Members lodged their Complaint, is still within 90 working days from 30<sup>th</sup> August 2012 (national holidays do not count as working days for the purpose of this calculation).

23. Complainants sustain that in the remainder of its first argument supporting its Motion to Dismiss, the Bank also argues that HR Manager's letter of August 30, 2012 was not a refusal to revise the staff salaries as requested by the Complainants. Complainants sustain that the August 30, 2012 email is a refusal to revise their salaries. In the Complainants' August 14, 2012 Memorandum to Ms. Bock-Valotta, they registered their disagreement with the application of the Towers Watson (TW) study.

24. They explained that by applying the results of the study, the Bank was violating Staff Rule PN-7.02, paragraph 3.02. They also explained that the IDB salary scale did not correspond to the salaries paid in Brazil.

25. Specifically, they showed the Bank that 75% of all staff members had salaries below the median for their respective grades and 84% of the specialists (grades 3 to 5) had salaries below the median for their respective grades.

26. Perhaps more importantly, the Complainants concluded their Memorandum by recalling that 15 months had elapsed since their initial request, and they *"ask[ed] HRD to immediately make the adjustments that are called for to the salaries of the CBR local staff, and to properly apply Staff Rule PN-7.02 by comparing the salaries actually paid at CBR to the market salaries, and not to the averages on the scale, since the scale does not represent the salaries actually paid at the country office"*.

27. Is the view of Complainants that HR Manager's letter of August 30, 2012 letter is a refusal to act upon the Complainants' request because it does not remedy the violation of Staff Rule PN-7.02, paragraph 3.02 and it does not adjust Complainants salaries so that they cease to be underpaid. By "noting" the Complainants' requests, and "listening" to their concerns, the Bank is failing to act, despite being under no illusion what the substantive grievance is.

28. Complainants rebut the Bank's arguments as section 502(b) PE-326 does not state that an employee must lodge his or her claim to the Conciliation Committee within 20 days of the notification of the decision that is being challenged; it states that if a matter has not been resolved within 20 days, then the employee may subsequently lodge it with the Conciliation Committee, and he or she, according to section 501, has 90 days in which to do so; therefore Complainants followed the correct process as provided for in the Bank's internal law.

29. The Bank's argument regarding the statute of limitation, according to the Complainants, seeks to limit the Complainants' claims prior to May 2011. Specifically, the Bank argues that any request for consideration of salary review prior to January 2011 (date at which the Complainants received their Advice of Personnel Action) is not permitted. The Complainants disagree; the Bank is misunderstanding the difference between an issue with the salary increase (which is not the Complainants' primary grievance) and an issue with the salaries themselves and how they are calculated. The Complainants

discovered that the Bank was misapplying its internal rules, and have brought this case: the Bank's breaches have affected the Complainants as far back as these breaches have taken place.

30. They also rebutted the statute of limitation argument pleading that they could have not challenged their remuneration before as (i) they did not know at the time that the Bank was underpaying them and (ii) there was no administrative decision to grieve.

31. Complainants further claim that the Bank is incorrect in asserting that the nature of their grievances is not the same: all Complainants allege the Bank's breach of its internal rules and the principle of equality of treatment; that they have suffered real financial loss based upon the same adverse decision and common grounds; that they were affected by the Bank's revised argument that the TW Study was an "ad-hoc study"; they seek specific performance, (namely that they are paid in accordance with the Bank's rules and in line with the market comparators) and compensation for any losses attributable to the Bank's incorrect use of the 50<sup>th</sup> percentile in Brazil.

32. On **November 25, 2014** the then President of the Tribunal, Judge Germán Barreiro González ruled pursuant Art. 16(3) (2<sup>nd</sup> paragraph) to address the issue of admissibility raised in the Motion to Dismiss once the Tribunal has before it the full record of the case.

## **B. MERITS**

### **i. Complainants' arguments can be summarized as follows:**

#### **a) Breach of the Bank's internal rules**

33. The Brazilian employees have discovered that their salaries are not being calculated in accordance with section 3.02 PN-7.02 of the Bank's manual and therefore that Complainants remuneration is not representative of the 75<sup>th</sup> percentile of a competitive segment of the local market.

34. In 2011 the Bank hired TW to conduct an ad hoc full salary survey of the local market in Brazil. The TW Compensation Study lays out the different methodology used to calculate the different statistical measures presented: 1) the Median: the number of reported salaries is considered (*i.e.*, the salary obtained first when organizing the gathered data in order of magnitude from the lowest to the highest, and then selecting the value that separates the sample in such a way that 50% of the reported salaries are greater and 50% are lesser); and 2) the Simple Average: the unitary weight of each company is considered, regardless of the number of salaries' reported (*i.e.*, the average salary obtained when considering each company with a unitary weight- all companies influence this measure equally, regardless of the salaries reported).

35. According to Complainants, management is erroneously comparing the *Median* with the *Simple Average*, which is on all views a major statistical flaw. In other words, one cannot logically compare the number of reported salaries in the market with a unitary mid-point salary. Either the individual salaries should be compared or the unitary salary structure should be compared. TW have instead used the 50<sup>th</sup> percentile mark, arguing that the companies they were able to acquire information on were of an aggressive nature and they therefore used 50% and proxy of the 75<sup>th</sup> (*i.e.* Towers Watson, with the consent and knowledge of HR, took the decision to degrade the percentile used in calculating appropriate local staff salaries and doing so violated the express terms of PN-7.02).

36. The issue raised by Complainants is not that the Bank should pay all employees at 75<sup>th</sup> percentile, but that TW proposed, and the Bank has applied its proposal, that the median (50<sup>th</sup> percentile) of the group serve as a representative proxy for the 75<sup>th</sup> percentile of a broader marketplace because the use of the 75<sup>th</sup> percentile would produce a result that is more aggressive and not in the spirit of the IDB's stated target. It is only in 2012, in TW's Compensation Study, that the mention of the 50<sup>th</sup> percentile makes an

appearance, and yet no justification is provided by the Bank for this and no explanation is provided regarding what *"focused peer group"* and *"too aggressive"* mean.

**b) Failure to implement Conciliation Committee findings**

37. Complainants argue that the Bank failed to implement the Conciliation Committee's recommendations. The Conciliation Committee found that one of the issues before it was *"whether the fact that over 75% of the local employees in the Country Office in Brazil are below the mid-point of the pay scale violates the Bank's obligations under Staff Rule PN-7.02."* Even the Bank must agree that the Conciliation Committee's understanding of the primary issue in this case was incorrect. Whatever issues the Bank and the Complainants disagree on, the nature of the issues themselves can (and must, in the interest of efficient and reasonable litigation) be agreed, and the Bank's reliance on a recommendation of the Conciliation Committee which appears to have fundamentally misunderstood this case from the outset does not take the Bank's case any further. Further, the Bank fails to refer to what the Conciliation Committee went on to say that it *"noted that the validity of the proxy used by Towers Watson had not been proven in its presentation; no statistical data appears to justify the statement made by Towers Watson. Thus, the local staff is left with doubts as to the validity and applicability of the proxy."*

38. Lastly, according to Complainants, the Bank also fails to refer to the Conciliation Committee's recommendations where it noted that *"the local staff in Brazil had reasonable expectations that Management was pursuing the study with all the rigor of a full salary review, and that the ad hoc study would proceed in strict accordance to the methodology presented at the briefing."*

**c) Breach of the principle of equality of treatment**

39. Complainants claim that in the IDB Country Office in Brazil, (i) its employees were substantially underpaid and (ii) the Bank breached *its* internal law when calculating their salaries. In this regard, the Complainants were treated less favorably than employees in other countries. If the Bank has breached *its* internal laws in all other of its Country Offices elsewhere, then of course there would be no discrimination; but in *this* case the Bank's liability would in any event be made out.

**ii. Respondent's arguments can be summarized as follows:**

**a) Breach of the Bank's internal rules**

40. The Bank alleges that Complainants' misread and misinterpreted Bank policy PN-7.02 section 3.02: "the Compensation and Benefits Division of the Bank makes periodical salary surveys in the different labor markets where the Bank has Offices with the purpose of establishing levels of remuneration representative of the 75<sup>th</sup> percentile of a competitive segment in each of the local markets. Among others, United Nations is included in the survey." The presence of the word "representative" means that the Bank is not obligated to set individual employee salaries at the 75<sup>th</sup> percentile of comparator markets.

41. The Bank's grade structure for all non-Executive local staff positions ranges from 12, at the lowest level, to 1, at the highest level. Also, the Bank establishes a minimum and a maximum pay for each grade level. The Bank strives to position the mid-point between the minimum and maximum pay for all grade levels for local staff at an amount representative of the 75<sup>th</sup> percentile of a competitive segment in each of the local markets. In order to assess the position of the Bank's salary scale, the Bank regularly compares its salary structure against those of relevant labor markets comparators. This comparison is intended to identify gaps between the salary structure and the markets in which the Bank competes for talent. Hence, the Bank must first identify relevant reference markets prior to making an assessment of positioning against those markets.

42. According to Respondent, the criteria stated in the full survey to define the selected group of companies that were surveyed from the private sector are many and the group of companies that were surveyed resulted in a very focused peer group that represented the very top tier companies in the market. Conversely, if TW wanted to select companies that were representative of a more comprehensive market, the pool of surveyed companies would have to be much broader and include employers with more varied sizes and scopes.

43. Therefore, according to the Bank, TW narrowed their study by surveying only the very top comparators of the market. In addition to gathering data from private sector organizations, TW also received data from two international organizations (*i.e.*: World Bank and UN) and five local public sector organizations. As for this last peer group, it must be noted that it was included in the *ad hoc* survey at the request of the local employees in Brazil. Once all the data was gathered the following statistical measure was used: As explained by TW “[b]ecause this study represents a small number of specific companies in each sector group, we have used the median of these select peer populations for the analysis.” That is to say that from the top market comparators surveyed by TW the median of this group is what would be equivalent to the 75<sup>th</sup> percentile of the entire employment. Therefore, the use of the median of the top market comparators is equivalent to an analysis of the 75<sup>th</sup> percentile of the broader market.

44. The Bank claims that Complainants confuse these very distinct concepts by claiming that the majority of the salaries of local staff members (approximately 2/3) in Brazil are below the mid-point of the salary range for their grades. Employees’ individual salary increases are granted strictly on merit. Therefore, staff members’ salaries can be positioned at *any* point within their grade range and it is *not* a requirement that a certain percentage of employees’ salaries be positioned at or above the mid-point of their grades.

45. In fact, claim the Bank, it would be unreasonable and undesirable from an organizational perspective to pay all employees at the midpoint (*i.e.*, the 75<sup>th</sup> percentile of the market) - which would represent a single rate of pay per grade. This would imply that a new hire with a minimum level of market experience and skills would be paid the same rate as an employee within the same grade with more extensive market experience and skills, and a proven record of performance at the Bank.

46. Given that conducting full surveys of the market is a comprehensive and laborious process, in the "off-years" the Bank relies on indexation surveys based on the most recent full survey conducted. Indexation for the salary structure involves utilizing published average salary increases or salaries reported by a consultant firm (for the relevant reference markets) to assess the movement of the salary structure.

47. As for 2013 onwards, the Bank initiated a new cycle of surveys, with a full survey followed by indexation surveys. It must be noted that this full survey was conducted only one year after the TW *ad hoc* survey. In this survey, the Hay Group utilized a much wider pool of comparators and arrived to same conclusion as TW did - the Bank’s compensation levels in Brazil were properly positioned when compared to the local market. This is further evidence that the methodology and reference market utilized by the previous surveyor was proper and compliant with Bank policies.

48. Respondent remarks that as a result of the Hay Group full survey, the overall salary structure movement for 2013 was 0%. The indexation survey produced by the Hay Group resulted in a salary structure movement for 2014 of 7.2%. All of the updated salary scales were posted on the Bank’s website.

**b) The Bank did not violate the principle of equality of treatment**

49. According to Respondent, the methodology utilized by the Bank in reviewing the salary scale for local staff in Brazil is the same as for other country offices. The Bank’s decisions on adjustments to salary scales are based on salary surveys conducted by the same surveyor utilizing the same methodology in all country offices. Therefore, local employees in Brazil were not discriminated against and were not treated

less favorably than employees in other country offices. Therefore, Complainants claim that they were not discriminated against is not substantiated as Complainants failed to provide any evidence to support a finding that the Bank breached the principle of equality of treatment.

**c) Complainants' failed to identify what losses, if any, they may have suffered**

50. Respondent claims that Complainants failed to specify what losses they may have suffered. Complainants request that the Bank assist them in re-calculating their salaries if they were to be successful. Complainants' case fails to provide evidence of actual harm, instead resorting to hypotheticals and erroneous interpretations of Bank policy to arrive at a desired outcome. Complainants also claim that they reserve the right to argue quantum subsequent to the Tribunal issuing a final ruling in this case. Complainants propose a process that does not exist. Nowhere in the Tribunal's Statute or Rules of Procedure is the proposed process allowed for. Complainants must identify what losses, if any, they wish to have remedied. Given the vagueness of this request as it does not define a specific loss suffered by staff members and an amount attributable to the alleged losses, this request should be denied.

**d) Conciliation Committee findings**

51. Complainants, according to the Bank, try to distort matters by stating that the Conciliation Committee's findings were limited to the periodic review of the salary scale. That is not true. The Conciliation Committee's recommendation was unequivocal in stating that the Committee "*Denies* Claimant's request for relief." For Complainants to claim otherwise is simply disingenuous. Because the Conciliation Committee's findings were not favorable to Complainants, the matter has moved on to the next stage in the Bank's grievance mechanism, which is the current claim that is now being brought by Complainants before this Honorable Tribunal.

52. Indeed, in the view of the Bank, the Conciliation Committee was of the opinion that "[t]he 75<sup>th</sup> percentile is the stated target for the median of the salary structures, but the policy does not stipulate any commitment to the distribution of individual salaries or averaged salaries within the ranges defined in the salary structure." Instead, the Bank strives to set the mid-point of wage levels (*i.e.*: salary ranges) at the 75<sup>th</sup> percentile of competitive markets. Employees' individual salaries will vary from one employee to another and can be positioned at any point within their salary range. This distinction is crucial as the policy under scrutiny is in place to set standards for determining the Bank's salary structure and not to serve as the basis for calculating individual salaries. In fact, the Conciliation Committee concluded that "no part of the policy obligates the Bank to pay all its employees the midpoint of a salary scales."

**II. TRIBUNAL'S CONSIDERATIONS:**

**ADMISSIBILITY OF THE COMPLAINT**

53. According to Article II.1 of its Statute, "The Tribunal shall hear and pass judgment upon any application by which an Employee of the Bank or of the Corporation alleges non-observance of his or her contract of employment or terms and conditions of appointment. The words "contract of employment" and "terms and conditions of appointment" include all pertinent regulations and rules in force at the time of the alleged non-observance, including the rights or benefits established by a Bank Staff Retirement Plan (hereinafter referred to as a "Plan")."

54. When dealing with "Jurisdiction", the Rules state that "The Tribunal shall hear and pass judgment upon any complaint by which an employee of the Bank or of the Corporation alleges non-observance of a contract of employment or terms and conditions of appointment." (Article 7.1).

55. The Tribunal finds that it is not contested that the Complainants are staff members, local employees, of the Brazil country office of the IDB.

56. The Bank opposes the defense of non-exhaustion of all internal administrative remedies. It argues that Complainants failed to exhaust all administrative remedies required for the Tribunal's jurisdiction and that the statute of limitations has expired.
57. Article II 2(a) requires that Complainants "exhaust all other remedies available with the Bank or the Corporation, as applicable within the appropriate time periods;" Article II 2(b) and (c) details the time periods. The Tribunal considers that the available remedies are all such remedies that could address a given claim effectively.
58. On 19 May 2011, twenty-seven local staff submitted a letter to Mr. Fernando Carrillo-Florez, local Representative, requesting review of local staff employees' salaries for grades 4, 5 and 6 from January 2011 and that the Bank conduct a salary study of the local market. An exchange between Human Resources and the local staff, in which it was informed of the TW study, followed.
59. On 14 August 2012, thirty-one local staff employees at the Bank's country office in Brazil submitted a letter to the General Manager of HR expressing disagreement with the conclusions of the survey conducted by TW. On 30 August 2012 the HR Manager replied by explaining the Bank's policies for salary adjustments.
60. On January 9, 2013, thirty-two local employees in the country office of Brazil - including those now before the Tribunal - presented jointly their Complaint to the Conciliation Committee seeking relief from the effect of Management's decision of August 30, 2012. On January 18, 2013 the Committee accepted jurisdiction over the Complaint.
61. The Bank argues that Complainants brought their Complaint to the Conciliation Committee on January 9, 2013, more than 90 business days after receiving the August 30, 2012 communication from the HR Manager. The Bank also argued this point before the Conciliation Committee. However, the Committee did not uphold the argument.
62. The Tribunal is not an appeal body from the previous steps that Complainants must take to exhaust in order for the Tribunal to be seized. That being so, the Tribunal does not have a duty to review the Conciliation Committee's decision on the point.
63. Nor is it up to the Tribunal to verify whether the Complainants complied with the deadlines prior to their submission to the Conciliation Committee. The only thing that the Tribunal must verify is (i) whether the Complainants exhausted administrative remedies, which, in effect, did happen, since the Conciliation Committee is the last administrative remedy in the Bank; and (ii) whether the Complaint was submitted within the 120 days established in Article 16(a) of the Rules of Procedure of the Administrative Tribunal, which was also the case, for it was submitted in the corresponding time frame.
64. The Complainants brought their Complaint to the Tribunal on February 7, 2014, which is 119 days after October 11, 2013 notification of the decision by the Conciliation Committee, and, thus, acted in accordance with the Rules of the Tribunal, Article 16.1.A.
65. The Tribunal recognizes the importance of complying with the time limits for any remedies that would be available and for bringing Complaints to the Tribunal. In the instant case, the Complainants complied with the requirement to bring their complaint to the Tribunal within 120 days of the rejection by the Conciliation Committee. The Tribunal, therefore, finds that the Complainants have met the required time limits.
66. An additional argument by the Bank is that statute of limitations applies to all claims before January 2011 because they did not comply with the 90 business days to challenge the questioned decisions. The Bank considers that that lapse should be counted from the day in which the Complainants received their Advice of Personnel Action. On their side, the Complainants reiterate that this case is not about their salary increases; it is about how the Bank calculated their salaries in the first place.



67. The Tribunal finds that the Complaint before it deals with the application of the Bank's rules to the determination of the salary structure according to PN-7-02. That being so, the claims had been brought to the Management of the Bank in May 2011. Their request at the time was to adjust their salaries, including based on inflation, and to put forward in a transparent way the methodology for their construction. Therefore, the Tribunal agrees that January 2011 is the reference time for the Complaint.

68. The Bank contends that Complainants do not form a class in the light of the Complaint because of their distinct employment history. The Complainants do not share this view and submit that they share the same grievances.

69. The Complainants in this case are all those having signed the "Claim submitted to the Conciliation Committee" dated January 9, 2013, and filed the Complaint with the Tribunal, with the exception of those who withdrew as informed in paragraph 5 and 10 above, namely:

1) Irene Guimarães Altafin, 2) Maria Cristina Mac Dowell Dourado de Azevedo, 3) Patricia Goes Bakaj, 4) Simone Bauch, 5) Wesley Nogueira Bazilio, 6) Luciana Botafogo Brito, 7) Claudete Camarano, 8) Claudia Patricia Campos, 9) Fernanda do Vale Caribe, 10) Paulo Eduardo Carvalho, 11) Marcia Silva Casseb, 12) Creuzamar Matos Costa, 13) Aderbal Jose Curvelo, 14) Claudia Veiga Da Silva, 15) Ana Lucia Paiva Dezolt, 16) Renata Lourenco Moretto, 17) Claudia Regina Borges Nery, 18) Marcisgley Vieira Perez, 19) Vanderleia Radaelli, 20) Marilia de Souza Santos, 21) Luciano Schweizer, 22) Dalve Soria, 23) Katia de Oliveira Sousa, 24), Andrea Tessitore, 25) Haroldo dos Santos Vieira.

70. The Tribunal finds that it is not requested to determine the amount of the salary of each of the Complainants but to decide whether the Bank was or was not in breach of its own rules when determining the salary structure according to PN-7.02. That being so, the employment history of each of the Complainants has not effect on the consideration of this case. The Tribunal notes in the instant case that the Complaint before it is at the same time one of individual Complaints and a collective Complaint about the terms and conditions of employment.

71. Therefore the jurisdictional objections opposed by the Respondent are dismissed and the Tribunal affirms its jurisdiction to study the merits of the case.

## **THE MERITS**

72. On May 19, 2011, twenty-seven local staff submitted a letter to Fernando Carrillo-Florez, local Representative, listing their concerns regarding their wages and specifically highlighting the decrease in salary for certain grades of employees in real terms in the face of rising costs of living and inflation. They requested that the Bank immediately correct salaries in grade levels 4, 5, and 6 by 21.12% retroactively to January 2011 and that the Bank conduct a salary study of the local market.

73. An exchange between the Bank's Human Resources Manager and the local staff followed. In that context, local staff in the Brazil country office was informed of the TW study that the Bank had ordered.

74. In October 2008, the Bank signed a contract with TW with the objective of "Develop[ing] and updat[ing] salary structure for all Bank Country Offices" as listed and there it set the parameters and requirements of the study. [Vol. III Confidential, Annex 10, Contract, Annex A]

75. On July 20, 2012, TW presented its Compensation study for the Bank's Brazil Office. It proposed four statistical methods for determining 75<sup>th</sup> percentile. The methods are: 1<sup>st</sup> Quartile, 2<sup>nd</sup> Quartile or Median, Simple Average, and 3<sup>rd</sup> Quartile. TW explained that "because this study represents a small number of specific companies in each sector group, we have used the median of these select peer populations for the analysis. The use of these small, select peer populations produces highly competitive, relevant data. Due to the highly focused peer groups, the median of this group serves as a representative proxy for the 75<sup>th</sup> percentile of a broader marketplace (which is the stated target of the IDB). Conversely,

use of the 75<sup>th</sup> percentile of this select peer group (in lieu of the median) would produce a result that is more aggressive and not in the spirit of the IDB's stated target." [Vol. I Annex 11, p. 100, and Vol. III Confidential, Annex 13, p.102]

76. The study was presented to local staff by videoconference on August 8, 2012. Later, on August 14, 2012, thirty-one local staff employees at the Bank's country office in Brazil submitted a letter to the HR General Manager expressing disagreement with the conclusions of the survey conducted by TW. On August 30, 2012 the HR Manager replied by explaining the Bank's policies for salary adjustments. Again, staff disagreed and brought their claims to the Conciliation Committee and after that, on January 9, 2013, thirty-two local employees in the country office of Brazil - including those now before the Tribunal - presented jointly their complaint to the Conciliation Committee seeking relief from the effect of Management's decision of August 30, 2012.

77. The Complainants contend that, in breach of its own rules, section 3.02 of PN-7.02, the Bank has set salaries in Brazil by applying the 50<sup>th</sup> percentile of the group of companies and other entities that it decided to sample and it has sought to justify its policy breach by arguing that the use of the 75<sup>th</sup> percentile of this select peer group would produce a result that is more aggressive and not in the spirit of the IDB's stated target. This situation supposes a discrimination vis-à-vis local staff. They also argue that the Bank should be considering the purchasing power of their salaries and make an adjustment because of inflation even when they are aware this last adjustment is not provided for in the Bank [Complaint, Vol. I, p.23, #6.1].

78. The Respondent denies that it is in breach of any of its own rules. It argues the Complainants confuse the salary structure with the calculation of given salaries. It provides explanation on that and, moreover, adds that the Bank retained the right, in the letters of appointment accepted by the Complainants, to change its salary policy.

79. The record shows that since 1996 the Bank has had policies for adjustment of local staff salary scales based on market comparators. Section 2.02 of the 1996 version of PN-7.02 provides for the use of salary surveys of market comparators and section 2.01 states that the Bank should divide salaries by grade and how the range of pay for each grade was to be calculated.

80. At the same time, it should be noted that as of 1948, the UN decided to utilize the so-called Flemming Principle for setting compensation for locally recruited personnel. According to such principle, the best practice for recruiting and for maintaining the conditions of service of locally recruited staff should reflect the best prevailing conditions found locally for similar work. [Manual for Salary Surveys in Non-Headquarters Duty Station, revised Draft 1998, UN Common System, in Vol. III, Annex 6, p. 76].

81. Section 3.02 of the 2004 version of PN-7.02 states that "The Compensation and Benefits Division of the Bank conducts periodic salary surveys in the labor markets where the Bank has offices in order to establish salary levels that are representative of the 75<sup>th</sup> percentile of a competitive segment in each of those labor markets."

82. Section 3.01 states that "The margin of each range is between 30% and 60% and the progressions of the midpoints are between 15% and 35%. The salary structure is reviewed, usually, once a year, at which point the salary levels prevailing in the local comparator market are taken into account." From 1996 to 2006, the UN conducted salary surveys for the Bank. Afterwards, it was TW and then the Hay Group, which were in charge of such study.

83. As noted before, the TW study used the median to determine "the representative 75<sup>th</sup> percentile," the validity of which the Complainants contest. The Brazil Country Office - Market Analysis, December 2012, conducted by Hay Group, which used a different methodology, reached, however, the same conclusions as the TW report. It showed the use of 152 comparators (pages 10 to 12) and summarizes the study as follows:

“Overall Competitiveness to Local Market:

Slightly above the 75th percentile for positions in IDB grades 2 through 5;

Slightly below the 75th percentile for positions in IDB grades 6 and 7;

Significantly above the 75th percentile for positions in IDB grades 8 through 11;

Overall Variance to market for Grades 2-11: +8.22%.” [Vol. III Confidential Annex 14 p.119]

84. Complainants claim that pursuant to section 3.02 of PN-7.02, the Bank is obligated to set salaries by reference to the 75<sup>th</sup> percentile of a competitive segment in each of the local markets. The Respondent argues that they misinterpret PN-7.02 which is a regulation for developing salary structures for all local staff. PN-7.02, the Respondent alleges, is not a regulation that sets individual employee salaries; rather, it sets parameters for the Bank’s methodology for developing a salary structure.

85. The Tribunal finds that there is a difference between salaries expressing the 75<sup>th</sup> percentile of the competitive segment in local labor market and salary levels that are representative of the 75<sup>th</sup> percentile of a competitive segment in each of those labor markets. The first assertion deals with the composition of individual salaries and the latter with a salary structure to be applied to all salaries and on top of which other components should be added as merit pay, for instance.

86. The evidence on file supports the assertion that the Bank was not obliged to meet the criteria for salary structure, provided for in Rule 7.02, through a given method. It was obliged to reach a result, “to establish salary levels that are representative of the 75<sup>th</sup> percentile of a competitive segment in each of those labor markets.” As shown in the file, from 1996, the Bank found support in market surveys conducted by UN, UNDP and, afterwards, the private consultants TW and Hay Group. They used different methods, especially TW and Hay Group, but, nonetheless they reached similar conclusions, as quoted above.

87. Elaborating on the scope and effect of the market survey conducted by TW, during the oral hearing in this case, the Complainants’ attorney stated that it was “when they saw ‘50<sup>th</sup> percentile’ written in the [TW] Report, that they were able to attribute part of their loss to a breach. ....” [Oral hearing October 18, 2016, page 64, lines 7-10, 13-18].

88. The Tribunal considers that when Complainants assimilate the use of the median of the select group of 27 comparators in the TW survey to the 50%, they are misinterpreting the methodology. As noted above, TW concluded that “Due to the highly focused peer groups, the median of this group serves as a representative proxy for the 75% percentile of a broader marketplace (which is the stated target of the IDB). Conversely, use of the 75% percentile of this select peer group (in lieu of the median) would produce a result that is more aggressive and not in the spirit of the IDB’s stated target.”

89. The Tribunal finds that Complainants may have suffered a decrease in their relative salaries because of many factors, which it is not in the best position to assess. The Tribunal also notes that, through their interpretation of the methodology advanced by TW, Complainants may have thought that the Report was using wrong criteria and, thus, attributed their salary problem to that. These and other reasons may be advanced and all of them may be compatible with Complainants’ views. However, none of them lead to the assertion that the Bank wrongly applied its own rules.

90. The Complainants submit that the Bank is in breach of the principle of equality of treatment in their respect. They allege that the principle precludes the Bank from treating one group of employees differently from others on grounds of, *inter alia*, nationality, race, religion or gender. In the instant case, the Bank has decided to use the median instead of the 75<sup>th</sup> percentile in calculating salaries only for its Brazilian based employees and has therefore singled them out within the Bank for separate and adverse treatment. The Respondent does not agree and attaches table of salary movements. The Tribunal finds that the Complainants failed to make their *prima facie* case on discrimination.

91. The Bank did not implement the plain meaning of the language in section 3.02 of PN-7.02. Due process requires that employees have access to the basis, including the full methodology, used to determine the salary structure "representative of the 75<sup>th</sup> percentile". In this respect, the Tribunal finds its duty to underline that the substantiation of the proceedings relating to the instant case revealed the opaqueness of the language of the relevant rule and the highly technical standard needed to have an accurate approach to it.

92. It is to be noted that the Conciliation Committee recommended that "Management provides clear and easily accessible information to all Bank staff about the details of the Total Reward Framework so as to simplify the very technical and complicated issue associated with compensation and thus avoid the potential of frustrating the employees or create misinformed expectations." [Vol. I, Annex 3, p. 49 #X.23.01.B]

93. As with the decision on the merits, here too the Tribunal concurs with the Conciliation Committee in that it would be desirable that the Bank move forward with a view of a more transparent policy in the wording and in its enforcement so as not to give rise to so complex interpretations.

94. Moreover, the Tribunal is concerned about the lack of due process to staff in implementing section 3.02. While the Bank has clear authority to adopt the necessary rules to implement its policies, staff received no notice that something other than the plain meaning of the words "representing of the 75<sup>th</sup> percentile" could be met by use of alternative methodologies, including the use of the median. Staff became aware of it only upon receipt of the TW report. Even today, there is no place where staff can find out about the current methodology being used to determine this measure. Due process requires that employees be able to be informed about the basis, including the methodology, for determining the salary structure "representative of the 75<sup>th</sup> percentile."

95. There is a point that has been raised in these proceedings relating to the confidential nature of documents and files to which the Complainants' attorney ordinarily have only restricted access, since they must be consulted in the HQ only and cannot be copied or scanned. Because of that, the principle of equality is eroded. The Tribunal is concerned about the restricted access and the effects that this could have on the ability of counsel to prepare adequately in bringing complaints to the Tribunal. While the Tribunal did not find evidence on record sufficient to support a breach of the principle of equality in this case, it does emphasize the importance of the principle.

96. The Tribunal further considers that the principle of transparency should be honored in all kinds of relationships, especially in the field of litigation. In line with that, the Tribunal is of the view that the number and quality of confidential files should not be large but as restricted as possible so as to become the exception to a general rule. It considers further that except for very special documents whose confidentiality the Bank should support with arguments beyond reasonable doubt, all other documents and files should be available for all the parties in the same proceedings or it should decide on its availability to the Complainants.

### **III. RULING**

For the above considerations, the Complaints are dismissed.

(signature)

German Leitzelar V.

(signature)

Alberto Wray

(signature)

Désirée Bernard

(signature)

Edith Brown Weiss

(signature)

Mónica Pinto

(signature)

Hugo Lorenzo

(signature)

Shoschana Zusman Tinman

(stamp)

(signature)

Giuliana Canè  
Executive Secretary

Washington, D.C., October 21, 2016

### **Separate opinion of Judge Hugo Lorenzo**

In keeping with Article 26(4) of the Tribunal's Rules of Procedure, I hereby state the grounds for my vote:

I join the majority in adopting the decision (the operative part of this judgment) for the following reasons:

1. I fully agree with the considerations put forth by the Tribunal referring to the formal aspects (procedural aspects, or referring to the jurisdiction of this Administrative Tribunal).
2. As regards the merits, I agree only with what was decided by the Tribunal (dismissal of the complaint), but I do not accept all the considerations with regard to the two market studies carried out by the companies contracted by the respondent, Towers Watson and Hay Group.
3. I believe the technical complexity of the economic, financial, accounting, and statistical issues of the facts in the instant matter would have required full clarification (for judges who are not experts in such matters). Perhaps that would have been possible by appointing impartial experts to analyze and present an expert opinion on the facts at issue in this litigation.
4. I understand that conclusive evidence has not been put forth in support of the position of either party; and I decided my vote (on the merits issues) by applying the procedural principle of the burden of proof, which in the instant case was borne by the Complainants.

Hugo Lorenzo

Judge