



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3581/2019\*, \*\*

<i>Communication submitted by:</i>	M.L.D. (represented by counsel, Rishi Gulati and Philippa Webb)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Philippines
<i>Date of communication:</i>	26 July 2018 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 3 April 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2024
<i>Subject matter:</i>	Jurisdictional immunities of a public international organization
<i>Procedural issues:</i>	Admissibility – substantiation of claims; exhaustion of domestic remedies; <i>ratione materiae</i>
<i>Substantive issues:</i>	Access to justice; right to a fair trial; right to privacy; non-discrimination; access to a remedy
<i>Articles of the Covenant:</i>	2, 3, 14 (1), 17 and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2)

1.1 The author of the communication is M.L.D.,<sup>1</sup> a national of Australia born on 6 November 1960. She claims that the State party has violated her rights under articles 2, 3, 14 (1), 17 and 26 of the Covenant, in connection with the termination of her employment contract with the Asian Development Bank. The author requests the Committee to grant her interim measures that would have the effect of “demanding that the Asian Development Bank remove all personal information in connection with her from its website and remove the entirety of the dispute tribunal decision until such time that a fair determination of her claims

\* Adopted by the Committee at its 141st session (1–23 July 2024).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

<sup>1</sup> The author has requested anonymity.



is forthcoming". The Optional Protocol entered into force for the State party on 22 November 1989. The author is represented by counsel.

1.2 On 3 April 2019, the communication was registered, without interim measures. On 3 June 2019, the State party requested that the admissibility of the communication be considered separately from the merits. On 15 October 2019, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

### **Facts as submitted by the author**

2.1 The author commenced employment at the Asian Development Bank on 16 February 2007 as an agriculture, environment and natural resources economist in the Bank's South-East Asia Department. On 22 April 2012, the author was promoted to senior staff level (IS5) in the Bank's Pacific Department.<sup>2</sup> On 27 March 2015, however, the author was placed on a performance improvement plan for three months, from 1 April 2015 to 30 June 2015.<sup>3</sup> On 23 November 2015, after almost nine years of service, the Bank terminated the author's employment for alleged unsatisfactory performance. On 2 November 2016, the author contested the decision to terminate her contract with the Bank's Administrative Tribunal, arguing, among other things, that there was no factual basis for the Bank's decision to terminate her employment because her performance was not objectively deficient, and that she had been subjected to gender-based discrimination by R.G., her then supervisor at the Bank.<sup>4</sup> The author primarily requested that the decision terminating her employment be

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<sup>2</sup> The author held this position until her appointment was terminated for unsatisfactory performance. She established herself as a loyal and competent person, with significant achievements, according to the counsels' account.

<sup>3</sup> When placed on the performance improvement plan, the author reported the incidents of harassment at work to the Bank's Ombudsperson. She alleged that her supervisor had on two separate occasions called her a "tone-deaf bitch", and requested an oral hearing by the Administrative Tribunal to call in the Ombudsperson to give evidence. In an Asian Development Bank statement of truth of 14 March 2016, the author's supervisor categorically denied any allegation of verbal harassment.

<sup>4</sup> Although the author does not elaborate on the contents of the Administrative Tribunal's decision, the documents submitted indicate that the Tribunal dismissed the author's application on 6 May 2017, after she had exhausted internal grievance procedures, including compulsory conciliation, the administrative review of allegations of "bullying and harassment in the workplace" by her supervisor and the appeal with the Appeals Committee, which found that the Bank had duly terminated the author's employment and that there had been no evidence of action that could be considered as an abuse of discretion, arbitrariness, improper motivation or discrimination. The president of the Bank accepted the recommendation of the Appeals Committee not to grant the relief sought by the author, but requested staff to address the discrepancies highlighted and to consider revising practices by supervisors with regard to performance evaluations and communication with staff. While the internal grievance procedure was continuing, the author filed a criminal complaint on 29 January 2016 against eight of her former Asian Development Bank colleagues, including her supervisor, alleging "cyber libel" for posting her written assessment on the Bank's internal IT system. As regards the author's claims of lack of due process of the termination of employment, the Bank held that the termination decision had been taken reasonably on the basis of facts accurately gathered and properly weighed and that the proper procedure had been followed; that the author had failed to meet either the standard of "satisfactory" or at least "generally satisfactory" performance; and that there was no evidence that the Bank had not satisfied due process. Regarding the claims of arbitrariness and abuse of discretion, the Administrative Tribunal concluded that the author had failed to discharge her burden of proof that the challenged decision was vitiated by arbitrariness or an abuse of discretion. As regards the author's claims of harassment, discrimination or improper motive, the Administrative Tribunal concluded that those had remained unsubstantiated. The Administrative Tribunal also held that the criminal complaint submitted by the author was incompatible with the system of internal review which is linked to the immunities from jurisdiction enjoyed by the Bank pursuant to the Agreement between the Asian Development Bank and the Government of the Republic of the Philippines regarding the Headquarters of the Asian Development Bank of 22 December 1966 (Headquarters Agreement). Consequently, the Administrative Tribunal denied the author's requests for relief, and for costs.

declared null and void.<sup>5</sup> There were several other seriously questionable and highly visible dismissals by the Bank, which were reported in the media in the Philippines in January 2016.

2.2 The author claims that the Administrative Tribunal of the Asian Development Bank is not an objectively competent, independent and impartial tribunal. The respondent to any claim at the Administrative Tribunal is the president of the Asian Development Bank. Judges at the Administrative Tribunal have a tenure of three years, and it is the president of the Bank, that is, the respondent in all cases against the Bank, who recommends whether or not to renew the term of a particular Administrative Tribunal judge.<sup>6</sup> Such a regime, including the significant role of the president in renewing the appointments of Administrative Tribunal judges every three years, does not comply with the standards of judicial independence demanded by article 14 of the Covenant, in the view of the author.<sup>7</sup> The author also claims that she did not have access to an oral hearing and the evidence was not properly tested,<sup>8</sup> that the Ombudsperson was not allowed to provide a witness testimony, that the Administrative Tribunal did not consider the significant witness evidence adduced or the alleged reprisals against witnesses by the Bank, and that its decision of 6 May 2017 was not properly justified, and that the author could not appeal the decision of the Administrative Tribunal – all of which reveal a violation of the right to a fair trial, according to the author.<sup>9</sup> The author's claims were dismissed on 6 May 2017 by the Administrative Tribunal, which considered her claims of lack of due process, and of arbitrariness and abuse of discretion, including her claims of harassment, discrimination or improper motive, to be unsubstantiated.

2.3 The Asian Development Bank enjoys jurisdictional immunities before the courts of the Philippines, pursuant to section 5 of the Headquarters Agreement.<sup>10</sup>

2.4 In respect of employment claims, the Supreme Court of the Philippines has held that public international organizations such as the Asian Development Bank cannot be subjected to the jurisdiction of the courts of the Philippines, by virtue of the Bank's immunities.<sup>11</sup> The author asserts that no reasonable prospects of success exist should she approach national courts with claims against the Asian Development Bank as an institution in its own capacity. On 28 September 2017, the author approached the Department of Foreign Affairs of the Philippines, urging the State party to provide protection to the author and to ensure that the violations were brought to an end and the rights of the author were restored. The communication to the Department of Foreign Affairs requested the State party to arrange, in line with the provisions of the Covenant and of its Headquarters Agreement with the Asian Development Bank, for her employment grievance to be re-examined by a competent,

<sup>5</sup> The author also requested that her 2014 performance review be expunged from her official records, that she be reinstated or receive adequate compensation, and that she obtain relief for moral damages and suffering, and for legal costs.

<sup>6</sup> The statute of the Administrative Tribunal, in its article IV, paras. 2 and 3, stipulates that the members of the Tribunal are to be appointed by the Board of Directors from a list of candidates to be drawn up by the president of the Bank after appropriate consultation, and that members of the Tribunal may be reappointed by the Board of Directors, upon the recommendation of the president.

<sup>7</sup> Administrative Tribunal statute, article IV (3). In that context, the author has alleged that there are no transparent procedures on how judges are selected/appointed. She adds that her case was determined by the Administrative Tribunal in a session held in Yokohama, Japan, which coincided with the fiftieth anniversary meeting of the Asian Development Bank, also held in Yokohama, to which the judges allegedly travelled together with their spouses. In that context, the author pointed to a possible interaction between the Bank's legal team and its Administrative Tribunal judges in Yokohama.

<sup>8</sup> The author contended that since her credibility was at issue, an oral hearing was indispensable.

<sup>9</sup> According to the rules of procedure, decisions of the Administrative Tribunal are final.

<sup>10</sup> The Headquarters Agreement provides that the laws of the Philippines apply to the Asian Development Bank (sect. 15). As a public international organization, the Asian Development Bank enjoys jurisdictional immunities before courts of the Philippines (sect. 5). The Bank is to prevent the headquarters seat from becoming a refuge for fugitives from justice (sect. 18). The Bank is to cooperate at all times with the appropriate authorities of the Philippines to facilitate the proper administration of justice and secure observance of the laws of the Philippines (sect. 54). No immunities from criminal prosecution or civil wrongs exist in relation to Asian Development Bank officials in the Philippines.

<sup>11</sup> Decision of the Supreme Court of the Philippines in *Department of Foreign Affairs v. National Labour Relations Commission*, GR No. 113191, 18 September 1996.

independent and impartial tribunal established by law, or alternatively not to issue any executive certificate in favour of the purported immunities of the Asian Development Bank in order to allow for determination of the author's employment dispute with the Asian Development Bank by court in the Philippines; and to take all steps to ensure that she was not identified as a litigant through the website of the Asian Development Bank or its Administrative Tribunal.<sup>12</sup> Despite repeated reminders to the Department of Foreign Affairs<sup>13</sup> and assurances from it that it would provide a response, no response has been given. In view of the lapse of time and the denial of justice at multiple levels, the author informed the Department of Foreign Affairs about her intention to submit the present complaint to the Committee.

### Complaint

3.1 The author, as an international civil servant, claims a violation of her rights under article 14 (1), read in conjunction with article 2 (3), of the Covenant, since she did not have access to a competent, independent and impartial tribunal. The Asian Development Bank is located on the territory of the Philippines and is bound by its laws. At the material time, the author was present on the territory of the State party and subject to its jurisdiction. The State party is bound by the Covenant, which applies to the present case of employment dispute with the non-State entity<sup>14</sup> as the breach of the author's rights occurred on the territory of the State party. The Department of Foreign Affairs has been notified that the author's rights have been violated, with a request for urgent action to be taken to bring an end to such violations. In regard to article 14 (1), the author has claimed: (a) that the Asian Development Bank is obliged to provide a fair trial to the author, which it has not done; and (b) that the international responsibility of the State party is engaged and has been contravened as it has failed to take any steps to remedy the violations of the author's rights, as is required under article 2 of the Covenant. As a public international organization, the Asian Development Bank is required, bearing in mind the organization's jurisdictional immunities before the domestic courts, to provide reasonable alternative means of dispute resolution to its staff members.<sup>15</sup> She argues that, as held by the International Court of Justice, civil service tribunals at international organizations must render justice independently and impartially, and in compliance with the right to a fair trial.<sup>16</sup> The International Court of Justice has stated that a failure of justice occurs when an official's right to a fair hearing is violated.

3.2 The author claims that the Administrative Tribunal of the Asian Development Bank does not constitute a reasonable alternative means of dispute resolution due to its structural deficiencies, which include the lack of judicial independence, and of proper nomination, election and appointment of judges, as well as the extrajudicial activities and personal contacts between the Administrative Tribunal members and the Asian Development Bank management.<sup>17</sup> Her right of access to a court or tribunal, which constitutes an absolute right,<sup>18</sup>

<sup>12</sup> In particular, the author requested the State party to ensure that her rights under arts. 14 and 17 of the Covenant were not contravened by the Asian Development Bank, which is located on the territory of the Philippines.

<sup>13</sup> Reminders were dispatched on 11 October 2017, 1 November 2017, 22 November 2017, 11 December 2017 and 11 January 2018.

<sup>14</sup> Human Rights Committee, general comment No. 31 (2004), para. 8.

<sup>15</sup> European Court of Human Rights *Waite and Kennedy v. Germany*, Application No. 26083/94, Judgment, 18 February 1999, paras. 6, 43 and 51; and *Beer and Regan v. Germany*, Application No. 28934/95, Judgment, 18 February 1999. In *Waite and Kennedy v. Germany*, which concerned an employment dispute with the European Space Agency, the European Court of Human Rights made two findings: that the right of access to a court and of a fair trial could not be limited in a way to "reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired", emphasizing the particular importance of the right to a fair trial; and that such "reasonable alternative means to protect effectively their rights" must comply with the right to a fair trial.

<sup>16</sup> The author refers to the *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports [1973]*, p. 166 ("review of judgment No. 158"), and in particular its para. 92.

<sup>17</sup> Burgh House Principles on the Independence of the International Judiciary, 2004.

<sup>18</sup> Human Rights Committee, general comment No. 32 (2007), para. 19.

was denied. She also argues that her right to a fair trial was violated as she was denied an oral hearing despite the facts and her credibility being contested, that the Administrative Tribunal did not address all key issues and take evidence adduced by the author into account,<sup>19</sup> that the Administrative Tribunal failed to address the allegations of reprisals by the Asian Development Bank against the witnesses who supported the author, that the Ombudsperson was not allowed to provide a witness testimony, that the author could not appeal the Administrative Tribunal decision, and that the Administrative Tribunal has not clarified the author's concerns about the lack of its independence and impartiality despite several written requests. The author argues that the State party did not guarantee her right to a fair trial. The author requested the State party, as the host State, to intervene for the author's right to a fair trial to be realized by carrying out independent and impartial arbitration in a neutral forum to resolve her claims, or through an arbitral procedure under the auspices of the Permanent Court of Arbitration. Due to the lack of a response, the State party violated the author's rights under article 14 (1), read in conjunction with article 2 (3), of the Covenant.

3.3 The author further argues that the Administrative Tribunal of the Asian Development Bank failed to determine her claim of gender-based discrimination by her supervisor, who had called her a "tone-deaf bitch" on multiple occasions, in its decision.<sup>20</sup> Although this grave issue was raised before the Administrative Tribunal, the tribunal refused to determine the issue of discrimination, despite possessing actual evidence that the author had adduced. In support of her claim, the author adds that the Appeals Committee of the Asian Development Bank did not agree with the discounting of her allegation of harassment for the fact that such claims were not made at the time of the incident. The author has, however, confirmed that she presented a claim of harassment in her request for administrative review. The Appeals Committee noted that victims of harassment may not immediately report an instance of harassment due to embarrassment, belief that no disciplinary action would be taken, or fear of retaliation, and that the victims of harassment, real or perceived, should never be dissuaded from speaking up, in line with the goals of the Asian Development Bank of providing a safe, secure and nurturing work environment. The Bank's Administrative Tribunal failed to provide the author with an effective remedy for the grave attack targeting her on account of her gender, and also disregarded her request for an oral hearing at the time when her credibility was at stake in relation to establishing the truth in relation to her credibility. She claims that by failing to act on her request for intervention, to prevent blatant sexism and discriminatory treatment amounting to violence by entities located on its territory, the State party denied the author "an effective remedy" and violated her rights under articles 2 (1), 3 and 26 of the Covenant.

3.4 Finally, the author claims that the Administrative Tribunal of the Asian Development Bank breached her right to privacy and caused significant harm to her personal and professional reputation by publishing the judgment on its website and identifying the author by her full name (instead of using a pseudonym in line with its usual practice), while it anonymized other officers.<sup>21</sup> Such treatment differed from that given to other applicants

<sup>19</sup> In the decision of the Administrative Tribunal (para. 27), submitted as supporting evidence, the Tribunal stated that it was for the Tribunal to take a decision in each case with regard to whether oral proceedings, including presentation and examination of witnesses, were warranted or not under art. VIII of its statute, noting also that the applicant had requested an oral hearing with regard to her allegations of harassment that she had submitted to the Ombudsperson. In that context, the Tribunal considered that it was not appropriate to call the Ombudsperson as a witness, in the light of the confidential nature of his role, referring to Administrative Order 2.14, para. 3.9, in which it is stated that "the Ombudsperson cannot be compelled to provide information or be a witness in hearings ... about concerns brought to the Ombudsperson's attention". As the submissions by the parties provided a sufficient basis for consideration of the issues, the Tribunal considered that oral proceedings were not warranted.

<sup>20</sup> The Administrative Tribunal's decision (para. 72) stated that the author had not filed a formal complaint at any time against the alleged harassment by her supervisor and that her supervisor had provided a statement denying the allegations. It concluded that the author's claims of harassment, discrimination and improper motive remained unsubstantiated.

<sup>21</sup> The author of the application to the Administrative Tribunal has been identified by her full name in the Tribunal's decision. However, the Asian Development Bank, as the respondent, has requested

before the Administrative Tribunal, and was inconsistent with the practice of other international administrative tribunals. The author recalled the Committee's case law in *Sayadi and Vinck v. Belgium*, where an international organization, the United Nations, had listed certain persons on a United Nations sanctions list, identifying the complainants by their names, in finding a violation of article 17 of the Covenant.<sup>22</sup> The author referred to that issue in her communication to the Department of Foreign Affairs. She claims that by failing to take any steps to remedy the situation, in line with the Headquarters Agreement, to ensure the administration of justice in regard to her, the State party has violated her rights under article 17, read in conjunction with article 2 (3), of the Covenant.

#### **State party's observations on admissibility**

4.1 On 3 June 2019, the State party submitted its observations on the admissibility of the communication, requesting the Committee to find it inadmissible for failure to comply with the requirements of rule 99 (a), (b), (c), (d) and (f) of the Committee's rules of procedure, and to award \$5,000 in legal costs to the State party.

4.2 The State party first argues that the communication does not emanate from an individual subject to the jurisdiction of the State party, as she is not directly subject to a State's exercise of power through its authorities, being a staff member of an international organization – the Asian Development Bank. Pursuant to the provisions of the "Agreement between the Asian Development Bank and the Government of the Republic of the Philippines regarding the Headquarters of the Asian Development Bank" (the "Headquarters Agreement"), staff of the Asian Development Bank enjoy immunity from legal processes of the Philippines under section 45 of that Agreement. The Bank did not waive the immunity granted by the Headquarters Agreement in favour of the author, placing her outside the jurisdiction of the State party. Entering into the Headquarters Agreement with the Bank, as an international organization endowed with functional immunities, in fact constitutes a permissible restriction of the provisions of the Covenant. The State party adds that concluding a headquarters agreement with an international organization cannot in any way be interpreted as being in contravention of the State party's obligations under the Covenant.

4.3 The State party further submits that the author failed to sufficiently substantiate her claim that she is the victim of a violation of any of the rights set forth in the Covenant. In regard to article 2 of the Covenant, the author failed to show that she is an individual within the State party's territory and subject to its jurisdiction. She was never directly subject to the State party's exercise of power through its authorities due to the immunity from legal process pursuant to the Headquarters Agreement, and the Bank did not waive that immunity which the author enjoyed through her employment with the Bank. In addition, the author does not sufficiently substantiate her claim that there has been a violation of the rights recognized in the Covenant. The violations alleged are linked to an employment claim that originates in a dispute between the author and the Asian Development Bank, a legal entity headquartered on the territory of the State party. The main issue is an employment claim against the Bank, not a violation of any right enshrined in the Covenant. Since the Covenant does not cover labour contract-related disputes between employees and employers, and does not implicate the State party, the communication should be declared inadmissible *ratione materiae* and due to a lack of substantiation.

4.4 The State party further notes that nowhere in the communication is it alleged that the State party violated the author's rights under articles 3 and 26. The gender-based discrimination was allegedly committed by the Bank, not the State party, and the review by the Department of Foreign Affairs in 2017 and 2018 of the issues concerning jurisdiction was not protracted. Hence, the communication does not sufficiently substantiate the claim that articles 3 and 26 of the Covenant have been violated.

4.5 Neither does the communication sufficiently substantiate the claim that articles 14 (1) and 2 (3) of the Covenant have been violated. The author has, inter alia, alleged that it was

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confidentiality of the name of the author's supervisor. This request was granted in view of the sensitivity of the issues and the fact that he was still an officer in the Bank.

<sup>22</sup> *Sayadi and Vinck v. Belgium* (CCPR/C/94/D/1472/2006), para. 10.13.

the Bank that failed to provide her with a fair trial. Such failure could not be attributed to the State party, as it does not exercise any control or supervision over the Bank, which is an independent international organization located within its territory. The State party has not failed to take any steps to remedy the alleged violations either, as there was no information that the author has in fact commenced any suit at law which involves the determination of her rights and obligations. There has been no suit which was declined by any court, body or tribunal in the State party. The claims of violation of article 2 (3) should also be declared inadmissible, as their basis comes from the assumed validity of the claims under article 14 (1).

4.6 The communication does not sufficiently substantiate the claim that articles 17 and 2 of the Covenant have been violated. The author alleged that it was the Bank that violated her right to privacy. Such act of the Bank could not be attributed to the State party. The State party also reiterated its objection to the alleged inaction in providing assistance and protection to the author.

4.7 The State party further submits that the communication constitutes an abuse of the right of submission insofar as it is inadmissible *ratione materiae*, as the Committee does not have the competence to hear the subject matter of the case, which concerns an allegedly illegal dismissal of the author from the Asian Development Bank, which enjoys jurisdictional immunity, and the complaint does not implicate the State party, as is apparent from the remedies sought. Moreover, the State party notes that the right to employment is a property right, not protected under the Covenant, which makes it incompatible with the Covenant. The Committee, under the Optional Protocol, has the competence, when so recognized, to receive and consider communications from individuals subject to the jurisdiction of the State party who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. The communication is also incompatible because the Committee is not an appellate body for reviewing the author's case that was originally decided by the Bank's Administrative Tribunal.

4.8 Finally, the State party argues, assuming *arguendo* that the author's claim has merit and there has in fact been a violation of her rights under the Covenant, that the author failed to exhaust all available domestic remedies, as she could have invoked article 32 of the Civil Code since the author's right to privacy provides for remedy through a writ of *habeas data*, based on the case law of the Supreme Court of the Philippines.<sup>23</sup> Mere doubts about the effectiveness of a remedy do not, in the Committee's view, dispel the obligation to exhaust it. The steps taken by the author were not appropriate remedies for her grievances, as the Department of Foreign Affairs certificate on possible immunities is generally issued once a legal suit has been started. In the present case, no suit relating to the author's grievances has been filed before any court.

#### **Author's comments on the State party's observations on admissibility**

5. On 18 July 2019, the author reiterated that her rights under the Covenant had been violated by the State party, in support of her arguments that the communication was admissible.

#### **State party's observations on the merits**

6.1 On 14 February 2020, the State party submitted its observations on the merits, recalling its earlier arguments that the communication is inadmissible for several reasons. Alternatively, there has been no violation of the Covenant.

6.2 The State party reasserts that it does not have jurisdiction over the Asian Development Bank and the author, pursuant to international law.<sup>24</sup> The parties to that labour dispute are immune from the suit, pursuant to the Headquarters Agreement of 22 December 1966, and the Asian Development Bank has not waived the author's immunity from suit. Likewise, the Asian Development Bank is immune from any legal processes of the State party, under section 5 of the Headquarters Agreement. Thus, the State party has no effective control and jurisdiction over the author. Moreover, the author's grievance constitutes a property right

<sup>23</sup> Section 1, A.M. No. 08-1-16-SC, Supreme Court's decision, effective as of 2 February 2008.

<sup>24</sup> Reference is made to art. 2 of the Covenant, and to the Committee's general comment No. 31 (2004).

which is not covered by the Covenant. Even if the Covenant were applicable, the State party did not violate any of its provisions. The State party further adds that an arbitration procedure cannot legally be arranged for.

6.3 Finally, the remedies sought by the author cannot be complied with by the State party without violating its obligations under international law pursuant to the Headquarters Agreement, in the absence of lawfully and properly instituted court proceedings.

#### **Author's further comments**

7.1 On 18 April 2020, the author submitted a response to the State party's observations. As regards admissibility, the author rebuts the State party's objections, insisting that she has been subject to the State party's jurisdiction and hence the communication should be considered admissible.

7.2 The issue of jurisdiction cannot be conflated with immunity, and there is no exception to the territorial application of the Covenant and the Optional Protocol.<sup>25</sup> Since the Asian Development Bank is headquartered in the State party, its laws continue to apply to the Bank. The Supreme Court of the Philippines itself has held that courts of the Philippines can exercise adjudicative jurisdiction over the Asian Development Bank and its officials based on the territoriality principle when the Bank and its officials are in breach of substantive legal obligations applicable in the Philippines, which continue to apply regardless of whether immunities are upheld in a particular case. Referring to section 45 of the Headquarters Agreement, the Supreme Court emphasized a distinction between labour-related issues in the context of official functions, and criminal issues, emphasizing that civil and criminal liability for exceeding authority is not exempted by the immunity of staff of the international organization, which remains functional.<sup>26</sup> The State party therefore possesses jurisdiction over the Asian Development Bank and its officials.<sup>27</sup>

7.3 Furthermore, the author argues that she has substantiated her claims and that the State party, as a host State, must ensure that the author has access to a "reasonable alternative means of dispute resolution", in accordance with article 14 (1) of the Covenant. The author also rebuts the State party's erroneous contention that her claims amount to an abuse of the right of submission, asserting that the substantive right to non-discrimination is not limited to the Covenant. Moreover, the communication was submitted without delay and no abuse of the right of submission exists. On the contrary, the author contends that the State party's obligation is not to participate in the abuse of immunities by the Asian Development Bank, in accordance with the Headquarters Agreement.<sup>28</sup> Finally, the author's communication is compatible with the Covenant, as she is not seeking judicial review of any court decision or approaching the Committee as a fourth instance. The author requests that she be provided with a fair trial in respect of her suit at law so that the ongoing violation of her rights can be remedied.

7.4 In addition, the author argues that her communication does not lack merit due to the alleged lack of the Committee's competence. For the State party to comply with its Covenant obligations, it must ensure that the author had access to "reasonable alternative means" of dispute resolution so that her right to a fair trial and other substantive rights could be realized. If not, the responsibility of a State hosting an international organization is engaged and contravened. Those claims fall within the scope of the Covenant, which rebuts the State party's assertions.

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<sup>25</sup> European Court of Human Rights *Klausecker v. Germany*, (Application No. 415/07, Judgment, 29 January 2015, para. 52.

<sup>26</sup> *Liang v. People of the Philippines* (application No. 125865).

<sup>27</sup> Apart from the European Court of Human Rights, reference is made to the French Court of Cassation decision in *African Development Bank v. X*, holding that French courts exercised jurisdiction over the African Development Bank since it did not provide reasonable alternative means of dispute resolution to X.

<sup>28</sup> Inter-American Juridical Committee, Practical Application Guide on the Jurisdictional Immunities of International Organizations.



7.5 On the merits, as regards articles 14 (1) and 2 (3), the author considers the State party's assertions as manifestly inaccurate, adding that the Administrative Tribunal of the Asian Development Bank is the highest level of review available, but that it lacks independence and impartiality. The alternatives referred to by the State party cannot be said to constitute "reasonable alternative means" of dispute resolution. The Ombudsman's process is not a judicial process, and the Appeals Committee does not consist of independent judges. Those are peer-review mechanisms with shortcomings as to due process and fair trial norms.<sup>29</sup> Consequently, the author faced a manifest denial of justice and her due process rights have been contravened at the level of the Asian Development Bank and of its Administrative Tribunal, including through the denial of an oral hearing, the intimidation of witnesses, the failure to address key claims and evidence adduced by the author, and a denial of her right to appeal.

7.6 As regards articles 2, 3 and 26 of the Covenant, the author objects to the State party's arguments that the restrictions imposed on the author in approaching the national courts are justified by the fact that she was an international civil servant working for the Asian Development Bank, which enjoys immunities from adjudicative jurisdiction, so the difference in treatment is allegedly justified. This completely misinterprets the author's claims of gender-based discrimination, disregarding, inter alia, the intimidating language used against the author as a woman, which resulted in denial of an effective remedy by the Bank's Administrative Tribunal. The author reiterates that the status of the Asian Development Bank as an international organization, possessing functional immunities, only affects the forum where a dispute is to be resolved. It does not result in a blanket disapplication of legal guarantees under the Covenant. The State party cannot deny its obligations pertaining to non-discrimination by purporting that it was carried out by an international organization located on its territory. If that contention were to be accepted, the obligations under articles 2, 3 and 26 would be rendered meaningless.

7.7 The author further insists that the State party should have negotiated in good faith with the Asian Development Bank under the Headquarters Agreement to ensure access to justice for the author, including through arbitration as the only appropriate alternative means available to her. Arbitration between a multilateral financial institution and the author would be a means of securing a "reasonable alternative means" of dispute resolution. The international organization "should seek a solution affording the applicant access to a court, either by waiving its immunity or by submitting the dispute to arbitration".<sup>30</sup> The author has sought an alternative remedy.

7.8 The author also objected to the State party's issuance of an executive certificate in favour of Asian Development Bank immunities, should she approach the national courts to resolve her employment claims. The author claims that it is an obligation of the State party to ensure that it does not facilitate an abuse of immunities by the Asian Development Bank. As the Supreme Court has upheld the immunity of the Asian Development Bank in employment claims, it means that the author has exhausted domestic remedies given this binding precedent. Without an assurance that the State party will not issue an executive certificate in favour of Asian Development Bank immunities, there are no realistic prospects before the domestic courts.

7.9 For an effective remedy to be granted, the State party ought to either secure the cooperation of the Asian Development Bank to enter arbitration with the author, not issue an executive certificate in respect of Asian Development Bank immunities, or secure a waiver of immunities from the Asian Development Bank. The author therefore requests the Committee to conclude that her rights under articles 14 (1) and 2 (3) have been violated and that she be granted adequate compensation.

7.10 As regards her claims under article 17, read in conjunction with article 2 (3), of the Covenant, the author reiterates that her privacy, honour and reputation continue to be

<sup>29</sup> *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports [1973]*, para. 17. See also *Siedler v. Western European Union*, appeal judgment, 17 September 2003, Brussels Labour Court of Appeal; and European Court of Human Rights, *Beer and Regan v. Germany* and *Waite and Kennedy v. Germany*.

<sup>30</sup> European Court of Human Rights, *Klausecker v. Germany*, para. 20.

breached, as the Administrative Tribunal judgment, which was reached following a manifest failure of justice, continues to identify her by her full name on the Internet, that is, on the website of the Asian Development Bank, causing damage to her reputation. The State party's submission that it cannot be held liable for the Bank's actions is erroneous. The author's rights under article 17 have been breached as she has been denied a fair trial, which is necessary for her to restore her honour and reputation once substantial justice has been done. The confusion rests in the fact that the State party suggests that the author rely on its law and entities, including the National Privacy Commission, while at the same time pointing to the Bank's immunities. The Committee should require the State party to secure the Bank's cooperation to remove the Administrative Tribunal judgment naming the author from its website.

7.11 As a remedy, the author requests that the Committee require the State party to ensure that the Asian Development Bank: (a) guarantees the author a fair trial through an arbitral procedure with regard to the employment dispute or, alternatively, not to assert on behalf of the Asian Development Bank the immunities from the jurisdiction of the relevant national courts for them to independently and impartially adjudicate on the author's claims against the Asian Development Bank; and (b) awards compensation to the author in the amount of \$5,000 for legal costs incurred.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 As regards article 5 (2) (a) of the Optional Protocol, the Committee notes that the same matter is not being examined under another procedure of international investigation or settlement. Therefore, the Committee considers that the requirements of article 5 (2) (a) of the Optional Protocol have been met.

8.3 The Committee notes the State party's objection that the author has not exhausted all available effective domestic remedies, arguing that she could have attempted, in addition to the internal grievance mechanisms within the Asian Development Bank, including its Ombudsman, to initiate right to privacy proceedings before the State party's courts. The Committee notes the author's response that the internal grievance mechanisms were not effective in her case, particularly as the Bank's Administrative Tribunal could not be considered as an objectively competent, independent and impartial tribunal, and as she tried to resort to the Bank's arbitration procedure without success. The Committee further notes the author's argument that the case law of the Supreme Court of the Philippines considers labour contract-related disputes within the Asian Development Bank to be outside the jurisdiction of the State party's courts (see para. 7.2 above). The author also asserted that the State party argued in a contradictory manner, by alleging that the author should have submitted the right to privacy writ to the national courts, while holding that the author was outside the jurisdiction of the State party. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirements of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.<sup>31</sup> In these circumstances, the Committee considers that the author has had no access to domestic remedies that would be available or effective,<sup>32</sup> due to an immunity of the international organization in labour disputes concerning official capacity. Therefore, the Committee considers that it is not

<sup>31</sup> For example, *Czernin v. Czech Republic* (CCPR/C/83/D/823/1998), para. 6.3; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; and *Zhuk v. Belarus* (CCPR/C/109/D/1910/2009), para. 7.5. The Committee has considered that domestic remedies are non-effective if the decisions of the national courts or other authorities have been contrary to the authors' claims and there would be no prospects of success, i.e. no reasonable chance of obtaining effective redress.

<sup>32</sup> Supreme Court of the Philippines, *Liang v. People of the Philippines*, Application No. 125865, Judgment, 28 January 2000.

precluded by the requirements of article 5 (2) (b) of the Optional Protocol from considering the author's claims.

8.4 The State party has further argued that the author abused her right of submission, due to being outside the territorial jurisdiction of the State party. The Committee notes the author's explanation that the issue of jurisdiction of the State party over the author is at the heart of the dispute between the parties, and that she submitted her communication to the Committee in time. The Committee recalls its jurisprudence regarding the jurisdiction of States parties in parallel to the roles of international organizations, and the Committee's competence to consider individual communications in that context, pursuant to article 1 of the Optional Protocol.<sup>33</sup> Accordingly, the Committee considers that the author has convincingly explained her motives in submitting her communication, as she felt deprived of her right of access to a court or tribunal and a fair trial, since she had been left with only internal grievance mechanisms due to the claims of jurisdictional immunity by the Asian Development Bank. Therefore, the Committee considers that it is not precluded by the requirements of article 3 of the Optional Protocol from considering the author's claims.

8.5 As regards the author's claims under articles 2 (1), 3 and 26 of the Covenant, the Committee notes that the allegations of discrimination against the author by Asian Development Bank staff concern the employment dispute with the Bank. The Committee also notes that such claims were made primarily in the context of alleged lack of access to a court or tribunal to seek protection against the termination of the author's employment with the Bank. The Committee also notes the State party's arguments that the author has not supported those claims by providing adequate evidence to the Bank's Administrative Tribunal. In such circumstances, the Committee considers the claims under articles 2 (1), 3 and 26 of the Covenant as not sufficiently substantiated, and hence inadmissible, under article 2 of the Optional Protocol.

8.6 Taking into account the jurisprudence of international judicial bodies, the Committee observes that while international organizations have an international legal personality and enjoy jurisdictional immunities, the host State party may still have jurisdiction under the Covenant if the international organization does not provide a reasonable alternative means of dispute resolution.<sup>34</sup> In the present case, the author's claims raise allegations of lack of access to justice through reasonable alternative means of dispute resolution within Asian Development Bank procedures, or through access to State party's courts, and of a violation of the author's privacy, and lack of a remedy in both instances, in the context of the labour relationship and its termination, with the international organization (the Asian Development Bank), headquartered in the State party. Accordingly, the Committee considers the author's claims under article 14 (1) read in conjunction with article 2 (3), and article 17 read in conjunction with article 2 (3), of the Covenant sufficiently substantiated for the purpose of admissibility.

#### *Consideration of the merits*

9.1 The Committee has considered the case in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's claims that by terminating her employment contract, the Asian Development Bank, as an international organization, placed her, as an international civil servant, outside the protection of the law, since the Bank did not lift her immunity pursuant to the Headquarters Agreement and did not provide her with reasonable alternative means of dispute resolution either. The Committee notes the author's claim that, as a consequence, she did not have access to an impartial tribunal, in violation of article 14 (1), read in conjunction with article 2 (3), of the Covenant. The Committee observes that the author submitted an appeal against the termination of her labour contract to the Bank's Administrative Tribunal, which was rejected. The author has asserted that the Administrative Tribunal is not a reasonable alternative means of dispute resolution due to a lack of

<sup>33</sup> Cf. *Sayadi and Vinck v. Belgium* (CCPR/C/94/D/1472/2006), para. 7.2.

<sup>34</sup> European Court of Human Rights, *Waite and Kennedy v. Germany*, paras. 6, 43 and 51; and *Beer and Regan v. Germany*, paras. 57 and 58.

independence and impartiality, as its members are appointed by the Board of Directors upon recommendation by the president of the Bank, who is formally a counterparty in any employment-related dispute. The Committee also observes that the author resorted to the internal grievance mechanisms of the Bank, which she found ineffective; unlike the arbitration procedure requested as a remedy, which she was not able to resort to.

9.3 On the other hand, the Committee notes the State party's arguments (a) that the author's immunity has not been lifted by the Asian Development Bank; (b) that the author is not within the State party's territorial jurisdiction and not subject to its effective control; and (c) that she was only able to benefit from the internal grievance mechanisms of the Bank, including the Administrative Tribunal and the Ombudsman, without access to the courts of the State party.

9.4 The Committee observes that international organizations, as specific subjects of international law, benefit from jurisdictional immunity, whose purpose is functional. The role of functional immunity is to achieve independent and impartial exercise of the mandate of such international organization. Its purpose is to protect the staff of the international organization from undue intrusions into the mandate of the international organization by States, including the host State. This functional immunity is not intended, however, to prevent access by staff to justice, before the internal grievance mechanisms or, alternatively, before the national courts.<sup>35</sup>

9.5 In the circumstances of the present case, the Committee observes the author's assertions that she has not enjoyed elementary safeguards of due process in accessing the internal grievance mechanisms, including due to the lack of independence of the members of the Administrative Tribunal, the absence of oral hearings, the disregarding of witness statements or other evidence and the absence of appeal. The Committee also notes the author's claims that she was deprived of access to the national courts of the Philippines.

9.6 Taking into account the jurisprudence of international judicial bodies, the Committee is of the opinion that where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activity, and where they transfer to those organizations certain competencies and accord them immunities, there may be implications as to the protection of fundamental rights. It would therefore be incompatible with the object and purpose of the Covenant if States parties were thereby absolved of their obligations under the Covenant in relation to the field of activity covered by such transfer. The Committee recalls that the Covenant is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is also true for the right of access to courts, in view of the prominent place held in all societies by the right to a fair trial, under article 14 of the Covenant.<sup>36</sup>

9.7 The Committee considers that it is incumbent on international organizations, including the Asian Development Bank, to provide for reasonable alternative means of dispute resolution such as in labour disputes between the international organization and its staff. Where the internal affairs of the international organization are concerned, the jurisprudence of international judicial bodies accepts that the standard of fair trial guarantees applicable to the resolution of internal disputes might differ depending on the type of dispute. Such doctrine accepts, for example, that oral hearings and witness testimonies are not required when the dispute concerns internal matters of the international organization, without external impact, and that the organization has discretion as to the reasonable alternative means of dispute resolution, taking into account the principles of objectivity, necessity and impartiality, and not amounting to arbitrariness or denial of justice.

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<sup>35</sup> European Court of Human Rights, *Klausecker v. Germany*, para. 20. See also *Waite and Kennedy v. Germany*, paras. 67, 68 and 73.

<sup>36</sup> See European Court of Human Rights, *Klausecker v. Germany*, para. 63. See also *Perez v. Germany*, Application No. 15521/08, Judgment, 29 January 2015, para. 93; and *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports [1973], paras. 17 and 88–101, or International Labour Organization Administrative Tribunal, judgment No. 4912, *S. v. Global Fund to Fight AIDS, Tuberculosis and Malaria*, 8 July 2024, available at <https://webapps.ilo.org/dyn/triblex/triblexmain.showList>.

9.8 In the present case, the author had access to internal review mechanisms, including the Ombudsman and a conciliation procedure, before resorting to the Administrative Tribunal, whose members are appointed by the Board of Directors, in line with the Administrative Tribunal's statute and the principles of independence and impartiality. The Committee observes that the Administrative Tribunal considered individual claims by the author, concluding in that regard, by a reasoned decision and taking into account the available evidence, that no oral hearing or witness testimonies were required, and found her claims to be not sufficiently substantiated. Recalling the applicable threshold for the assessment of reasonable alternative dispute resolution mechanisms provided by the international organizations, the Committee considers that the author has not supported with evidence the claim that the Bank's remedial mechanisms acted arbitrarily or denied the author access to justice or a fair trial. Consequently, the Committee finds that the author has not established that the internal review or the Administrative Tribunal proceedings suffered from any specific flaws, which would have obliged the State party to intervene. The Committee therefore concludes that the facts do not disclose a violation of article 14 (1), read in conjunction with article 2 (3), of the Covenant.

9.9 Taking into account the finding above, the Committee will not consider the author's claims under article 17, read in conjunction with article 2 (3), of the Covenant separately.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it do not disclose a violation by the State party of the author's rights under article 14 (1), read in conjunction with article 2 (3), of the Covenant.

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