

JUDGMENT CASE NO. 20 *

MANUEL VALDERRAMA vs. IDB

The Inter-American Development Bank Administrative Tribunal,

Composed of Dr. Agustín Gordillo, President, Dra. Elita Graterol Vice President, Hon. Charles D. Breitel, Dr. Alfredo Martínez Moreno, Dr. Ildélio Martins, and Hon. Kenneth G. Smith, considered the case following the procedures established in Articles 20, 21, 22 and 23 of the rules of the Tribunal.

Complainant argued his case. The Bank was represented by Maria da Cunha, Esq., of counsel. In addition to the written submissions the Tribunal heard oral arguments on 5 October 1988.

WHEREAS:

1. On 15 June 1988 Mr. Manuel Valderrama, a Bolivian Attorney at Law and former staff member of the Inter-American Development Bank filed a complaint with this Administrative Tribunal, petitioning for:

A. Determination that the special merit bonuses received by Complainant were part of his remuneration and should be computed as such in the calculation of the benefits to which he is entitled upon retirement from the Bank, as regards not only termination of service and accumulated leave but retirement benefits as well, including pension and amount of conversion.

B. Overturning of the decisions embodied in:

(i) The letter from the Deputy Manager of the Human Resources Administration, dated 17 September 1987 where he states that current regulations preclude consideration of the amount of special merit bonuses in computing any kind of additional allowance or benefit.

(ii) The letter from the Executive Secretary of the Staff Retirement Plan of 30 November 1987, where he reports the unanimous decision of the Plan's Administrative Committee that it is not authorized to approve Complainant's request to include merit bonus payments in computing his pension benefits.

(iii) The letter of 30 December 1987 from the Manager of the Administrative Department in which he ratifies both of the above.

C. Ordering Bank Management to:

*The Spanish text alone is authoritative.

(i) Pay Complainant the difference between the amounts paid for termination of service and annual leave, etc. and the proper amount fixed in accordance with paragraph A above.

(ii) Reimburse Complainant on account of the Staff Retirement Plan, the difference between the amounts paid for conversion and for pension up to the date of the judgment, and the amount resulting from the computations referred to in paragraph A above.

(iii) Pay Complainant the interest accrued on the amounts referred to in paragraphs i and ii above.

(iv) Instruct the Executive Secretariat of the Staff Retirement Plan to adjust Complainant's monthly pension on the basis of the computation referred to in paragraph A above.

D. Alternatively, in the event that the President of the Bank should choose to make use of the option granted him by Article IX (1) of the Statute, the amount of the compensation should be the maximum indicated in that paragraph.

2. In support of his petitions Complainant gave an account of facts which may be summarized as follows:

A. Under IDB regulations, Complainant's services ended on 30 June 1987, the date on which he retired.

B. Since Complainant's salary was at the top of IDB's salary scale for Grade I, in accordance with regulations in force his remuneration was divided into two parts, thus: The larger portion—equal to the maximum salary for his grade—which he received fortnightly; and the balance over that salary maximum, which he received as a special merit bonus in a single annual payment.

C. Exercising his option under the Staff Retirement Plan, Complainant chose to convert a portion of his pension.

D. By memorandum of 15 June 1987 addressed to the Chief of the Benefits, Records and Reports Section of the Administrative Department, Complainant requested that computation of the benefits to which he was entitled upon retirement from the Bank (termination of service, accumulated leave, etc.) should be made on the basis of his annual salary, including the special bonuses he received in the course of recent years.

E. By memorandum of 18 June 1987 addressed to the Secretary of the Staff Retirement Plan, Complainant requested to have his retirement and pension conversion benefits computed on the basis of his annual remuneration, including the special merit bonuses he received in the immediately preceding years.

F. With regard to the petitions mentioned in paragraphs D and E above, all available remedies and appeals were exhausted through the administrative remedies prescribed in Section 326 of the Personnel Policies Manual as follows:

(i) Regarding the petition concerning termination of service benefits, payment of accumulated leave, etc. the Chief of the Benefits, Records and

Reports Section did not issue a decision concerning Complainant's memorandum of 15 June 1987 but in his place HUR Deputy Manager replied on 17 September 1987. The same HUR Deputy Manager issued another negative decision, this time pursuant to the procedure under Section 326 of the Personnel Policies Manual on 12 November 1987 and the Manager of the Administrative Department also replied negatively on 30 December 1987 in a letter which reached Complainant on 8 January 1988.

(ii) On the petition for retirement benefits, including pension and conversion the Secretary of the Staff Retirement Plan did not reply to Complainant's memorandum of 18 June 1987 and the Administration Committee, to which he appealed on 17 August 1987, did not issue a timely decision. HUR Deputy Manager, to whom he wrote on 23 October 1987, also failed to issue a decision in due time. The Administration Committee issued a belated decision in the form of a letter from the Executive Secretary of the Retirement Plan dated 30 November 1987, received on 6 December 1987, indicating that the Management of the Plan was not authorized to approve his request and suggesting that the case should follow the Bank's established grievance procedure. The Manager of the Administrative Department to whom Complainant appealed on 1 December 1987 replied negatively on 30 December 1987.

(iii) The complaint to the Conciliation Committee, regulated by Section 326 of the Personnel Policies Manual, paragraph A(1) and required by Article 15(1) of the Statue of the Administrative Tribunal, was duly filed by Complainant on 8 January 1988. The original term for a decision, which fell due on 20 April 1988, was extended by the Committee until 20 May 1988. Orally, Complainant told the Chairman and the Secretary of the Committee that he was willing to accept a new extension of the term until 27 May, but the Committee did not take steps to formalize the extension. Upon expiration of the term, the Committee did not issue the preliminary recommendations provided for in Section 326 of the Personnel Policies Manual, paragraph G(3). Nor did it summon the parties to the Conciliation hearing established in clause 4 of that same paragraph, thereby flagrantly violating the regulations mentioned.

3. That Complainant invokes the following principles of law in support of his petition:

A. Section 334 of the Personnel Policies Manual establishes a different salary grade for each level of authority and responsibility existing within the Bank and sets 15 grades, the highest of which is I. The IDB salary structure provides for a salary scale under which the remuneration for each grade is bound by fixed minimum and maximum limits.

B. Memorandum HUR/19/86 of 20 August 1986 from Human Resources Administration provides that Bank Management is to review the salary scale twice a year, comparing it with the salary levels of "comparator" international organizations. Salary adjustment actions, according to this memorandum, are to include both salary scale adjustments and salary increases based on merit. The document attached to the aforesaid memorandum by HUR Deputy Manager explains in Chapter C.(3) that if the application of the system carries the salary of a staff member to amounts beyond the grade maximum, the difference shall be paid in a single annual payment as a special merit bonus. This is to say that Bank staff members are entitled to salary increases as a result of comparing the scale with those of comparator agencies and, if justified by their

performance, to salary increases based on merit. Merit increases are granted to staff members on the basis of their performance reviews and, consequently, are part of the payment made for services rendered. If the salary increase raises the staff member's salary to amounts beyond the maximum the Bank uses an administrative subterfuge to increase his remuneration. This payment system is a purely administrative alternative to changing the salary maximum for the respective grade.

C. Section 333 of the Personnel Policies Manual plainly states that when the application of the salary system results in a staff member's salary exceeding the maximum of his salary range, the difference shall be paid to him in the form of a special merit bonus. Nowhere does this Section indicate, nor does any other Bank rule, that the special merit bonus ceases to be part of the staff member's remuneration.

D. Annex A to the memorandum of 30 May 1985 by the President of the IDB, as well as the Annex to the memorandum by HUR Deputy Manager (HUR/19/86) and Section 333 of the Manual cited establish that taxes which may accrue on account of the bonus will be reimbursed by the Bank. IDB's authority to reimburse taxes is very clearly established in a Resolution of the Board of Governors dated 5 February 1960. This Resolution provides that the Bank will reimburse such national taxes as the IDB staff members and personnel must pay on their remuneration. Inasmuch as the Board of Governors has not authorized reimbursement of national taxes on income other than remuneration, when the President of the Bank, HUR Deputy Manager and Section 333 of the Personnel Policies Manual indicate that taxes on the special merit bonuses will be reimbursed, it becomes clear that such bonuses are part of the remuneration of the beneficiary staff members.

E. Section 333 of the Personnel Policies Manual is referring to very different cases, such as determining the base salary to calculate the overtime of administrative personnel, to pay special bonuses such as those received by employees performing special duties or the bonuses that Management may grant in special cases when it excludes the amount of the bonus from the computation of other allowances.

F. When Article I of the Staff Retirement Plan, Section 1.1 (k) provides that a staff member's remuneration is the net regular salary paid to him by the Bank for services rendered, this net regular salary comprises both the portion of remuneration included within the grade ceiling and the special merit bonus. The fact that Bank Management calls one portion of remuneration "salary" and another "special merit bonus" does not affect the substance of the matter, namely, that both portions make up the total remuneration of the employee.

G. The establishment of the special merit bonus originates in Management's preference to refrain from amending the salary scale by raising each grade's ceiling. Notwithstanding, Section 334 of the Personnel Policies Manual provides that the salary scale is to be periodically revised to reflect changes in compensation levels or to identify other elements capable of contributing to the preservation of a salary scale that is both fair to IDB employees and competitive in the labor market. By not changing the salary scale to raise range ceilings, Management has attempted to attain the goals established in Section 334 through the introduction of the special merit bonus. But not to consider the bonus in computing other benefits would accomplish precisely the opposite of what Section 334 seeks to achieve, for it would defeat the basic aim of preserving a fair salary structure. This because a staff member at the beginning or in the middle of his salary range would receive proportionally higher benefits than those received by an employee at the top of his salary range. The salary increase of the former would be fully computed

for purposes of his retirement benefits, including retirement payments themselves, whereas the increase for the latter would not be computed to the extent it exceeded the salary grade ceiling under the scale.

H. On the occasion of the last salary increase for IDB Managers and Deputy Managers the consultant firm of *Towers, Perrin, Forster and Crosby* stated that the difference between the salary minimum and maximum for Managers and Deputy Managers leaves no room to pay regular salary increases and forces Management to pay non pensionable bonuses to those officials. On account of this the Manager of the Administrative Department, for its part, proposed an expansion of the scales in line with the recommendation from the consultants and points out to the President of the Bank that such an amendment does not in itself bring about a salary increase for the executive staff but "a percentile change in the salary location of each executive within the new scales". The President of the Bank approved the proposal by the Manager of the Administrative Department. From this the following conclusions may be drawn:

(i) Changes in the salary scales of the IDB may take place through mere administrative channels at any time deemed advisable (in the case of the scales for Managers and Deputy Managers, an explanatory memorandum from the Manager of the Administrative Department was sufficient for the President of the Bank to approve the expansion of those scales).

(ii) The decision to increase salaries by amending the relevant scale or by granting bonuses is within the authority of the Administrative Department and the President of the Bank and does not require approval by the Board of Executive Directors.

(iii) Increments in salary scales may be replaced by bonuses and these by scale increases, depending on administrative preference. Notwithstanding, total remuneration, including the bonuses, is fixed in terms of the salaries and compensation paid by other "comparator" international organizations. This is to say that remuneration increases, whether special merit bonus beyond the scale, or increases within a scale expanded ad hoc, are interchangeable at the discretion of the Administrative Department and the President of the Bank. Complainant alleges that the treatment given Managers and Deputy Managers, where the correct decision was made, albeit regarding a select group of personnel, is evidence that the above is true.

4. The Bank answered the complaint and asked the Tribunal to dismiss the petition of Complainant of receiving an additional payment for severance benefits and pension based on their recalculation taking into account the special merit bonuses.

5. The Bank in support of its position states:

A. The facts of this case are essentially uncontroverted.

B. The case requires the determination of whether, according to the current provisions of Personnel Policies and the Staff Retirement Plan, the special merit bonuses received by Complainant in 1985 and 1986 can be considered in the computation of his termination and pension benefits.

C. The provisions of the following policies and regulations of the Bank are relevant for the determination of this case: Documents GP-59-2 of 22 August 1979 and GP-59-3 of 29 January 1980; Personnel Policies Nos. 332, 333, 334, 325, 351, 352 and 338; Staff Retirement Plan; Circulars HUR/16/83 of 3 August 1983, HUR/15/84 of 3 August 1984, HUR/17/85 of 13 June 1985 and HUR/19/86 of 20 August 1986 (all modifying Personnel Policies Nos. 333 and 334 among others).

Notwithstanding, the correct interpretation of the Bank's policy regarding its salary scale and the special merit bonus, and their effect upon the calculation of Complainant's termination benefits must be made following the chronology of the applicable rules, which is as follows:

(i) The Bank's salary administration system is basically designed to determine remuneration according to job classification pursuant to Personnel Policy No. 332. Under the system in effect from 1 August 1964 until 1 August 1984, each job was graded I (highest) to XV and a minimum and maximum basic salary for each grade was established to reflect approximately the market value of the job and its relative importance in the organizational structure of the Bank. Each grade was broken down into merit steps carrying progressively higher salary levels. Individual employees moved from one step to the next by completing given periods of service during which they received a satisfactory performance evaluation.

Movement from one grade to the next occurred by promotion. Individual employees who reached the highest step of their grade would cease to receive salary increases except for adjustments in the general salary scale, until they were promoted to the next grade.

(ii) During consideration of the 1979 general salary adjustment, the Board of Executive Directors approved the policy that future general salary adjustments would be based on the salary levels of "comparator" institutions. After a transition period between 1980 and 1982, during which several studies were carried out and several interim adjustments were made, the Administration has been following this directive, and, to date, the minimum and maximum salaries for each grade are set to maintain the competitiveness of Bank salaries with those of the "comparator" institutions.

(iii) In 1982, the World Bank adopted a more merit-oriented salary adjustment system. It sought to strengthen the linkage between salary increases and employee performance. Likewise, in 1983, The Bank initiated a transition to a merit based compensation system, by adopting a policy similar to the World Bank's. Under this interim policy the application of step increases by merit was maintained until consideration of the use of salary scales without steps and of a merit remuneration system which emphasized individual performance was completed.

(iv) The salary administration system was modified again in 1984. A continuous salary scale was adopted, defined only by a salary minimum and maximum corresponding to each grade and merit steps were eliminated. This was intended to allow for greater flexibility in the determination of individual salary increases in recognition of merit. The 50/50 allocation of scale increases between performance and general adjustments was retained and, in addition, the policy required the Administration to assign, annually, a merit increase budget equivalent to the one used under the former step system for allocation as a

function of individual merit. For the first time, provision was also made for a special merit bonus which permitted employees at the highest percentile of their grades to receive a financial reward for good performance. The special merit bonus provision stipulated that the bonus would not be considered for the purpose of the Staff Retirement Plan. This policy also provided for a one-time merit equalization adjustment intended to account on a pro-rata basis for the time elapsed between the last step merit increase received by each staff member under the old system and the effective date of application of the new system.

(v) On 30 May 1985, the President of the Bank addressed a memorandum to the staff describing the details of the application of the performance evaluation and salary administration systems to be implemented that year. The salary administration policy described in the President's memorandum was essentially the 1984 policy with the addition of new merit categories and of a formula for the distribution of the new merit recognition payments according to the performance rating received by each staff member. The objective of the new system was to award to each employee the merit recognition commensurate with the level of his/her overall performance.

The special merit bonus for employees at the last percentile of their grades was included in the policy in order to provide the Administration with a means of recognizing excellent performance by individuals who had reached the top percentile of their grades, and could no longer be rewarded with career advancement without distorting the salary scales in effect at any given time. This was a benefit which had not been available to the Bank's staff under the old step system.

The Administration chose to award the special merit bonus each year as a percentage of the employee's basic salary calculated according to the same merit matrix applicable to the rest of the staff. The bonus itself was not included or paid as part of the basic salary and was not cumulative. That is, the bonus was not considered in the calculation of subsequent bonuses, nor was it considered as part of the employee's basic salary for calculation of the salary increase awarded in the case of promotions of employees below Grade I. The language of the policy also excluded the special merit bonus from consideration for the calculation of any "additional allowances and benefits, except reimbursement of taxes if applicable."

D. Complainant was appointed to the staff of the Bank on 19 September 1960. Complainant was a distinguished officer of the Bank until his retirement on 30 June 1987, having served as Technical Assistance Division Officer (1960-62); Loan Officer (1962-63); Chief of Loans Division I (1963-66); Deputy Director of the Loan Administration Division (1966-73); Director of Operations Division 8 (1973-75); Representative in Perú (1975-80); and Senior Attorney (1980-87).

Complainant received his last salary increase based exclusively on merit on 1 October 1981 at which time he reached the highest step of Grade I and became ineligible for individual salary increases for merit. Between this date and 1 August 1984 Complainant received the salary increases covered by scale adjustments. In 1984, when the old step system was abandoned in favor of continuous salary scales, Complainant's salary was located at the top percentile of Grade I and, therefore, Complainant was ineligible for the merit equalization adjustment. Although the 1984 policy provided for

merit recognition including a special merit bonus, the application of these provisions was prospective starting on 1 August 1984, and the merit recognition budget for 1984 was dedicated to the merit equalization payments.

In August of 1985 and 1986, Complainant, who remained at the top percentile of Grade I, received no salary increases based on merit. Instead, he was awarded the special merit bonuses. He received and accepted the bonuses for two years without deductions for contributions to the Staff Retirement Fund, and never requested to make the employee contributions or that the Bank make the corresponding employer contributions.

6. In support of its position the Bank argues as follows:

A. The plain language of Personnel Policy No. 333 establishes that the special merit bonus cannot be included in the calculations relating to any additional allowances and benefits. Personnel Policy No. 333 provides in relevant part: "The amount of the bonus will not be considered in the computation of additional allowances and benefits, except reimbursement of taxes, if applicable."

B. The fact that the special merit bonuses, along with the basic salary and all other economic and social benefits such as dependency allowances, educational allowances and pensions themselves (as deferred remuneration) are part of the overall remuneration the employee receives for his services, in the broader sense of the word, does not have any normative effect as to inclusion or exclusion of said bonuses or allowances as part of the basis for the calculation of specific benefits under the Personnel Policies or of pensions under the Staff Retirement Plan, where these policies and the Plan expressly set forth the appropriate basis for the calculation of the benefits they establish.

The issue therefore, is not whether the special merit bonus is, in general, a form of remuneration. The issue is simply whether Personnel Policies No. 333, 325, 351 and 352 and Section 1.1(k) of the Plan permit the inclusion of said bonus in the calculation of termination and pension benefits, respectively. Personnel Policies Nos. 325, 351 and 352 are consistent with Personnel Policy No. 333 in excluding the special merit bonus from the basis used to calculate the benefits they establish. Paragraph c(iii) of Personnel Policy No. 325, the provisions for final payment in lieu of annual leave, paragraph (b), of Personnel Policy No. 351, and the provisions for final payment in lieu of sick leave, paragraph (f), of Personnel Policy No. 352 all refer to "basic salary" or "basic pay." Therefore, all payments in addition to basic salary, unless specifically included in these policies, are excluded from the corresponding calculations. Furthermore, the special merit bonus is also excluded from the calculation of subsequent merit bonuses or salary increases due to promotion, both of which are calculated as percentages of the basic salary.

C. Complainant's allegation that the exclusion of the special merit bonus from termination and pension benefits is inequitable is without foundation, because said exclusion applies equally to all employees in the top percentile of their grades, that is, those similarly situated, and results from the creation of a special merit bonus which in fact exceeded the highest legitimate expectations of the staff.

D. The provisions of the Plan explicitly preclude the inclusion of the special merit bonus in the Plan's definition of "remuneration" for the purpose of pension calculations, thus:

(i) Under Article 4 of the Plan, an employee's pension is calculated as a fraction of his "highest average remuneration" multiplied by the number of years of eligible service. Section 1.1(k) of Article 1 of the Plan sets forth the functional definition of "remuneration" for the purposes of the Plan itself, as follows: "Remuneration' of an employee means the regular net compensation paid by the Bank to such employee for services rendered to the Bank and shall not include such payments as reimbursement for taxes, allowances, bonuses, overtime, special pay or separation payments, temporary salary increases or lump sum payments in lieu of annual leave..."

This language plainly excludes from the "remuneration" to be considered for the purposes of the Plan all compensation received by the employee other than his basic salary. The Plan makes no distinction between secretarial, special merit or any other form of bonuses or special payments, applying the same exclusion rule to all such payments.

(ii) Section 1.1(k) of the Plan refers to "regular net compensation." The Plan is funded according to actuarial calculations based upon the Bank's salary scale. Contributions by participant employees and by the Bank are all calculated as percentages of the basic salary paid to participants. The exclusion of all benefits whose payment and amounts exceed the Bank's salary scale contributes to the stability of the Plan's funding by tying the increases in pensions over time to the natural progression of the Bank's salary scale, which in turn is subject to general limitations set by the Board of Directors. This prevents the temporary decapitalization of the Staff Retirement Fund which might occur if special payments and bonuses awarded to participants during their last years of service were pensionable.

(iii) Furthermore, the Plan also requires employee contributions to be deducted from the employee's eligible remuneration at the time such remuneration is paid. Article 6, Section 6.1 of the Plan states: "Each participant shall contribute to the Plan seven percent of his remuneration for pay periods through 31 December 1970 and seven and two thirds percent for pay periods thereafter up to 1 January 1981, and ten percent for pay periods thereafter. The Bank shall deduct such contributions from the remuneration of each participant for each pay period at the time such remuneration is paid. Sums so deducted shall be held by the Bank as part of the Retirement Fund."

Complainant received on 1 August 1985, his first special merit bonus and no pension contribution was deducted from said bonus or from the bonus he received on 1 August 1986. Complainant accepted payment of the full bonuses and never attempted to make the corresponding contributions to the Retirement Fund or demanded that the Bank do so. These actions constituted a tacit acceptance of the non-pensionable nature of the special merit bonus, which was the natural result of the terms of Personnel Policy No. 333 and of the Plan.

(iv) The practice of excluding bonuses and other payments, in whole or in part, from pensionable remuneration is a reasonable practice widely accepted in both the public and private sectors, and is related to the need for some degree of predictability in pension calculations and funding. The calculation of pensions by reference to the salary scales in force is a common practice in international organizations. Normal retirement pensions are generally calculated on the basis

of the final salary level, that is, the salary carried by the last step reached in the last grade in which the employee was classified. The practice of the "comparator" institutions is to exclude bonuses, where applicable, from pensionable remuneration. Therefore, said exclusion as contained in the Plan and in Personnel Policy No.333 is in keeping with the Bank's policy of offering a compensation package which is competitive with those of its "comparators".

E. The salary scale for executives was modified in February of 1987 to eliminate disparities between the Bank and its "comparator" institutions and not to cause non-pensionable bonus payments to be included in pension calculations. The new managerial salary scale approved by the President of the Bank was proposed following the recommendations of *Towers, Perrin, Forster and Crosby* which identified the following problems with the Respondent's then current scale for executive salaries: (a) a very narrow spread between minimum and maximum salaries which did not reflect the career pattern of incumbents; and (b) considerably wider competitive salary ranges outside the Bank. Notwithstanding, the special merit bonus policy remained in effect for all executives who were part of the permanent staff.

F. The doctrine of acquired rights is by no means a settled area of international organization tribunal jurisprudence. Two principles, however, emerge from the cases addressing the doctrine: (a) the administrations of international organizations are entitled to prospectively change the rules and regulations governing staff appointments unilaterally, and (b) the essential terms of any individual contract can be amended unilaterally only when the general substance of the basic conditions of appointment, which might have influenced the individual's decision to sign this contract are not altered, or, when such basic conditions are altered with the consent of the individual.

Neither the payment of a special merit bonus, nor the inclusion of said bonus in the calculation of Complainant's termination and pension benefits were essential or even unessential conditions of Complainant's original contract of employment which made no reference to any bonuses and was governed by employment conditions which, until 1984, did not provide for any special merit bonus for employees who reached the highest level of salary permitted by their job classification or grade. Furthermore, given the contingent nature of the special merit bonus, contingency upon performance from year to year, upon the grade of the employee's job and the percentile of his salary, upon the funds available in the Bank's budget for merit payments in any given year, upon the performance rating of other staff in the same Department, and upon the continued existence of the same job and salary structure in the Bank, not even the bonus as such can ever become, prospectively, an acquired right.

7. Having the term referred to in Article 19 (1) of the Rules of the Tribunal expired without Complainant making observations and having the Bank accepted without controversy the facts as stated in the Complaint, the President of the Tribunal ordered Case No. 20 placed on the List of Cases Pending Consideration by the Administrative Tribunal.

8. On 5 October 1988 the Tribunal heard oral arguments.

9. To better judge the case the Tribunal heard testimony from Mr. James F. Armistead, Executive Secretary of the Staff Retirement Plan and from Mr. Weston A. Williams, Deputy Manager of the Human Resources Administration Subdepartment, with the attendance of Counsel for the parties, the Complainant *pro se*.

AND WHEREAS:

10. Even though worthy elements of fairness are brought into play by the staff member's complaint, the Tribunal is in principle bound under Article VI(3) of its Statute to pass judgments "based on the Agreement Establishing the Bank and the written and approved policies, rules and regulations of the Board of Governors and the Board of Executive Directors, and the Personnel Administrative Policies in force at the time of the alleged non-observance, "which is to say that the administrative law sources of the Inter-American Development Bank are at present confined to the express content of that Article VI.

11. In reviewing the case on its merits, the Tribunal relied on the specific provisions of the Administrative and Personnel Policies of the Bank dealing with positions and salaries, as well as on the Staff Retirement Plan. Such provisions are clear and categorical as to their content and scope with regard to computation of benefits upon both termination of service and retirement, including pensions and conversion amounts.

12. The relevant provisions in this case are, on the one hand, Personnel Policies Nos. 325, 333, 351 and 352 and memorandum HUR-19/86 of 20 August 1986, all of which stipulate that the Special Merit Bonus—benefits..." and, on the other hand, Article 1(k) of the Staff Retirement Plan, which defines remuneration as "...the regular net compensation paid...for services rendered and not include such payments as ...bonuses..."

13. Refining the rules that govern merit increased ought to be a goal of the Bank, in order that relations between it and its staff may keep growing closer on the basis of fairness and harmony.

14. It hardly requires statement that this case, like any other, is decided on the issues of fact and law presented by the parties with respect to the transactions in question. Consequently, it does not mean that in the event of a showing that the Bank Administration has used unfairness or unexplained discrimination in the application of the large discretionary powers lodged in its administrative officers, such conduct might or would not be subject to review and consequences different from those reached here.

ACCORDINGLY:

The Tribunal decides, by a majority vote, to dismiss the complaint.

Washington, D.C., 7 October 1988.

Alfredo Martínez-Moreno
Judge.

Agustín Gordillo
President.

Hernán Sáenz-Jiménez
Executive Secretary.

Judge Graterol Calles respectfully dissents from the majority opinion as follows:

1. Complainant contends that the special merit bonuses paid to him by the Bank in 1985 and 1986 must form part of his remuneration for the purpose of computing both the benefits to which he is entitled upon termination of service and his retirement pension.

2. Both the Deputy Manager of the Human Resources Administration and the Administration Committee of the Staff Retirement Plan turned down his request based on the argument that as the special merit bonuses were not part of his remuneration or salary, they were excluded from computation of such benefits, because the new salary policy states that the amount of the "special merit bonus" will not be considered in computing additional allowances and benefits, and as regards the Retirement Plan, because by being left outside the salary scale the special merit bonus is excluded from his remuneration, which according to the definition of the term under the Plan excludes bonuses.

3. The communication addressed on 1 August 1983 to the Executive Board by the then President of IDB Mr. Antonio Ortiz Mena on the subject of "general salary adjustment" establishes, in my view, the policy on merit increases to be followed henceforth by the Bank (see item 8). It provides for a merit adjustment for those regular employees whose last performance evaluation was rated at least "generally at the norm". It goes on to discuss temporary increases pending the results of the new Performance Review System, which took effect in 1984 when he sent another communication addressed to all staff (2 August 1984) on salary adjustment and new salary administration measures. It states that, "as a new and important step towards the establishment of a salary administration system that will more closely link staff performance and merit compensation, new measures are being introduced, and that it will be possible in the future to reward the merit of the staff located at the top of the salary scale by paying them a special merit bonus."

Moreover, Chapter III of Policy No. 333 on Classification and Remuneration states: "The employee must have a performance evaluation at a minimum level of 'generally at the norm' as requisite to obtain a merit increase."

All of the above persuades me that it is unfair to staff members at the top of their grade (as is the case of Complainant) and self-defeating for the Bank itself to exclude the merit increase from computation of their benefits on termination of service and retirement. I say this fully persuaded that the IDB, like any agency that does not wish to "manage efforts" but "objectives and results," must conclude that excluding the merit increases of staff at the top of their salary range simply because they do not fit within the current salary scale is not the best way to encourage its employees who reach the highest grade of their positions or the top of the compensation scale. On the contrary, I believe this practice might demoralize them. In addition this practice hinders the development of a career system which would be geared to promoting personnel within the organization on the basis of merit, and not of other considerations.

4. As I see it, the fact that the Bank resorted to this administrative procedure of paying that merit increase through an annual bonus is not enough for that acknowledgement to cease being a merit increase in compensation, which nature is the same as that of the merit increases of all other employees whose salaries are not at the top of the scale. This conviction of mine is strengthened by the fact that the Bank evaluated the performance of Complainant even though it knew that he had reached the top of the salary scale. It is logical, under Personnel Policy 333, that once the performance review was completed and the staff member was rated "at the norm" he was entitled to a salary increase, which increase should be recognized, irrespective of the form it takes, when computing termination of service and retirement benefits. That is why I feel that

the rejection of his requests by both HUR Deputy Manager and the Committee basically violated the essence of the merit increase policy discussed in item 3 above.

In my view, a decision for the Complainant is called for by the concepts of justice, fairness and non-discrimination and by the general principles of law universally recognized.

Washington, D.C., 7 October 1988.

Elita Graterol-Calles
Vice President.

Agustín Gordillo
President.

Hernán Sáenz-Jiménez
Executive Secretary.