2019 AIIB Legal Conference Report

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1 Introduction and Overview

On 11 and 12 September 2019, the Asian Infrastructure Investment Bank (AIIB) held its third annual Legal Conference at AIIB Headquarters in Beijing, China. The Legal Conference was organized by AIIB's Office of the General Counsel (OGC) as part of OGC's legal outreach, which also includes the annual AIIB Law Lecture.

The Legal Conference brought together over 40 prominent legal practitioners and academics to examine the role of the law of employment relations of multilateral institutions—known commonly as international administrative law. The panelists comprised senior officials and legal advisers from major international organizations and international financial institutions including the United Nations (UN), the Commonwealth Secretariat, the North Atlantic Treaty Organization (NATO), the European Patent Office (EPO), the Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund), the Credit Guarantee and Investment Facility (CGIF), the World Bank, the International Monetary Fund (IMF), the Asian Development Bank (ADB), the European Bank for Reconstruction and Development (EBRD) and the African Development Bank (AfDB). Scholars from the London School of Economics and Political Science, Ritsumeikan University and Kyushu University also joined.

Over two days, the panelists, divided into five panels, with each chaired by a senior lawyer of AIIB's OGC, addressed the following topics: (i) the extent to which international administrative law is inherent to the international legal status of multilateral institutions; (ii) the formal dispute resolution role afforded by international administrative tribunals and the part they play in the successful mandates of multilateral institutions; (iii) the considerations of employment-related dispute resolution and international administrative law in creating an efficient workplace culture for multilateral institutions; (iv) the legal basis and dynamics of international administrative law and (v) the critical

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aspects of international administrative law that go to the heart of the efficiency and effectiveness of multilateral institutions, namely integrity and performance management. Following the panel discussions, the Legal Conference was concluded by a plenary session chaired by AIIB's General Counsel, Gerard J. Sanders.

This report is intended to provide a summary (reflecting the Chatham House Rule) of some of the key discussions and conclusions of the Legal Conference. It is structured by following the order of the Conference sessions, with each session focused on one of the topics outlined above.

2 International Administrative Law and the International Legal Status of Multilateral Institutions

The first panel examined the international legal status of multilateral organizations. In particular, it discussed the tension between jurisdictional immunity of international organizations and the human rights principle of access to justice. It also discussed how international organizations address and reconcile this tension.

International organizations are established by their member States to pursue collective goals. They are not sovereign states, although some international organizations (such as the European Union) may exercise sovereign functions bestowed upon them by their member States. On the one hand, jurisdictional immunity is granted to international organizations to enable them to effectively, independently and efficiently fulfill their mandates. This immunity derives directly from various legal sources, including (i) the constituent instruments of international organizations, such as AIIB's Articles of Agreement and the Charter of the United Nations; (ii) multilateral treaties, such as the Convention on the Privileges and Immunities of the United Nations (UN General Convention) and the Convention on the Privileges and Immunities of the Specialized Agencies; (iii) bilateral treaties between international organizations and their host states and (iv) national legislation, such as the US International Organizations Immunities Act and the UK International Organisations Act 2005.

The right to access to courts, on the other hand, is established in various human rights instruments adopted by international or regional communities, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights. There tends to be an inherent tension between the jurisdictional immunity of international organizations and the right of individuals to access to court.

In respect of the interplay between these conflicting principles, the panel noted that various international organizations, whilst afforded immunity from national jurisdictions, do provide aggrieved parties with alternative dispute resolution mechanisms. For instance, the UN General Convention states that the UN shall make provisions for appropriate modes of settlement of: (a) disputes arising out of contracts or other disputes of a private law character to which the UN is a party and (b) disputes involving any official of the UN who by reason of their official position enjoys immunity, if immunity has not been waived by the Secretary-General.

Drawing on judgments of various international tribunals and national courts, the panel examined the issue of whether the jurisdictional immunity of international organizations is conditional on the availability of alternative dispute resolution mechanisms. In particular, the panel explored the issue of whether existing internal dispute resolution mechanisms, including the proceedings of international administrative tribunals, meet the standards of the various human rights instruments such as article 6(1) of ECHR. In its advisory opinion, on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, the International Court of Justice (ICJ) found the Tribunal to be “an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions”.

It was noted that the European Court of Human Rights set a useful standard for upholding the jurisdictional immunity of international organizations in the *Waite and Kennedy v Germany* (1999) case. It formulated the view that the jurisdictional immunity afforded to international organizations served a ‘legitimate objective’, that is, to ensure the proper functioning of such organizations free from unilateral interference from individual governments. In addition, the Court ruled that the extent of jurisdictional immunity must be proportionate to the objective of enabling international organizations to perform their functions efficiently. Over time, this standard has been taken to mean that where there is no alternative dispute resolution mechanism within an international organization, or the alternative mechanism available is considered inadequate, such organization’s jurisdictional immunity may not be upheld. In a number of cases before national courts, the jurisdictional immunity of international organizations was not confirmed due to the inadequacy of their internal dispute resolution mechanisms. Even international administrative tribunals recognized the significance of providing an alternate dispute resolution mechanism to the enjoyment of jurisdictional immunity. The International Labour Organization Administrative Tribunal (ILOAT), whilst dismissing a case for being beyond its competence, nevertheless noted that its judgment created a legal vacuum and considered it highly desirable for the

respondent organization, in this case, the EPO, to seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.

In other cases, however, the panel noted that although the availability of an alternative dispute resolution mechanism is material, its absence or inadequacy does not automatically deprive international organizations of jurisdictional immunity. In a case before the Canadian Supreme Court, for instance, it was decided that the availability of an internal appeals mechanism was not determinative of whether an international organization will be afforded jurisdictional immunity.

Drawing on the example of the Commonwealth Secretariat Arbitral Tribunal (CSAT), the panel discussed the role of the CSAT in upholding the Commonwealth Secretariat's privileges and immunities, and the relationship between international administrative law and international, human rights and domestic laws.

The Commonwealth Secretariat was established by the Commonwealth member countries as an international organization to help them achieve development, democracy and peace. In fulfillment of its obligations under the Agreement Memorandum on the Commonwealth Secretariat, the UK Government passed the Commonwealth Secretariat Act in 1966, which gives the Commonwealth Secretariat legal personality and accords it certain immunities and privileges. In the early years of its operations, however, the Commonwealth Secretariat did not have a dispute resolution mechanism. Disputes were resolved informally. The CSAT was established in 1995 to meet the requirements of the Agreement Memorandum in connection with the institutional immunities and privileges conferred on the Commonwealth Secretariat.

The panel referred to the CSAT's judgment in the *Faruqi* case (CSAT/5(No.1)) in which the CSAT considered the immunity it enjoys and its relationship with international, human rights and domestic laws. Relying on the reasoning in the *Waite and Kennedy* case and a previous case, the CSAT concluded that, as an international body, it is not subject to those laws, and nor are its decisions subject to appeal to national courts. This notwithstanding, a number of challenges had been made in the UK High Court, attempting to subject CSAT's judgments to judicial review. These challenges led to the revision of the Commonwealth Secretariat Act 1966 by the International Organizations Act 2005, which repeals the section of the Commonwealth Secretariat Act under which the judgments in question were challenged.

The panel then examined the international legal status of the Global Fund, especially through the prisms of the privileges and immunities of the organization and the mechanisms for the resolution of employment-related disputes. A public-private partnership, the Global Fund was originally established in

2002 as a nonprofit foundation under Swiss law, but gradually evolved into an international organization. It entered into a headquarters agreement with the Swiss Government in 2004 to ensure that privileges and immunities are afforded to it as to other international organizations in Switzerland. In 2006, the Global Fund was recognized by the US as an international organization under the US International Organizations Immunities Act. In 2009, the Global Fund Board approved the Global Fund Agreement on Privileges and Immunities (Agreement) and recommended states to consider granting privileges and immunities to the Global Fund. The Agreement entered into force on 17 April 2019 after 10 countries ratified it.

Despite its unique business model and governance feature as a public-private partnership, international administrative law plays a significant role in the evolution and administration of the Global Fund. Like many other international organizations with jurisdictional immunity, the Global Fund has established alternative dispute resolution mechanisms, including by subjecting itself to the jurisdiction of the ILOAT for staff grievances. In addition, it has established a staff association and created an ombudsman to resolve employment-related disputes.

In the ensuing discussion, the panel shared their views on the adequacy of alternative dispute resolution mechanisms available to international civil servants in the context of considering the jurisdictional immunities enjoyed by international organizations. One participant enquired into the adequacy of remedies available to complainants, including their reinstatement, in cases where they were unlawfully dismissed. One of the panelists remarked that the statutes of some international administrative tribunals give them the authority to order reinstatement or grant the employing organizations the option to pay damages as an alternative. In this regard, one participant concurred that although the UN Dispute Tribunal (UNDT) and Appeals Tribunal (UNAT) have the power to order reinstatement, they are also mandated to order financial compensation as a remedy. The tribunals would take account of the practical realities in relation to reinstatement, including the amount of time for a case to be concluded. For instance, reinstatement becomes practically impossible where the peace keeping mission in which the successful complainant served has been closed. With regard to the status of the Global Fund, another participant asked whether the Global Fund would resort to the fact that it has accepted ILOAT's jurisdiction as evidence of its status as an international organization. In response, one of the panelists remarked that the Global Fund's status as an international organization derives from the Agreement and domestic laws which afford it the privileges and immunities required for its operations. The fact that the ILOAT has accepted the Global Fund's application and recognition of its jurisdiction, which requires that the admitted organizations enjoy

jurisdictional immunity from domestic courts, supports the Global Fund's status as an international organization. In addition to sharing their experience on the review mechanism of decisions rendered by CSAT, the panel also exchanged their views with the participants on the substantive laws that local courts would apply in cases in which they are unsatisfied with the adequacy of the alternative mechanisms provided by international organizations and decided to intervene.

3 International Administrative Law and the Formal Resolution of Employment-Related Disputes of Multilateral Institutions

The second session focused on the establishment, evolution and development of formal dispute resolution mechanisms of various international organizations. Panelists from the UN, EBRD and NATO, among others, shared their views on the predominant features of their respective internal justice systems. They also discussed some potential reforms to such systems, incorporating the lessons learned from their application. Finally, they reflected on the contributions of an internal justice system to the efficiency and accountability of international organizations.

The panelists introduced their employing organizations, including their histories, mandates and governance structures. They also discussed the contexts in which the internal justice systems in these organizations were established and reformed. It was commonly recognized that an effective formal dispute resolution mechanism plays a central role in the resolution of staff disputes and the promotion of functional efficiency of international organizations. A panelist reported that the NATO Administrative Tribunal encourages and promotes changes to the rules and policy of the organization. This tribunal's jurisprudence provides guidance to both managers and staff in their decision-making. Counsel could also rely on the tribunal's jurisprudence when providing legal advice. In the case of the UN, the role of its internal justice system is to make the organization more accountable, supporting multicultural staff members and allowing them to effectively discharge their duties. Efficient resolution of staff grievances affects not only the staff members; it also impacts the efficient functioning of the entire organization. Indeed, the jurisprudence of administrative tribunals tends to enhance the predictability and certainty of the legal relations between the organization and their staff, thus encouraging the parties to pursue an informal, amicable resolution of their disputes.

It was further noted that while each organization has the discretion to establish its own internal justice system, all systems have, since their inception, gradually evolved over time to adapt to the changing circumstances and to

improve the efficiency, transparency and fairness of the processes. EBRD, for instance, has gradually reformed its internal dispute resolution mechanism by broadening its scope and enhancing the due process protections afforded to staff. It has maintained a two-tier system for the review and adjudication of staff grievances since 2006. In early 2018, EBRD introduced changes to the first tier of the process to enhance its efficiency without compromising the legitimate interests of both the organization and staff. Similarly, NATO carried out a reform of its internal justice system in 2013, resulting in the creation of its Administrative Tribunal. The reform took account of the interests of various internal stakeholders and the recent external legal developments. In the case of the UN, following extensive consultations and review by a special panel, the UN implemented a new internal system for the administration of justice for its staff in 2009.

Some common features were considered in the reformed internal justice systems in the different international organizations, including, notably, enhanced professionalism, transparency, independence and accountability. In terms of professionalism of the systems, for instance, a minimum amount of national judicial experience is required of judges for the UNDT (10 years) and the UNAT (15 years). The judges' qualifications must also be verified by the newly established Internal Justice Council to ensure the professionalism of the new system. At EBRD, the Administrative Review Committee comprises an independent legal professional as chair and one member elected by staff and one appointed by EBRD's President. The increased professionalism in the NATO internal justice system is manifested in the conversion of the internal Appeals Board to an administrative tribunal with a judicial character.

Increased transparency is another notable feature of the new systems. A panelist pointed out that the selection process of the judges of UNDT and UNAT is transparent. In addition, UNDT has courtrooms in New York, Geneva and Nairobi and may hold public hearings therein, to which all would be allowed access. Furthermore, all resultant judgments are published on the official websites of the tribunals. Similarly, both NATO and EBRD publish judgments of their respective administrative tribunals to promote transparency. Independence was also highlighted by the panel. In the UN, the Office of Administration of Justice (OAJ) was established to safeguard the independence of the entire system. Both UNDT and UNAT, whilst supported by the OAJ, are independent from the UN's Secretariat. The Internal Justice Council was also created to ensure the independence, impartiality and accountability of the new system.

The panel also discussed the role of lawyers in the functioning of the internal justice systems. EBRD proceedings are conducted in an inquisitorial

manner and staff are not allowed representation by external counsel in the administrative proceedings (though they are free to seek legal advice). Likewise, the legal counsel of EBRD does not appear in these proceedings on behalf of EBRD. NATO, on the other hand, does not prohibit or restrict participation by external counsel in the proceedings. In the case of UN, the Office of Staff Legal Assistance was established in 2009 to provide legal advice and representation to staff in relation to the organization's formal internal justice system. Legal advisers of the Secretariat also play an active role in the process, including by advising, negotiating and litigating on behalf of the employing organization. In addition, other stakeholders, such as the Human Resources Department, Ethics Office and Staff Union, contribute to the efficient functioning of the system.

It was emphasized that the internal justice system must resolve staff grievances not only effectively, but also in a timely and efficient way, since justice delayed is justice denied. In this regard, a panelist noted that EBRD has considerably shortened the process of the Administrative Review Committee from one and a half year to 90 working days, whilst also simplifying the process for claims that are manifestly inadmissible or unrelated to an administrative decision.

While the formal means of redress ensures that effective and efficient remedies are provided in case of disputes, it was noted that the use of informal dispute resolution mechanisms, including mediation and ombudsman services, are constantly encouraged. EBRD has lifted the restrictions on the use of mediation, previously limited to pre-administrative review and now available at any time. NATO has also been trying to make greater use of mediation in resolving staff disputes. Likewise, the UN places great emphasis on the informal resolution mechanism, including by establishing the Office of the UN Ombudsman and Mediation Services, to assist staff to resolve their disputes through informal means.

In the resultant discussion, the panel exchanged their views and experience with the participants on multiple issues associated with the reformed administration of justice systems. One participant asked the panel whether their respective tribunals have established a code of conduct for their judges, including standards for the disqualification and recusal of judges from a particular case. It was remarked that the UN General Assembly has adopted an extensive Code of Conduct for the Judges of the UNDT and the UNAT to preserve the independence, impartiality, integrity and propriety of the judges' conduct. In addition, the UN General Assembly has also adopted a Mechanism for Addressing Complaints Regarding Alleged Misconduct or Incapacity of the Judges of

the UNDT and the UNAT. In respect of the administrative tribunals of NATO and EBRD, it was noted that while a code of conduct has yet to be established for judges, the code of conduct for staff members of the organizations is equally applicable to them. Another participant asked the panel whether there had been any concerns that the revised internal justice systems, which seem to be 'very staff-friendly', could lead to an increase of unfounded claims by staff or a chilling effect on managers. It was remarked that the UN has yet to measure, but is conscious of, the chilling effects of the revised system on managers' actions and decisions. As regards envisaged frivolous claims, it was noted that staff members have full access to the internal justice system and that there is no limit on the number of cases a complainant may file. However, each case will turn on its merit, and matters that have already been adjudicated will be considered inadmissible. In addition, the conference extensively discussed the settlement culture within their organizations, the breakthrough in the UN case law attributed to the reformed administration of justice system, the variation in the costs awarded by different tribunals and their relations with the equality of arms, as well as the percentage of cases ruled by international administrative tribunals in favor of their organization, among others.

4 International Administrative Law and the Creation of Efficient Workplace Cultures of Multilateral Institutions

The third session related to other means—alternative to international administrative tribunals—of resolving employment-related disputes within international organizations, including resorting to arbitration, as well as informal procedures to supplement formal dispute resolution mechanisms. In terms of arbitration, a panelist elaborated on such questions as why there is a need to arbitrate, what disputes to arbitrate and how to arbitrate such disputes within multilateral institutions. It was noted that arbitration provides the parties with a flexible, neutral and independent avenue for the resolution of their disputes, and that arbitration has increasingly assumed a judicial character, with the resultant arbitral decisions being final and binding on the parties. In terms of enforceability, arbitration awards are enforceable in the state parties to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Arbitration Convention'). In light of these advantages, and in order to stay out of the jurisdiction of national courts, international organizations with functional immunity are motivated to choose arbitration as an alternate dispute resolution mechanism. The question remains, however, whether

arbitration constitutes a reasonable, impartial, alternative means of resolution, as prescribed in the *Waite and Kennedy* case, for jurisdictional immunity afforded to international organizations to be upheld.

In terms of how to arbitrate disputes, the panel highlighted the importance of ensuring the independence and impartiality, and thereby fairness, of the arbitration process. Independence entails that, structurally, there exists a 'separation of powers' between an arbitral tribunal and the employing organization, whereas impartiality, albeit related, requires individual arbitrators to be neutral vis-à-vis the parties in dispute. Related to these is the selection and appointment of arbitrators, and the allocation of associated costs. Arbitration of employment-related disputes of international organizations could be costly, given the limited availability of the right expertise required of arbitrators in the field of international administrative law. The challenge of ensuring equality of recourse to courts, including determining who should be granted access to arbitration, was also discussed. It was commonly recognized that consultants and contractors of international organizations are granted such access by the arbitration clauses in their contracts. Where arbitration clauses are available, arbitration should be conducted by an international organization in good faith to avoid putting the jurisdictional immunity afforded to them at risk.

The question of what disputes to arbitrate pertains to the arbitrability of the subject matter in dispute. It was considered that nothing prevents arbitral tribunals from arbitrating international administrative law disputes, except for the costs that the arbitration may entail relative to the monetary value of the matters in dispute. A panelist related the experience of an international organization in the arbitration of employment-related disputes with the assistance of the Hong Kong International Arbitration Centre. To create a workable arbitration regime, it was further suggested that consideration be given to the establishment of an appeal mechanism for arbitral awards on limited grounds.

In addition to arbitration as an alternate mechanism of dispute resolution, informal means of redress, including ombudsman and mediation services, were also considered as an important way of addressing employment-related grievances within international organizations. As an example, the Office of the United Nations Ombudsman and Mediation Services (Ombudsman Office) was established in 2002 to assist in the informal resolution of employment-related concerns and conflicts within the UN. Guided by the key principles of evenhandedness, neutrality, confidentiality and informality, the Ombudsman Office is unique in adopting an informal and collaborative approach to resolving workplace disputes. In addition to assisting in resolving workplace conflicts, the Ombudsman Office identifies and addresses systemic issues, thus improving the management of the organization. Since its establishment, the

Ombudsman Office has addressed approximately 20,000 cases, ranging from non-extension of employment to performance management. It was recognized that informal dispute resolution is complementary to the formal mechanism, since not all cases are suitable or admissible to the UN's administrative tribunals, the UNDT and UNAT. By resolving disputes informally, the Ombudsman Office reduces the number of cases that are brought before the administrative tribunals. The tribunals' judgments, on the other hand, provide the Ombudsman Office with guidance in addressing workplace disputes informally, including through mediation. The panel concluded that, given the diversity of backgrounds of the UN staff, potential conflicts may inevitably arise and the value of the Ombudsman Office in properly managing them cannot be overemphasized.

In the ensuing discussion, the conference exchanged views on the informal and alternative means of redress available to international civil servants. For instance, one participant expressed concerns with the transparency and fairness of arbitration processes (*vis-à-vis* international administrative tribunals) and the role of arbitration in filling jurisdictional gap. One of the panelists remarked that none of the systems is perfect. While they advocated an enhanced degree of transparency in arbitration and the publication of arbitral awards, this must be subject to the agreement of both parties involved. Another participant enquired which organizations, in addition to the Permanent Court of Arbitration (PCA), have opted for arbitration (to the exclusion of administrative tribunals) in resolving employment disputes. While the number of international organizations (in addition to PCA) opting for arbitration was unknown to the panel, it was proposed that international organizations with a geographic or thematic commonality may consider working together to establish a joint entity, with personnel of different backgrounds, to adjudicate on their employment disputes. In addition, drawing on their experiences, the conference also shared views on the selection and appointment of arbitrators and how to entice people to choose arbitration to resolve staff disputes. Lastly, the panel also shared their experience in the use of mediation to settle personnel conflicts, including through developing a code of conduct for mediators and establishing standard operating procedures and other guidance.

5 International Administrative Law and the Internal Legal Framework of Multilateral Institutions

At the fourth session, the panel discussed the international legal framework of multilateral institutions, including the concepts and origins of international

administrative law, as well as the terms and conditions of employment of staff of international organizations. The panel also analyzed the role of the jurisdictional immunity of international institutions in shaping the development of international administrative law by, for instance, bridging the gaps between national and international norms governing employment matters.

Drawing on their experience as a judge of an international administrative tribunal, one panelist discussed their understanding of the concepts and origins of international administrative law. In the panelist's view, international administrative law is a body of law applied by international administrative tribunals in adjudicating the cases before them. However, it remains to be answered what constitutes this specific body of law. While the notion of international administrative law was referenced by many on multiple occasions, international administrative tribunals have been silent on this concept and its origins in their constituent statutes. Consideration was given to whether public international law should be the source of international administrative law, but it does not seem to be the case. Scholarly studies undertaken by some experts (including C.F. Amerasinghe) seem to suggest that international administrative law is a body of law comprising the internal rules (such as staff regulations and rules) of international organizations, the general principles of law (such as non-discrimination), equity and judicial precedent. However, the panelist noted that, distinct from what is commonly understood, their understanding of international administrative law is closer to the concept of Global Administrative Law adopted by some scholars in New York University, which comprises a whole system of administrative procedure to regulate the activities of international organizations, rather than substantive law. Referring to the rules by the World Trade Organization on international trade disputes and the labor standards established by the International Labour Organization, the panelist considered that, like international economic law or international labor law, international administrative law is a *sui generis*, 'self-contained' system of law. This system of law, as applied by international administrative tribunals, includes terms of contract of employment, general principles of law and case law developed by each administrative tribunal.

Related to the concept and origins of international administrative law, another panelist focused their discussion more specifically on the terms and conditions of appointment that define the employment relationship between staff of an international organization and the employing international organization. The basic question is what constitutes the terms and conditions of employment, beyond those expressly provided in the staff's contract of employment. The panelist analyzed the jurisdiction of the Asian Development Bank Administrative Tribunal (ADBAT), as provided in its Statute, to hear claims of

“nonobservance of the contract of employment or terms of appointment” of a staff member. The Statute then defines the expressions “contract of employment” and “terms of appointment” to include all pertinent regulations and rules in force at the time of alleged nonobservance, including the provisions of the Staff Retirement Plan and the benefit plans provided by the Bank to the staff. This statutory jurisdiction is mostly identical to that of the World Bank Administrative Tribunal (WBAT), whereas the IMF Administrative Tribunal possesses a slightly different and more expansive jurisdiction over staff grievances.

The ADBAT’s jurisdiction is limited to contractual relations between ADB and its staff. In order to sustain a claim before the ADBAT, therefore, a claimant’s application must relate to the non-observance of their contract of employment and terms of appointment, otherwise such application will be dismissed as inadmissible. The panelist referred to three cases before the ADBAT to elaborate on the latter’s approach in interpreting the terms and conditions of a staff member’s employment. The first case arose from the homicide of a staff member, committed on the Bank’s premises by a security guard employed by a contractor to the Bank. Following the death of the staff member, their spouse filed legal proceedings against ADB, claiming damages in respect of ADB’s alleged liability for the tort committed against the staff member, as well as other damages and costs. The ADBAT held that it may deal only with an application which “alleges non-observance of the contract of employment or terms of appointment” of a staff member and its proceedings “are limited to claims in contract”. The ADBAT then turned to the issue of whether ADB had failed to fulfill an obligation expressly or impliedly laid down in the contract of employment. While ADBAT considered that as a matter of the general principles of the law of employment, ADB owes to its staff a contractual duty to exercise reasonable care to ensure their safety whilst on ADB’s premises, it found no evidence to establish that the staff member’s death was caused by any failure on the part of ADB to exercise reasonable care. ADBAT thus dismissed the application.

The second case arose from the failure by an external medical service provider contracted by ADB to diagnose lung cancer of a staff member, who died afterwards. The staff member and, following their death, their family, filed legal proceedings against ADB, claiming that ADB breached its duty of care in the selection and supervision of the service provider. The ADBAT considered that ADB had a duty to exercise reasonable care in selecting the service provider and supervising its operation. However, it was not persuaded that there had been a breach of such duty by ADB and thus dismissed the case accordingly.

The third case was filed by an applicant against the restrictions imposed by ADB on their eligibility to be engaged as an ADB consultant or staff subsequent

to the non-confirmation of her appointment as a staff member due to performance issues. ADB contended that the applicant had no standing before ADBAT since their claim did not relate to non-observance of their “contract of employment or terms of appointment” as a former staff member and, in any event, that the internal policy whereby the restrictions were imposed did not form part of the applicant’s terms of employment or appointment. The ADBAT found that the contract of employment or terms of appointment under its Statute include “pertinent regulations and rules in force at the time of the alleged nonobservance”. Cross-referring to the WBAT’s decision in the *de Merode et al. v International Bank for Reconstruction and Development* (1981) case, ADBAT concluded that it had jurisdiction over the applicant since the contested policy formed part of the ‘ensemble of conditions’ that comprise the relationship between ADB and the applicant.

The panelist discerned from these three cases an expansive approach by ADBAT in considering the terms of appointment of a staff member. They considered that this expansive approach, including the implied contractual duty of care identified by ADBAT, would expose the institution to potential legal action by third parties. This approach also raises a question regarding the scope of the institution’s financial liability in case of a breach of its contractual duties. This issue has yet to be clearly addressed by ADBAT.

Another area of discussion focused on the role of international organizations’ jurisdictional immunities in shaping the development of international administrative law. It was noted that jurisdictional immunities play a dual role in this regard: not only do they serve as boundaries within which a separate body of law has flourished, they also provide bridges between national and international norms.

The panelist first discussed how jurisdictional immunities, as a boundary, contribute to the development of international administrative law. As elaborated by other panelists, jurisdictional immunities do not simply create a jurisdictional void. International organizations and member states have established internal accountability mechanisms. The most highly developed of these accountability mechanisms are international administrative tribunals. These tribunals, as judicial bodies, provide a forum for the application and development of a unique international legal system governing the employment relationship between international organizations and their staff. Resorting to this mechanism is not only about a choice of forum, but a choice of law. As an example, the CSAT Statute provides that the tribunal shall be bound by the principles of international administrative law which shall apply to the exclusion of the national laws of individual member countries. Similarly, under the ILOAT Statute, an international organization which accepts ILOAT’s jurisdiction

shall not be required to apply any national law in its relations with its officials. The boundary created by jurisdictional immunities of international organization thereby nurtures the growth of international administrative law.

The panelist then examined how jurisdictional immunities create bridges between international and national norms. Because international organizations' immunities exist by the consent of States, and are accordingly vulnerable to withdrawal, the dialogue across the boundary of immunities also shapes the content of international organizations' internal law. For instance, international organizations often incorporate into their standards of staff conduct that noncompliance with local laws may result in disciplinary action. While this does not mean that local laws shall apply to the employment relations of international organizations, there are instances where public policies of the host state were transformed into the internal policies of an international organization. In this way, the host state communicates powerfully the norms of its own community across the boundary of immunities.

Subsequently, the conference discussed the case law and jurisdiction of various international administrative tribunals. One participant asked whether ADBAT or IMFAT, like ILOAT, accept the recognition by other international organizations of their jurisdiction and which organizations have done that. The panel responded that the current statute of ADBAT does not contain a provision that enables other international organizations to accept their jurisdiction. It was enquired whether the implied contractual duty of care under ADBAT's jurisdiction would encompass all potential tortious claims by ADB staff members and, if not, what other remedies they may have in respect of those tortious claims. It was noted that ADB's contractual duty of care towards its staff only covers a limited aspect of tort law and, since the organization does not have jurisdiction to examine tortious claims, there is indeed a jurisdictional gap. In those cases, the organization may need to provide the complainants with alternative, external means of redress. In addition, the conference exchanged views on the relevance of third party's liability towards claimants to that of the employing organization under its contractual duty of care, and the tendency of judges of an international administrative tribunal to cite the jurisprudence of other tribunals, among others.

6 International Administrative Law and the Integrity and Performance Management of Multilateral Institutions

The fifth session related to essential characteristics of the international civil service, governed by international administrative law, namely the integrity and

performance management of international organizations. Ensuring high standards of integrity of international civil servants is important to the efficient and effective functioning of international organizations. A panelist introduced the most recent revision of the IMF's code of staff conduct and whistleblower protection policy. While it is commonly required by all international organizations that their staff have a duty to report suspected misconduct, the question remains what standards of evidence may trigger this duty. For instance, would hearsay information or subjective suspicions suffice? The standards adopted by international organizations vary from one to another. IMF adopts a relatively low standard, as staff are required to report any ethical concerns that came to their attention. The International Telecommunication Union, in contrast, adopts a relatively high standard, as it requires that the staff member reporting misconduct should have information or evidence to support a reasonable belief. The panelist also discussed the consequences of failure to report misconduct; it may not only be considered as a performance issue, but as a violation of the code of conduct for which the staff may be subject to disciplinary procedures.

Associated with the staff's duty to report suspected misconduct is the organization's obligation to protect them from retaliation. Retaliation against staff for having reported suspected misconduct is commonly prohibited in all organizations, as it amounts to misconduct for which disciplinary sanctions may be imposed. The panel also discussed the burden and standard of proof of retaliation. At the IMF, when a staff member reports retaliation, it is for the organization to prove, on clear and convincing evidence, that retaliation has been committed. Given the significance of integrity, the panelist highlighted that the organization shall establish clear and enforceable rules to foster a culture of accountability.

The panel turned to the discussion of procedural requirements in staff misconduct cases. Drawing on the case law of the African Development Bank Administrative Tribunal (AfDBAT), a panelist discussed how allegations of procedural irregularities and violation of due process in disciplinary cases are addressed under international administrative law. In a disciplinary case resulting in the summary dismissal of a staff member, AfDBAT held that the staff member must be notified unequivocally of the charges against them and be provided with an opportunity to respond to those charges. In a similar case, AfDBAT emphasized that the right to due process is essential to the staff member's right of defense and that it must be respected. On the extent to which a procedural irregularity, if proven, may vitiate the resultant disciplinary decision and lead to the award of damages, AfDBAT takes into account such

elements as the prejudice sustained by an applicant, the fairness of the process and the gravity of the misconduct. In a case where a shorter notice was given than prescribed, AfDBAT was not convinced that this compromised the fairness of the procedure, since the applicant did not request additional time and, in any event, responded to the allegations against them prior to the expiration of the given time. In another case where an applicant contested the non-confirmation of their appointment, AfDBAT found that due process was violated. However, in light of the gravity of the misconduct by the applicant, AfDBAT limited the award to moral damages, without an order of reinstatement. It was noted that, in this way, AfDBAT takes a flexible approach in addressing due process violations.

The panel's discussion subsequently moved to the examination of the prominent performance trends within international organizations and the evaluation of their legal implications. A panelist noted that the new macro-trends increasingly focused on promoting meritocracy (the 'what'), continuous feedback (the 'how') and people manager (the 'who') of the performance of a staff member.

On the 'what', it was highlighted that there has been a shift from seniority-based progression to merit-based performance management and, as a consequence, the advancement of a staff member's career is now based more on the merit of their performance than on their time spent serving the organization. This shift raises the question whether privileging merit over seniority conflicts with the generally recognized principles of international administrative law, including the notion of 'acquired rights'—in other words, a right that staff may legitimately expect to survive all amendment to the international legal framework of the employing international organization. In this regard, the ILOAT considers the nature, the reasons and the consequences of shifting to meritocracy as basis of performance assessment to determine whether there was a breach of acquired rights. WBAT takes a similar approach. UNAT, however, takes a different approach, assessing whether the new merit-based policy is applied retroactively.

On the 'how', international organizations have changed the way in which they manage their staff's performance. A year-end evaluation has been replaced or supplemented by continuous feedback. It was noted that continuous feedback provides better data for informed personnel decisions, encourages conversation and allows for a focus on the content rather than the outcome of performance. A panelist opined that, from a legal perspective, continuous feedback does not qualify as an administrative decision that can be appealed, otherwise the organization may face endless litigation. However, in some

cases, the final evaluation outcomes (such as formal findings of unsatisfactory performance in UN) may be open to challenge. In those cases, it has been widely accepted by international administrative tribunals that performance evaluation is a value judgment and thus is subject to only limited review.

On the 'who', the trend of performance management is to involve more stakeholders in the process. Feedback from peers, supervisors and colleagues in client departments, for instance, are taken into consideration in the assessment of the merits of a staff member's performance. This would also put a checks and balances mechanism in place and provide safeguards against potential flaws in the evaluation process.

The panel noted a conflict between the organizations' need to adapt to the changing circumstances in pursuit of operational efficiency and the staff's legitimate rights and interests in the stability of employment relations. It was concluded that a balance needs to be struck between the legal features specific to managing the performance of employees of international organizations on the one hand, and the demands for accountability and sustainability in the delivery of their public service mission, on the other.

In the ensuing discussion, the conference shared views and analysis on the management of staff relations and due process in disciplinary cases. One participant asked whether and how the jurisdictional immunities enjoyed by international organizations may affect their employment relations with their staff. One panelist remarked that jurisdictional immunities only set boundaries between international organizations and their member states and do not define the employment relations with their staff. Another panelist added that the immunity enjoyed by their organization does not create an antagonistic relationship with their staff and that, in their practice, they have always consulted with the staff union before taking a systemic decision that affects the staff as a whole. In relation to whistle-blower protection, one participant asked whether such policy extends to witnesses who are obliged to cooperate with disciplinary investigations. One panelist noted that while witnesses are not whistle-blowers who proactively report misconduct, they are equally protected under the whistle-blower protection regime. In addition, the conference exchanged views on such issues as whether and how the grievance systems contribute to international organizations as attractive employers in both recruiting new staff and retaining existing staff, the burden and standard of proof of due process violations allegedly committed by employing organizations in disciplinary cases, and whether different standards of proof adopted by various tribunals would lead to a forum-shopping by the organizations.

7 Conclusion

The third annual AIIB Legal Conference covered important aspects of the law of employment relations of multilateral institutions—international administrative law. Firstly, international organizations are established by their member States to achieve common objectives. Vested with international legal personality, they function on the international plane independently from their member States and are usually afforded jurisdictional immunities. The tension between the jurisdictional immunities afforded to international organizations and individuals' fundamental rights of access to court was a central issue for discussion and deliberation.

Second, in the light of the jurisdictional immunities afforded to international organizations, alternative dispute resolution mechanisms, whether formal or informal, have been widely established by international organizations. As part of the formal mechanisms, most international organizations have either established their own international administrative tribunal or accepted the jurisdiction of a tribunal already established by their peer institutions (such as the ILOAT and UNAT). The feasibility of recourse to arbitration as an alternative to the use of an international administrative tribunal warrants examination. In addition to formal dispute settlement mechanisms, international organizations also encourage and establish informal dispute resolution procedures to facilitate amicable settlement of staff disputes. Both formal and informal dispute resolution mechanisms play a vital role in resolving the conflicts and grievances arising in the workplace of international organizations, ensuring the fair treatment of staff and improving the accountability, efficiency and effectiveness of the organizations.

Third, international administrative law is considered as a *sui generis* legal system beyond the realm of national jurisdiction. While it is generally recognized as the law of employment relations of international organizations, the concept, content and origins of international administrative law remain inchoate. In practical terms, international administrative law is derived from and comprises the internal law of international organizations, general principles of law, equity and the case law of international administrative tribunals. It is not a static system but evolves as any of its components change over time. The development of international administrative law is inevitably shaped by the jurisdictional immunities of international organizations.

Finally, the rule of law plays an integral role in the effective, transparent and efficient management of international organizations. To ensure that high ethical standards of conduct are respected, international organizations have

codified the duties of their staff members to report suspected misconduct on the one hand, and the obligation of organizations to protect staff against retaliation, on the other. Effective investigative and disciplinary procedures are also essential to safeguard the integrity of the organization, whilst safeguarding the due process rights of staff. In addition to protecting the integrity of international organizations, an effective performance management system is imperative to the efficient operations of international organizations. Performance management systems must ensure a balance between the respect for the rights of staff in accordance with established rules and the need of international organizations for accountability and sustainability in the delivery of their vital mandates.