116th Session **Judgment No. 3289**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. T. against the World Trade Organization (WTO) on 21 October 2011, the WTO's reply of 28 November 2011, the complainant's rejoinder of 28 February 2012 and the WTO's surrejoinder of 4 April 2012;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant joined the WTO in 1995. He is currently serving at grade 9 in the Technical Cooperation Audit Unit. From March 2003 to April 2007 he also worked as a consultant for the Agency for International Trade, Information and Cooperation (AITIC), and he was recruited in May 2007 to act as its Deputy Executive Director until the end of December 2008. At his request, the WTO granted him special leave without pay for the periods from 1 November 2004 to 31 October 2006 and from 1 May 2007 to 30 April 2009.

On 14 April 2010, in the context of its internal audit, the AITIC enquired with the WTO regarding payments the former had made to

the complainant towards his pension contributions during his tenure at the AITIC as Deputy Executive Director. The AITIC request mentioned that the complainant had provided consultancy services from 2003 to 2007.

Having obtained further details from the AITIC regarding the complainant's consultancy work and the remuneration he had received for it, the Director of the Human Resources Division (HRD) met with the complainant on 27 May 2010 and informed him that, according to the information available in his personal file, it appeared that he had neither requested nor been granted the prior authorisation required for engaging in outside activities and for accepting remuneration for such activities. She asked him to provide his comments by 4 June 2010 and noted that the facts, if confirmed, could lead to the initiation of disciplinary action.

By a memorandum of 2 June 2010 the Director of HRD requested the complainant to disclose the total amounts of remuneration he had received from the AITIC for his consultancy work, as well as the exact periods of that work.

On 8 June 2010 the complainant provided his comments, stating that he had sought prior authorisation orally and had received permission from his Director to engage in consultancy work for the AITIC. He added that Administrative Memorandum No. 950/Rev.2, which requires prior written notification and authorisation, had entered into force more than one year after he had received permission to work for the AITIC. He also mentioned that his colleagues were aware of his activities at the AITIC and that the WTO had even equipped his office at the AITIC so as to allow him to have remote access to certain files and to be in contact with his team at the WTO. Finally, the complainant underlined that his activities at the AITIC were not related to the work of the WTO, and that he would provide the information requested by HRD as soon as possible, including the total amounts of remuneration received from the AITIC.

On 17 June 2010 the complainant submitted his detailed personal bank records for the period from 1 January 2003 to 30 April 2007, and

on 13 August 2010 he provided further information concerning the payments he had received from the AITIC.

By a memorandum of 7 February 2011 the Director of HRD informed the complainant that the Director-General had decided to undertake an investigation regarding the remunerations and other payments he had received from the AITIC between 2003 and 2007. He was further informed that, depending on the results of the investigation, the Director-General might decide to apply disciplinary measures. The complainant replied to the allegations against him by memorandum of 11 March 2011.

On 18 May 2011 the complainant was informed that, after having carefully reviewed his memorandum of 11 March, the Director-General proposed to apply the disciplinary measure of a fine in the amount of 26,000 Swiss francs, corresponding to the total amount of remuneration received from the AITIC without written authorisation. Further, the sanction ultimately applied would be recorded in his personal file. The Director-General considered that the nature of the complainant's functions as an official dealing with budget and finance matters, constituted an aggravating factor, as did the fact that he had repeated the breach, because since the entry into force of Administrative Memorandum No. 950/Rev.2 in May 2004 he had received large amounts of money on at least three occasions without requesting written permission.

In accordance with Staff Regulation 11.3 a Joint Advisory Body (JAB) was established to review the disciplinary proposal. In its report of 4 July 2011, the JAB recommended that the Director-General sanction the complainant with a written censure and a fine equalling the total remuneration received in breach of Staff Regulation 1.9 and Administrative Memorandum No. 950/Rev.2. According to its findings, this amount corresponded to 14,000 Swiss francs, as the sum of 12,000 francs received in July 2004 had been paid to him for the work undertaken prior to the entry into force of the Administrative Memorandum. The JAB further recommended that the fine be paid over a period of seven years, having regard to the fact that the sanction was based on events having taken place seven years previously.

By a memorandum of 29 July 2011 the Director-General informed the complainant that he had decided to endorse the JAB's recommendations and motivated the decision. That is the impugned decision.

B. The complainant contends that the decision of 29 July 2011 is time-barred, because it refers to alleged infringements of an administrative rule having taken place between four and seven years before the disciplinary measures were taken. By analogy with the general criminal law principle of prescription, according to which specific acts must be prosecuted within a certain maximum period of time, he submits that the facts in his case are "too old to be prosecuted". He also refers to Staff Rule 106.9 concerning the recovery of overpayments. In light of the undue delay in initiating and conducting the investigation and the disciplinary proceedings, the complainant submits that the decision to impose disciplinary measures against him must be considered time-barred. He asserts that the WTO Administration was aware of his activities with the AITIC and their remuneration and refers, inter alia, to his requests to be placed on special leave without pay in 2004 and 2007. He contends that both HRD and the Director of the Administration knew of the alleged breach of Administrative Memorandum No. 950/Rev.2 and had already contemplated initiating disciplinary proceedings against him in 2008. He submits that because the WTO did not do so immediately after the discovery of the alleged breach, it is estopped from doing so several years later.

In the complainant's view, the Director-General did not provide adequate reasons for rejecting the JAB's reasoning on many aspects. He submits that the Tribunal's case law imposes an obligation on the Director-General to state reasons for disagreeing with the JAB's reasoning, and that failure to do so justifies setting aside the impugned decision.

The complainant objects to the wording of the written censure, which was unilaterally drafted by the Administration and placed on

his file "for the full duration" of his career within the WTO, without having been reviewed by the Advisory Body who remained silent on the text of the written censure and its duration. This, he argues, constitutes a breach of the principle of adversarial proceedings, especially since the text of the censure implies that he deliberately committed the alleged error and that he subsequently acted in bad faith, which means that he must renounce any hope of promotion or of being assigned other responsibilities for the rest of his career at the WTO.

The complainant asserts that the Administration was informed about his remunerated activities for the AITIC since their beginning in 2003 and that he thus complied with Staff Regulation 1.9. He underlines that he did receive the authorisation from his Director and that, at any rate, the Administration did not question the continuation of his remunerated work without a written authorisation from the Director-General following the entry into force of Administrative Memorandum No. 950/Rev.2. Moreover, his activities at the AITIC actually supported the mission of the WTO. In his view, Administrative Memorandum No. 950/Rev.2 cannot take precedence over Staff Regulation 1.9.

In addition, the complainant submits that the decision impugned constitutes an abuse of authority. He points out that the Administration initiated the investigation against him shortly after discovering that he was providing legal assistance to a former staff member engaged in a dispute with the WTO, and that the disciplinary procedure and the disciplinary measure were acts of retaliation. Lastly, the complainant contends that the disciplinary measures imposed on him are grossly disproportionate. He submits that the JAB erred when it concluded that the least onerous measure was a written censure, based on the fact that it is the first disciplinary measure to be listed under Staff Regulation 11.2. In his view, a written censure of indefinite duration is more severe, especially for his career prospects, than some of the other measures listed in the Staff Regulations and, as the decision to impose a written censure rests on a flawed recommendation of the JAB, it should be set aside.

The complainant asks the Tribunal to set aside the impugned decision, to order that any reference to the disciplinary proceedings, such as the written censure, be removed from his personal file, and to order that the WTO pay back the amounts withheld from his salary with interest. He further asks that the Tribunal set aside the decision of 11 August 2010 requiring him to seek written authorisation from the Director-General before providing assistance to colleagues in administrative proceedings. He seeks moral damages in an amount of no less than a multiple of 26,000 Swiss francs and at least 20,000 francs in costs.

C. In its reply the WTO submits that, to its knowledge, there is no case law on the issue of prescription in cases of disciplinary sanctions. It argues that the complainant's analogy with the Tribunal's case law on the recovery of overpayments is irrelevant to his case, as the sums owed by him are not money that the WTO overpaid, but represent a fine imposed following a serious breach of its internal rules. In its view, while the Tribunal's case law recognises as a general principle that lapse of time may extinguish an obligation, in the absence of an express provision on prescription, it cannot be automatically inferred that the obligation at stake ceases to exist after a certain amount of time. The WTO points out that the complainant does not dispute the fact that he was fully aware of the requirements of Administrative Memorandum No. 950/Rev.2 following its issuance in May 2004, and that his activities at the AITIC, even though they began before the entry into force of the Memorandum, nevertheless had to be notified again under the new procedure provided therein.

The WTO denies the complainant's allegation of excessive delay. The payment of the outside remuneration only became explicitly known to the Organization in April 2010 and it commenced its enquiries immediately thereafter. It explains that the five-month delay between September 2010 and February 2011 was due to the fact that the complainant was assisting a former staff member in the context of a harassment investigation, and the suspension of the disciplinary

investigation was applied to prevent any confusion between the complainant's case and the harassment investigation. The overall length of investigation and disciplinary procedure – from May 2010 to July 2011 – was "rather short", and the complainant contributed to the delay by failing to cooperate properly with the Administration in identifying the payments he had received and by seeking extensions on several occasions, all of which were granted in the interest of due process.

The WTO considers that sufficient reasons were given for the impugned decision, which confirmed the disciplinary measures recommended by the JAB. Moreover, the decision sufficiently explains why the Director-General disagreed with two specific passages of the JAB's reasoning. As to the wording and duration of the written censure, the WTO submits that, in the absence of precise indications on the part of the JAB, the Director-General was acting within his discretionary powers when he determined what was the most suitable content and duration of the censure.

With regard to the complainant's assertions that various members of the Administration were more or less informed, that his activities were not contrary to the Organization's interests, and that they did not involve any conflict of interest, the WTO observes that these arguments are irrelevant; indeed, after the entry into force of Administrative Memorandum No. 950/Rev.2, the authorisation of his Director was no longer sufficient, and the complainant was under the obligation to comply with the requirements of that Memorandum.

The WTO strongly denies that the disciplinary measure was an act of retaliation, and points out that the Director-General never objected to the assistance provided by the complainant to a former staff member. The WTO recalls that the investigation into his outside activities originated in a letter sent by the AITIC in April 2010.

Lastly, the WTO asserts that the disciplinary sanction adopted was not disproportionate in light of the particular gravity of the complainant's behaviour. It notes that the fine will place the complainant in the situation in which he would have been, but for his

disregard for the obligation to seek a formal authorisation from the Director-General. It is payable over a period of seven years and does not place an excessive financial burden on the complainant. Regarding the written censure, the WTO submits that the complainant's negligent conduct deserved not only a pecuniary sanction, but also a clear statement in his official records about his negligence, as a reminder of the duties and standards of conduct expected of any WTO official of his ranking and responsibilities. As for the alleged long-term detrimental effect of the censure on his career, the WTO underlines that the text of the censure makes clear that the complainant is to be censured only for his negligence.

D. In his rejoinder the complainant presses his pleas. He maintains that the WTO was aware of his remunerated activities for the AITIC throughout the period 2003 to 2008 and asserts that he was authorised, both orally and in writing, to be remunerated for those activities, even after the entry into force of Administrative Memorandum No. 950/Rev.2 in May 2004. The complainant argues that the Administration is bound by its own practice, recognised in the JAB's report, of granting "a single open-ended permission to receive remuneration" rather than separate specific authorisations for each payment. As his remunerated activities for the AITIC continued without interruption between 2003 and 2008, the complainant contends that the initial authorisation that he received for his work at the AITIC was sufficient. He denies that he failed to cooperate properly in the identification of payments and points out that, although he sent a declaration to the Administration in July 2010 stating that he was no longer assisting the former staff member involved in the harassment case, the WTO did not suspend the disciplinary procedure against him until September 2010.

E. In its surrejoinder the WTO maintains its position in full. It underlines that paragraph 12 of Administrative Memorandum No. 950/Rev.2 explicitly excludes the complainant's allegation that the initial authorisation he received sufficed.

CONSIDERATIONS

1. The complainant, an accountant, joined the WTO in 1995 and has worked in various capacities, the most recent being in the Technical Co-operation Audit Unit. In 2003, a Swiss association, the Agency for International Trade, Information and Cooperation (AITIC), sought his assistance as a consultant during its process of becoming an intergovernmental organisation. The complainant asked for and received verbal permission from his Director to work as a paid consultant for the AITIC in his free time. He worked as a consultant for the AITIC in his free time until May 2007, when he received permission to take two years of special leave without pay from the WTO to work as the Deputy Executive Director of the AITIC. In 2009, the complainant returned to the WTO full-time.

2. On 14 April 2010, the AITIC e-mailed the Director of the WTO's Administration and General Services Division, with a question regarding the complainant's pension contributions. The information was needed for an AITIC audit. Following an exchange of correspondence between the AITIC and the WTO, in May, the WTO's Director of Human Resources informed the complainant that she had just learned that he had been working for AITIC as a consultant between 2003 and 2007. The WTO had no record that written authorisation to undertake this work had been requested or granted, as required by Administrative Memorandum No. 950/Rev.2. She asked him to disclose information about the remuneration he had received. Between May and September 2010, the complainant provided information to the WTO regarding his work for the AITIC. In February 2011, the Organization informed him it was commencing an administrative investigation against him.

3. On 18 May 2011 the Director of Human Resources notified the complainant of the Administration's proposal to apply a disciplinary measure pursuant to Staff Rules 113.1 and 113.2(a). A Joint Advisory Body (JAB) was formed and the complainant was

given the opportunity to make submissions. The JAB recommended that a fine and a written censure be imposed on him. On 29 July 2011, the Director-General accepted the JAB's recommendations and imposed a fine of 14,000 Swiss francs and a written censure. This is the impugned decision.

4. The first issue is whether the disciplinary measures taken by the WTO were time-barred. In summary, the complainant submits that the facts giving rise to the disciplinary measures are too old for prosecution; the WTO waited too long after becoming aware of the facts to initiate the disciplinary procedure; and the disciplinary procedure was not conducted expeditiously. The complainant's position is rejected.

5. At the outset, it is observed that there is no limitation period in relation to disciplinary proceedings in the Staff Regulations and Rules. The complainant's attempt to analogise from the Staff Rule concerning the recovery of an overpayment within one year is without merit. An overpayment is in no way analogous to misconduct. It is true that, if possible, an organisation should promptly take action when the possibility of misconduct on the part of a staff member comes to its attention. However, the complainant's assertion that an alleged violation of a Staff Rule, if considered serious, "has to be investigated promptly and at the latest one year after the Administration took notice thereof" has no foundation in law or in the Staff Regulations and Rules.

6. In relation to the complainant's submission grounded on the alleged knowledge senior officials had regarding his work at the AITIC, it is useful to reiterate that the disciplinary action was only in relation to the complainant's remunerated work at the AITIC between May 2004 and May 2007. To the extent that it is an attempt to advance an argument based on estoppel, it has no evidentiary support. The complainant has adduced evidence showing that several individuals in the Administration knew that he was working at the AITIC in 2003 and 2004. However, he has not provided evidence that anyone in the WTO had any specific knowledge of his work between

2004 and 2007, or that those who may have had some informal knowledge would have known if he had the Director-General's approval.

7. As to the alleged delay in the disciplinary procedure, it is observed that the WTO has provided a reasonable explanation for waiting until February 2011 before starting the disciplinary procedure. Also, the time taken to complete the disciplinary procedure was, in the circumstances, reasonable.

8. On the merits, the complainant claims that he fully complied with Staff Regulation 1.9. It reads:

> "Staff members shall not accept any remuneration, honour, decoration or favour, or gift other than of token value, from any source external to the WTO, unless authorized to do so by the Director-General."

9. In summary, he maintains that the Administration was informed about his remunerated consulting activities for the AITIC from the outset in 2003 and regularly afterwards; he received the authorisation of his Director; and the Administration did not question the continuation of his remunerated work for the AITIC after the entry into force of Administrative Memorandum No. 950/Rev.2, and hence tolerated it. Further, the written approval he received to take special leave without pay to perform exactly the same work for the AITIC on a full-time basis demonstrates that the Administration consented to his remunerated work for the AITIC. He also claims that Administrative Memorandum No. 950/Rev.2 did not create new obligations. Rather, it simply "clarif[ied] the conditions under which a staff member will normally be authorised to engage in outside activities and to accept remuneration from an outside source".

10. The complainant's position is fundamentally flawed. None of the arguments he advances overcome the clear language of Administrative Memorandum No. 950/Rev.2. It requires that "[a] staff member must […] obtain approval from the Director-General, in writing by means of the attached form, before accepting any

remuneration, honour, decoration or favour, or gift from any source external to the WTO ('outside remuneration') of more than token value". It specifically addresses the complainant's circumstances in stating that "[t]his notice applies to all staff members, including those who have already committed to perform outside activities which may be regarded as related to the work of the WTO or who have an existing agreement to receive outside remuneration of more than token value on a regular basis". Lastly, staff members are put on notice that failure to comply with the Administrative Memorandum may render them liable to disciplinary measures.

11. As the complainant by his own acknowledgement did not request or obtain the Director-General's approval in writing as required by Administrative Memorandum No. 950/Rev.2, he was in clear violation of the provisions of that document and subject to disciplinary measures.

12. The complainant contends that the disciplinary procedure and measures were an abuse of authority. He claims they were taken in retaliation for assistance he had given to a former staff member who was involved in a dispute with the WTO. In support of this position he points out that it was only after he assisted a former staff member on 23 April 2010 that the Administration took action that ultimately led to the disciplinary measures being imposed. He also claims that it is common practice at the WTO for staff members to receive remuneration for outside activities and action is not taken against those staff members.

13. The claim of retaliation is rejected. While there is some coincidental overlap in time, the evidence is clear that the triggering event was the AITIC 14 April 2010 request for information approximately one week before the incident with the former staff member. The allegation concerning other staff members receiving outside remuneration without suffering adverse consequences is a bald assertion.

14. The complainant also challenges the adequacy of the Director-General's reasons for his final decision. He claims that even though the Director-General endorsed the JAB's recommendations, he was obligated to give reasons for rejecting the JAB's reasons. As well, the reasons were inadequate as they did not address each of the complainant's arguments. It is observed that the Director-General did provide reasons for rejecting the JAB's reasoning. At paragraph 4, he states:

> "I consider that the JAB disregarded the provisions of paragraph 12 of Administrative Memorandum 950 Rev 2 […] I also disagree with the JAB reasoning regarding any supposed discretion of directors to depart from rules and written policies and the alleged right of staff members to rely on such departures."

15. It is also observed that even in circumstances where a decision maker rejects the recommendations of an internal advisory body, a decision maker is not obligated to address each and every submission. The obligation is to provide reasons for the decision itself that include reasons for rejecting the recommendation of the internal advisory body.

16. Lastly, the complainant takes issue with the proportionality of the disciplinary measures. In Judgment 2656, under 5, the Tribunal stated:

> "5. The main argument he puts forward is that the disciplinary measure imposed lacks proportionality. In this respect, it may be noted that lack of proportionality is to be treated as an error of law warranting the setting aside of a disciplinary measure even though a decision in that regard is discretionary in nature (see Judgments 203 and 1445). In determining whether disciplinary action is disproportionate to the offence, both objective and subjective features are to be taken into account and, in the case of dismissal, the closest scrutiny is necessary (see Judgment 937)."

17. In the present case, in arriving at the amount of the monetary sanction, all of the relevant considerations were taken into account as set out in the carefully articulated reasons of the JAB. There is no

basis in law upon which to interfere with the monetary sanction. However, the contents of the written censure go beyond the findings of the JAB or are not compatible with those findings. Having accepted the recommendations of the JAB based on those findings, the written censure should have reflected, in a balanced way, those recommendations. The censure in its present form cannot stand and must be set aside. It will be remitted to the Director-General for reformulation in accord with the report of the JAB and, in particular, its factual recital. The impugned decision insofar as concerns the written censure will be set aside. In these circumstances, there will be no award of moral damages for the error in relation to the written censure.

DECISION

For the above reasons,

1. The impugned decision insofar as concerns the written censure is set aside.
2. The decision is remitted to the Director-General for a reformulation of the censure in accordance with consideration 17.
3. All other claims are dismissed.

In witness of this judgment, adopted on 6 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet