FORTY-SECOND ORDINARY SESSION

In re BENARD and COFFINO

Judgment No. 380

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the Interim Commission for the International Trade Organisation/General Agreement on Tariffs and Trade (ICITO-GATT) by Mrs. Germaine Bénard and Mr. Gaetano Coffino on 13 March 1978, the letter of 19 July 1978 from the complainants' counsel withdrawing several of the claims made in their original complaints, the defendant organisation's reply of 14 September 1978 to the two complaints, the complainants' single rejoinder of 28 December 1978 and their observations on Judgment No. 236 of the United Nations Administrative Tribunal (Belchamber v. the Secretary-General of the United Nations), and the defendant organisation's surrejoinder and its observations on the same judgment, dated 30 March 1979;

Considering the applications to intervene filed by:

M. Aboukrat,
M. Albanell,
M. Anklesaria,
M.L. Arias Alonso,
R. Armuzzi,
S. Aspinall,
R. Banderet,
O. Bangoura,
M. Banihachemi,
P. Barranco,
F. Beaudouin,
F. Bermudez,
C. Bienner,
J-P. Boirot,
A-M. Bonnefond,
A. Bonnet,
S. Bouchet,
I. Bracco,
L. Broadley,
R. Buttoudin,
J. Cespedes,
D. Chudnovsky,
J-C. Clavier,
J. Coelho,
G. Colicchio,
C. Collart,
D. Colongo,
D. Conti,
A-M. Costello,
E. Cove,
D. Dejean,
B. Delavy,
J. Deschenaux,
F. Donet,
F. Doppler,
A. Dubouchet,
S. Dudas,
G. Durand,
C. Elie,

M. Ellis-Jones,
R. Emery,
A-M. Favre,
J.M. Fortin,
M. Frechin,
A. Frongia,
C. Gabrielli,
C. Garcia,
G. Gardin,
L. George,
A. Georget,
C. Gerlier,
M.I. Ginés,
R. Gomez,
J. Grosjean,
R. Haimbl,
I. Hansen,
K. Hayes,
N.J. Herbst,
V. Hernández,
C. Hodgson,
P. Höhener,
J. Hudry,
M. Jansch,
A. Jost,
C. Kabariti,
P. Klimacek,
G. Klunge,
M-F. Labrunie,
J. Lacroix,
J-P. Lapalme,
E. Lattes,
Y. Le Cornec,
C. Leonhardt,
J. Magalhas,
M. Malavallon,
L. Marqués-Flores,
M. Mas,
J. Mason,
C. Mathé,
J. Matthews,
M. McCormack,
A. McLoughlin,
V. Meach,
P. Melin,
K. Messmer,
D. Messulam,
A. Meylahn,
A. Michaud,
J. Moliere,
M.P. Morici,
E. Mullin,
M-J. Murat,
M. Nabet,
C. Neuwerth,
V.P. Nguyen,
L. Pattey,

V. Pereira da Cruz,
M. Pibouleau,
A. Pillonel,
C. Pineda,
F. Pinget,
P. Pique,
V. Prost,
D. Reversy,
L. Rinaldi,
V. Rizzo,
G. Rocchi,
B. Rosset,
P. Rossillon,
M.C. Rüchti,
J.A. Santiago Tagle,
A. Sauge,
M. Savoie,
E.L. Sester,
V. Simpson,
J. Teare,
R. Thely,
E. Thickett,
A. Tissot,
M-L. Tissot,
K. Tosetti,
M. Trabacchi,
S. Triquet,
R. Verdasco,
J. Verger,
J. Vilaplana,
J-J. Waldvogel,
J. Went,
J. Williams,
D. Winterson,
D. Wisping,
I. Woodruff,
A. Woodward,
R. Yekedo;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article VIII (Regulations 8.1 and 8.2) and Annex I, paragraph 7, of the United Nations Staff Regulations, and United Nations Staff Rules 103.2, 108.1 and 108.2, which apply to the staff of ICITO-GATT;

Having examined the documents in the dossier and disallowed the complainants' application for oral proceedings;

Having ordered that the complaints be joined;

Considering that the material facts of the case are as follows:

A. The complainants are members of the General Service category of staff and as such are objecting to a new salary scale which on 20 January 1978 the Director-General applied to their category by Administrative Memorandum No. 484. The new scale came into being in the following circumstances.

B. Since the early 1950s there has been a uniform salary scale for the General Service category staff of the United Nations Office and of United Nations specialised agencies in Geneva and it has been established by reference to the best prevailing salary rates in public and private employment in that city. To determine those rates, surveys have been carried out from time to time, but not at any set intervals, and by methods decided on after consulting the staff associations of the organisations. Since 1966 an institute independent of those organisations has collected

and analysed data for the surveys. Giving effect to the results of the 1975 survey meant substantial salary increases, and the Administrations and the staff associations disputed the matter. The former refused to accept in full the results of the survey; the latter wanted them to be put into effect. The dispute led to a strike by United Nations staff from 25 February to 3 March 1976. On 23 April 1976 it was settled by an agreement which a "sole negotiator designated by the Secretary-General of the United Nations and by the Executive Heads of the Geneva-based agencies" concluded with the staff representatives of the organisations (the United Nations, the International Labour Organisation, the World Health Organization, the Interim Commission for the International Trade Organisation/ General Agreement on Tariffs and Trade, the World Meteorological Organization, the International Telecommunication Union and the World Intellectual Property Organization). That agreement was a compromise providing for smaller increments, with different percentages for different grades. On 1 September 1976 the parties concluded a supplementary agreement, on interim cost-of-living adjustments.

C. Meanwhile, on 18 December 1974, the General Assembly of the United Nations had approved the statute of the International Civil Service Commission (ICSC). Article 1 of the statute states that the function of the Commission is "the regulation and co-ordination of the conditions of service of the United Nations common system" and that it shall perform its functions in respect of the United Nations and of those specialised agencies and other international organisations which participate in the United Nations common system and which accept the statute of the Commission. By Resolution XXI/193 B of 22 December 1976 the United Nations General Assembly instructed the Commission to carry out a new survey. A working party set up by the Commission consulted the representatives of the Geneva-based organisations and of their staffs and, despite strong objections expressed orally and in writing by the staff representatives, chose a method for collecting data which differed from the methods applied in earlier surveys. The staff representatives later took the view that the application of that method, to which they had objected, had been defective and therefore incorrect. They therefore rejected the Commission's recommendations and refused to join the Administrations in working out the arrangements for applying them, on the grounds that they did not afford an acceptable basis for discussion. No talks took place, and on 22 November 1977 the Secretary-General of the United Nations announced that the recommendations would be put into effect. On 20 January 1978 the Director-General of the defendant organisation adopted the same arrangements, namely: salaries including incidental allowances, were reduced by 17 per cent, but the amount of the reduction was offset by a "personal transitional allowance" of the same amount. The staff took the view, however, that the new scale was to their disadvantage in that no cost-of-living adjustments were to be made until the difference of 17 per cent had been made up, and annual increments, increases resulting from promotion and compensation for overtime were to be paid in accordance with the new scale.

D. The new scale having come into force with the publication of Administrative Memorandum No. 484, the complainants wrote to the Director-General asking him to reconsider his decision. On 17 February 1978 the Director-General answered that there was nothing to be done and that he authorised the complainants to appeal directly to the Tribunal.

E. In their claims for relief, as amended on 19 July 1978, the complainants ask the Tribunal

(a) to find that the agreement of 23 April 1976 either creates a clear understanding on prior negotiations or recognises that a clear understanding was already in existence,

(b) additionally, to find that the Director-General of ICITO-GATT breached the agreement by unilaterally revising without prior negotiations with the staff representatives the salary scale of the General Service category he fixed pursuant to the agreement

and therefore

(a) to quash the decision of the Director-General of ICITO-GATT dated 20 January 1978, introducing as from 1 January 1978 a new salary scale for General Service category staff in ICITO-GATT,

(b) to restore, retroactively as from 1 January 1978, the status quo ante on the basis of the 1976 agreements on salary scales and interim adjustments,

(c) to assign to the defendant organisation any expenses incurred by the complainants in the preparation of their cases before the Tribunal, including lawyer's fees, on the basis of documentary evidence which will be submitted to that effect by the complainants.

F. In support of their claims the complainants observe that under the new scale they suffer a reduction in salary and incidental allowances. Salary, they maintain, is an element of the employment relationship which is governed not by the staff regulations but by the contract of appointment, and so the organisation may not alter it unilaterally. The 1976 salary scale was not put into effect unilaterally: it was the outcome of collective bargaining and of the agreements of April and September 1976, which were binding on both sides. Those agreements succeeded earlier ones, such as those of 1968-69 on the survey methods. Neither the agreements of 1968-69 nor those of 1976 make any express provision for denunciation. In other words, argue the complainants, both sides took the view that the agreements remained in force from one survey to the next. The signatories had been duly accredited: the Director-General under United Nations Staff Rule 103.2, which applies mutatis mutandis to ICITO-GATT, and the staff representatives under Staff Regulation 8.1, as applied to ICITO-GATT. The complainants argue that the Director-General may not plead the unilateral decision of the United Nations Secretary-General to apply the ICSC's recommendations in defence of his own arbitrary breach of his contractual relationship with the complainants' representatives.

G. In its reply the defendant organisation points out that it has very close links with the United Nations, mainly in administrative matters. Thus it abides by the United Nations Staff Regulations and Staff Rules, and any derogation therefrom has to be specifically approved by the parties to the General Agreement on Tariffs and Trade. Hence, having been adopted by the United Nations, the new salary scale for staff in the General Service category had ipso facto to be adopted by the Administration of ICITO-GATT. The Tribunal derives its competence from its own Statute and may therefore review only individual decisions affecting the rights or career of an official or his successors. In Judgment No. 92 of 11 October 1966 (Varlocosta Patrono) it held that "when a complainant prays for the rescinding" of a general provision it "must confine itself to considering the legality of the provision and, if it is found to be invalid, to rescinding the decision by which it was applied or the consequential decisions". Accordingly the complainants ought to have impugned not the general decision of 20 January 1978 but the individual decision applying the new scale to each of them. They cannot now correct their error since an appeal against the individual decision would be time-barred. Likewise, the Tribunal is not competent to hear a dispute about a collective labour agreement. The opinion dated 16 May 1978 which three members of the Tribunal gave in their personal capacity in reply to the joint application from the International Labour Organisation and the Staff Union of the International Labour Office consists in considerations de lege ferenda and is immaterial to the present complaints. Moreover, the Tribunal is competent to hear neither a dispute between the Staff Association and the Administration of ICITO-GATT nor the complainants' allegations that the Administration has failed to observe the agreement of 23 April 1976 with the staff representatives.

H. The defendant organisation observes that the Staff Association expressly and publicly refused to negotiate with the Administration on the basis of the new scale recommended by the ICSC. That refusal appears in an issue dated 3 October 1977 of Staff News, a bulletin published by the Staff Association, which said that by an overwhelming majority it had rejected any idea of negotiating with the Administration on the basis of the recommended new scale and had declared that it recognised only the scale agreed to in 1976 between the executive heads and the staff representatives. As to the merits, the defendant organisation refers to the memorandum submitted to the United Nations Administrative Tribunal by the legal adviser of the United Nations in the Belchamber case (No. 225). In its view, the present cases are identical to that one and, if necessary, it will endorse the arguments and pleas in that memorandum.

I. The defendant organisation accordingly believes that the Tribunal is not competent and that the complaints are unfounded. It asks the Tribunal to award costs against the complainants.

J. In their rejoinder the complainants maintain that it is a distortion of the facts to say that, having been introduced in the United Nations, the new scales had to be applied ipso facto to ICITO-GATT. The organisation has its own legal personality, is distinct from the United Nations and is on a par with the other specialised agencies. If it were not, and if its case were accepted, that would be tantamount to avoidance of the contracts of appointment signed by the Director-General since a decision by the United Nations Secretary-General could alter the rights of GATT officials, and they would have no right of appeal to the United Nations Administrative Tribunal. The complainants deny that only an individual decision may be impugned before the present Tribunal. Article VII, paragraph 2, of the Statute of the Tribunal states that a complaint may be filed within ninety days after notification of a decision "affecting a class of officials". Besides, the Tribunal itself has held (cf. Judgment No. 323: Connolly-Battisti (No. 5), paragraph 23): "No matter how often a similar breach is repeated, it is not the same breach nor the same decision, and it gives rise to a fresh cause for complaint. If an official in ignorance of his rights allows an underpayment of salary to be repeated for many months without challenge, he can, as soon as he learns of his

rights, complain ...". The introduction of a new salary scale, however it is notified to the staff affected, is tantamount to an individual decision affecting each staff member. The decision is not the notice sent to each official informing him of the change in his salary: it is the Administrative Memorandum, which is marked "One copy per staff member". Any other conclusion would be absurd since it would mean that the staff member would have no legal redress against any decision by the Director-General which was not formally notified to him as applying to his particular case, but was applied erga omnes. Lastly, the Director-General ought to have raised the plea of irreceivability when he received the letter from the staff inviting him to reconsider his decision. As for the opinion given by the members of the Tribunal on 16 May 1978, the complainants do not believe that it consisted exclusively in considerations de lege ferenda and they stress its quasi-arbitral nature. If when it signed the agreement of 23 April 1976 the defendant organisation realised that the Tribunal would not be competent to hear any appeal by the staff representatives who had signed that agreement, then its good faith is open to doubt. In reply to its allegation that the GATT staff representatives refused to negotiate, the complainants point out that it is not being consistent since it also maintains that GATT automatically follows the United Nations and that negotiation was therefore pointless. It is mistaken in detecting a refusal to negotiate in the Staff News of 3 October 1977: what the staff representatives were refusing to do was merely to engage in negotiations the scope of which appeared at that time to be limited to ways and means of putting into effect the new salary scale based on the ICSC's recommendation. Besides, the organisations which had signed the 1976 agreement made no formal offer to open inter-agency negotiations with the staff representatives. The few contacts which did take place were between representatives of the United Nations Secretary-General and of the United Nations staff and, for the other parties to the 1976 agreement, were res inter alios acta. Lastly, the Statute of the Tribunal makes no provision for awarding costs against an unsuccessful complainant.

K. In their observations on the Belchamber judgment of 20 October 1978 the complainants observe that the United Nations Administrative Tribunal concurs in the opinion given by the members of the Tribunal that the agreement of April 1976 did not qualify the authority of the executive bodies of the organisations. The United Nations Tribunal also agrees that the United Nations Secretary-General was under an implied obligation to consult the staff representatives before revising the salary scale. The complainants take the view, however, that the Belchamber judgment differs from the opinion in that the United Nations Tribunal found that the Secretary-General had sought unsuccessfully to start consultations and held that he was therefore released from the obligation; whereas the opinion appears to make the actual holding of consultations an indispensable condition of the lawfulness of later action. The complainants draw a parallel between collective bargaining governed by labour law and joint consultations held by the organisations: the employer's sole duty is to bargain in good faith. If collective bargaining reaches stalemate, the employer may then act as he pleases. The United Nations Tribunal was mistaken in holding that the staff representatives' "negative" attitude on the ICSC's work and recommendations had discharged the Secretary-General from his obligation to consult them. It was the Secretary-General who wanted to change the results of the 1976 agreement, and so it was he who was under a duty to press for holding consultations in good faith and who showed a negative attitude.

L. In its observations on the Belchamber judgment the defendant organisation makes three points. First, the last paragraph of the September 1976 agreement made it quite clear that the agreement was adopted without prejudice to the ICSC's review of General Service category salaries with the full participation of the staff representatives. Secondly, the United Nations Tribunal found that the staff representatives' "negative" attitude had deprived of effect articles 12.3 and 28 of the ICSC's statute, which relate to consultation of staff representatives.

Thirdly, that Tribunal found that the staff representatives had stubbornly refused consultations with the United Nations on the ICSC's recommendations.

M. In its surrejoinder the defendant organisation contends that the legal nature of its relationship with the United Nations is immaterial since it endorses the very same arguments on the merits as those the United Nations put to the United Nations Tribunal. The term "a decision affecting a class of officials" in Article VII, paragraph 2, of the Statute of the present Tribunal denotes a decision directly applicable to a class of officials who are in the same legal position. Administrative Memorandum No. 484 of 20 January 1978 was not, however, directly applied to each official affected since each official was later informed by a personnel action notice. The complainants have failed to challenge that notice within the time limit and are therefore time-barred. Moreover, they have misinterpreted Judgment No. 323 (Connolly-Battisti (No. 5)). The key words of the passage they quote are "in ignorance of his rights". What the judgment means is that when a decision is repeated the official may act as soon as he becomes aware of the wrong which he believes it does him. In the present case the complainants were aware of the wrong they allege as soon as the new salary scale came into force. Furthermore, there was no need for the Director-

General, in answering the complainants' letter inviting him to reconsider his decision, to point out that they could not challenge a general decision of that kind. The defendant organisation is addressing that plea only to the Tribunal and in doing so is relying upon the terms of the Tribunal's Statute. The opinion which the members of the Tribunal gave on 16 May 1978 relates exclusively to the Administration and staff of the International Labour Office, since the other organisations took no part in the exchange of views which was held before that opinion was given.

CONSIDERATIONS:

As to jurisdiction:

1. These complaints are against the Director-General's decision contained in an information circular dated 19 January 1978 by which he introduced a new salary scale for the General Service category of staff. The relief sought by the complainants in its first two paragraphs requests the Tribunal to make certain findings concerning an agreement of 23 April 1976 (hereinafter called "the April Agreement") made between the representative of the executive heads of the international organisations based in Geneva (hereinafter called"the Geneva organisations") of the one part and the representatives of the staffs of the Geneva organisations of the other part; in its third paragraph the relief requests that the decision of 20 January 1978 be quashed; in its fourth and fifth paragraphs it requests certain consequential orders. The Tribunal is competent to quash any decision of the Director-General which does not observe the terms of appointment of officials of the organisation or of the provisions of its Staff Regulations and to make the appropriate consequential orders. When considering whether or not to quash such a decision it may or may not be relevant for the Tribunal to reach conclusions about the meaning and effect of an agreement such as the April Agreement and to make findings about whether there has been a breach of it; if so, such conclusions may be expressed in the considerations leading to the order which the Tribunal makes. But they will not be part of the order and the Tribunal will not attend to requests for specific declarations. The first two paragraphs of the relief sought are therefore rejected.

2. As to the third paragraph of the relief, it would manifestly be convenient, having regard to the competence of the Tribunal as defined in Article II, paragraph 5, of its Statute, if the complaints specified the terms or regulations which allegedly have not been observed and the respects in which they have not been complied with. The complaints do not contain any precise allegation of this character. A perusal of the dossiers has led the Tribunal to conclude that the main complaint is that the decision impugned was contrary to certain contractual qualifications, set out in paragraph 13 below.

3. Since the complaints so construed allege breaches of contract or of staff regulations they are prima facie within the jurisdiction of the Tribunal. The organisation objects to the jurisdiction on the ground that, if the complaints are established, the Tribunal is not competent to grant the relief sought. Since however it is not disputed that the Tribunal would, if the facts justify it, be competent to grant relief in some other appropriate form, the preliminary objection fails.

As to receivability:

4. The organisation objects also to the receivability of the complaints on the ground that the complainants will, by reason of transitory measures to which the decision impugned gives effect, continue to receive the same monthly salary as they were getting before the decision took effect and therefore have no personal interest in quashing it. The complainants however contend that they have suffered or may suffer material damage in other respects which they have specified. This issue will not arise unless the complaints succeed on the merits and it cannot be conveniently considered until after the merits have been determined.

On the merits:

5. On 20 January 1978 the Director-General acting under paragraph 7 of Annex I of the Staff Regulations, which empowers him to fix the salary scales for staff members in the General Service category, normally on the basis of the best prevailing conditions of employment in the locality, gave the decision impugned in this case. On the same day the Secretary-General of the United Nations, acting under an exactly similar power, gave a decision which, save that it applied to the officials of that organisation, was in the same terms as the decision impugned. His decision was challenged by an official of the United Nations and was upheld by the Administrative Tribunal of that organisation in Judgment No. 236 given in Case No. 225 (Belchamber). While the facts and contentions in the

present case are not exactly the same as in the Belchamber case, the fundamental question is the same and the defendant organisation relies on the arguments which prevailed in that case. While the organisation does not contend that the Belchamber decision governs the present case, it points to the close ties which bind the defendant organisation to the United Nations; the complainants on the other hand dispute that there is any special relationship. What this Tribunal considers to be significant is that the defendant organisation has not drawn up staff regulations of its own but has provided by a decision of the Contracting Parties made on 3 December 1970 for the application of the United Nations Staff Rules and Regulations. This Tribunal would therefore hesitate to depart from any interpretation which had been placed upon any regulation by the United Nations Tribunal. The fundamental question in issue cannot, however, be decided as a matter of pure interpretation.

6. The qualifications referred to in paragraph 2 above can be understood only in the light of a description of their background. It is not disputed that under their contracts of employment officials in the General Service category (created in 1951) of the Geneva organisations are entitled to be paid on a scale fixed by their executive heads in their discretion to conform with the best prevailing local practices in Geneva. This is a very simple idea but it has proved in practice very difficult to give effect to. The executive head would naturally employ experts to ascertain the best prevailing local practices and to construct therefrom a salary scale appropriate to his organisation. The experts conducted surveys and devised methodologies, but were not always in agreement either about the correct methodology or about the figures to be derived from it; the effect on the organisation's wage scale could vary by as much as 30 per cent.

7. In these circumstances it would be natural for an executive head to contact his staff association in order to ascertain their views and, if necessary, negotiate with them to reach an agreed figure. This is something which a prudent executive head might do even if contact was not prescribed by the staff regulations. But in fact Article VIII of the Staff Regulations of the defendant organisation provides that a Staff Council elected by the staff shall be established for the purpose of ensuring continuous contact between the staff and Director-General; and Rule 108.1 provides that the Staff Committee shall be consulted on questions of policy on inter alia salaries. Article VIII provides also for a Joint Advisory Committee which under Rule 108.2 is to be composed of a chairman selected by the Director-General from a list proposed by the Staff Council, of four members representing the Staff Council and of a like number representing the Director-General. It is convenient to refer to these provisions in general (unless it should be necessary to refer to a specific rule) as Article VIII.

8. There was however a difficulty. There were seven Geneva organisations and it was manifestly desirable that there should not be seven different and competing salary scales. All the seven had staff associations and some sort of provision for consulting them, but the provisions were by no means in the same terms. It would be highly improbable that seven different bodies engaged in separate discussions about figures, their only guiding light being a formula wide enough to permit a divergence of 30 per cent, would all come up with precisely the same figure. There were other subjects besides salaries on which divergences of practice between different organisations would be undesirable. Consequently the organisations have entered into a network of agreements between themselves to promote co-ordination. The name given to this network is "the common system". It is not an idea which has as yet been given complete legal precision, but it embodies a policy to which the organisations attach the greatest importance and to which as a general idea the staff associations have shown no objection; the extent to which they accept its products, such as the ICSC (International Civil Service Commission), is a different matter.

9. At the latest by 1956 the common system had apparently been accepted by both sides in relation to General Service category salaries in Geneva. But no provision was made in the separate sets of regulations of each organisation for securing uniform decisions. So far as each set of regulations was concerned, the common system did not, and still does not, exist. The executive heads could of course agree among themselves that their decisions should be uniform; then from the practical point of view all that they needed to know was that the decision would not be one against which any of their staffs would rebel. For this purpose, it seems, they created in 1956 a joint inter-agency committee composed of representatives of themselves and of the staffs of the Geneva organisations. The dossier contains no details of its composition. In the argument of the United Nations in the Belchamber case it is said to have been "analogous to" the Joint Advisory Committee provided for in their Article VIII. If, however, there were four members on each side, it does not appear who they were nor how they were appointed nor who the chairman was.

10. However it was constituted, this emanation of the common system, as it appears to be, worked satisfactorily; an agreement on the salary scale was reached and the Director-General gave effect to it as from 1 January 1957 in the decision which he promulgated under the appropriate regulation. Between then and 1976 there was a number of

agreements reached in the same way by joint bodies, representing both sides of all the Geneva organisations, about whom the dossier contains no details; one must presume that they were constituted ad hoc and that both the executive heads and the staffs were content with their composition. There was often hard bargaining, there were technical difficulties about methodologies to be overcome and the course of the negotiations did not always run smooth; but except in one case they succeeded. In the excepted case the negotiations did not reach finality and the executive heads fixed a midway figure which was accepted. Over the period the negotiations averted one strike in 1967 and settled another in 1976.

11. An up-to-date picture of the working methods used by this type of joint body is given in the minutes of a "Plenary Meeting", headed as being of Representatives of the Executive Heads of the Staff of the Geneva Organisations. It was held on 22 April 1976 and was one of those which led to the April Agreement. The executive heads had appointed as "sole negotiator" an Assistant Secretary-General of the United Nations and he was in the chair; the staff associations each had two representatives and a "spokesman" whom the chairman began the meeting by thanking for his "effort to find a solution acceptable to all parties concerned". The chairman informed the staff representatives that their last proposals had been thoroughly examined and he presented a second draft for their consideration. This draft specified increases in the existing salary scales by different percentages for the different grades and new rates for dependency allowances. Commenting on the text of the staff draft, he stressed that the establishment of salary scales could not be based on agreement between the executive heads and the staff because the establishment was within the exclusive authority of the executive heads. But he "reiterated that his mandate was to negotiate on behalf of all organisations to find a solution to outstanding problems"; his signature as negotiator would show that a joint conclusion was reached between him and the staff representatives. He appealed again for a realistic effort on their side to move towards a reasonable solution. The meeting was suspended so that the second draft by the Administrations could be examined and the staff representatives later presented a third draft. They said that they would no longer insist on having the agreed text signed by the executive heads. Apart from this formal point as to signature, the substance of the meeting is typical of wage-bargaining.

12. The decision impugned was reached differently. It followed on the intervention of the ICSC as a body designed to take charge of the surveys and produce recommendations for fixing the salary scales. The staff regulations of the Geneva organisations were not however adapted to take account of the Commission's activities. The organisations who created it seem to have intended that its recommendations should have a status higher than those produced by the old surveys and that they should not be the subject of negotiation, or at any rate of the sort of negotiation practised up to 1976. The staff associations, however, thought otherwise.

13. This history explains the language of the complainants' two main contentions, which are set out in D(b) and (c) of their Statement as follows:

(b) that the 1968-69 agreements and the April Agreement "qualified, on a contractual basis, the independent authority for the executive heads to set the General Service scales under the rules of the common system";

(c) that, therefore, the complainants' "contractual rights under the ... Staff Rules extend, aside from the actual rates of remuneration, to the agreed methodology for surveys, to the agreed procedure for processing data arising out of surveys and to [their] right to negotiate [their] salary with [their] employer on the basis of the results of such surveys".

To sustain these contentions the complainants must take two steps. Their first step must be to establish that the agreements they specify in the first contention cover the subjects set out in the second contention. If they succeed in this, their second step must be to establish that they are entitled to enforce these agreements as a part of their contracts of employment over which alone the Tribunal has jurisdiction.

14. To establish the first step the complainants rely upon the facts and reasoning contained in an opinion dated 16 May 1978 and given by the members of this Tribunal personally on questions put to them in accordance with the decision taken by the Governing Body of the International Labour Office at its 205th Session (February-March 1978). In this opinion the members, who were not confined within the limits of the Tribunal's jurisdiction, reached the conclusion that the April Agreement either created or recognised a clear understanding that the executive heads would not exercise their power of settling salary scales without prior negotiation with the staff associations. The Tribunal sees no reason to differ from this conclusion. Accordingly, in relation to the promise to negotiate, the complainants have taken the first step.

15. They have not however taken that step in relation to their contention that the April Agreement bound the executive heads to use the 1968-69 methodology in all subsequent surveys until they denounced the agreement. This point was not considered in the opinion. It is not covered by the language of the April Agreement and in the opinion of the Tribunal no such term can be implied into it. An important consideration in the case of the promise to negotiate is that in 1976 the organisations themselves sought negotiation in order to extricate themselves from the difficulties created for them by the 1975 survey; this does not apply to any supposed agreement about methodology.

16. The question is therefore whether in relation to the promise to negotiate the complainants can take the second step and establish that the promise has become a part of the contract between them and the defendant organisation. An obligation put upon an employer to negotiate before introducing changes, such as an increase or diminution of salary, into the individual contract of employment is a common feature of collective agreements. There is no reason in law why such an obligation should not be made a term of the individual contract of employment. But its inclusion in such contract would be sufficiently unusual to mean that it would either have to be specifically expressed in the contract or very clearly implied. Merely because the term is contained in a collective agreement, it cannot be deemed ipso facto to be incorporated in the individual contracts of all those affected by the collective agreement.

17. In the present case no such term is expressed in the complainants' contracts of employment. Since it would be a term of general and not of individual application, its expression would require the amendment of the Staff Regulations. This is a formal process and it is not contended that it has been complied with in the present case.

18. As to the clear implication, in the opinion of the Tribunal there are no grounds which would justify any implication in the complainants' contracts of employment. The Tribunal draws attention in particular to three points. The first is that the obligation to negotiate would arise out of a collective agreement made between the executive heads and the staff associations of seven separate organisations. If it was introduced into the individual's contract of employment, what would it mean? That ICITO-GATT was to negotiate with its own staff association in defiance of the common system? Or that it was to negotiate in conjunction with the other six organisations? What then if one or more of the other executive heads refused to negotiate? The second point is that Article VIII of the Staff Regulations (referred to in paragraph 7 above) expressly provides for the Director-General to consult the Staff Committee. This makes it difficult to imply a further term requiring him not merely to consult but to negotiate, and even more difficult to imply a term requiring him to combine with other executive heads to negotiate with a group of staff associations. Thirdly, it must be noted that a collective agreement such as the April Agreement is not in need of incorporation into a contract of employment so as to make it effective. The sanction for the breach of it is the occurrence of the labour trouble which the agreement was designed to avoid.

19. But the Tribunal must consider another view of the case introduced by the argument of the United Nations and adopted by the defendant organisation. These organisations, for extraneous reasons which appear good and sufficient to them, do not wish to be associated in any way with the concept of collective bargaining, which is what the processes described in paragraphs 6 to 11 above are commonly called. They contend that collective bargaining does not apply to public employees. This is disputed by the complainants, but since the dispute does not relate to any issue in this case the Tribunal will not pursue it. What the Tribunal is concerned with is the consequence of the organisation's denial that it has engaged in collective bargaining. The denial leads naturally to an explanation as to what it and the other organisations thought they were doing between 1956 and 1976. The explanation advanced by the organisation is that it was engaged in consultations under Article VIII, presumably either with its Staff Committee or with a joint Advisory Committee, it has not specified which. It would seem to follow that the other six organisations must likewise have been engaged in six other sets of consultations with the various bodies specified in their staff regulations. This explanation cannot but be agreeable to the complainants since (although they do not accept the denial which leads to it) it offers them a way into the contract of employment which would otherwise be closed to them. For it cannot be and is not disputed that the organisation's obligation under Article VIII, whatever it may be, is one that forms part of the complainants' contracts.

20. Thus on this way of looking at the case the question becomes whether or not the organisation committed a breach of Article VIII. The facts are not in dispute and both sides assert that consultation and negotiation are only two words for the same thing. Yet the organisation alleges that the Director-General offered to consult/negotiate before making the decision impugned, while the complainants assert that the Director-General was unwilling to consult/negotiate at all. This confrontation would be difficult for the Tribunal to resolve, were it not that the Tribunal does not share the view of both parties that there is no difference between consultation and negotiation.

While in practice the two often overlap there is a clear distinction between them.

21. The distinction lies in the situation. If the end-product of the discussions (to use a wide and neutral term) is a unilateral decision, "consultation" is the appropriate word. If it is a bilateral decision, i.e. an agreement, "negotiation" is appropriate. Decisions are reached after consultation; agreements after negotiation. Negotiation starts from an equality of bargaining power (i.e. legal equality; economic strength may be unequal); consultation supposes legal power to be in the hands of the decision-maker, diminished only by the duty to consult. Where there is only a simple obligation to consult, the decision-maker's duty is to listen or at most to exchange views. The object of the consultation is that he will make the best decision and the assumption is that he will not succeed in doing that unless he has the benefit of the views of the person consulted. The object of negotiation on the other hand is compromise. This object would be frustrated if either party began with the determination not to make any concession in any circumstances, just as the object of consultation would be frustrated if the decision-maker began with a determination not to be influenced by anything that might be said to him. On both these hypotheses there would be a lack of good faith.

22. There is however a situation midway between the two considered in the preceding paragraph. This is where the purpose of what is called "consultation" is not merely to furnish the decision-maker with the other party's views but also to give him the opportunity of obtaining the assent of the other party to the decision proposed, maybe at the cost of some concessions. When the discussion moves into the second phase it becomes negotiation because it is then in the field of equality of bargaining power. The decision-maker may have the contractual power to command obedience, but he cannot command willing co-operation. Maybe he cannot command co-operation at all. If there is a strike and he is unwilling to discipline the strikers he must settle the dispute by negotiation in which he will start on an equality with the staff. This was the situation in 1976. The ordinary employer, who has no contractual power of fixing wages, is always in this position and always has to negotiate in order to get any agreement at all. The organisations on the other hand, with their reserve power of unilateral decision, are only in that position if they put themselves there voluntarily and because they want an agreed solution in preference to one that is imposed.

23. The Tribunal is satisfied from the history of the discussions between the executive heads and the staff associations up to 1976 that the discussions were negotiations in the fullest sense. They were not merely joint consultations in which the object of each side was to ascertain and understand the position of the other. They went further into the realm of compromise. The detailed figures set out in the agreements between 1951 and 1976 could never have been reached without compromise. The record shows that the executive heads did not exercise unilaterally their contractual powers until after the possibilities of compromise had been exhausted. An obligation to negotiate in good faith is not violated by a refusal to make a concession on a specific point; it is violated if from the outset there is a firm determination not to compromise at all. The successful outcome of the negotiations in April 1976 was due, as the Director-General of the International Labour Office said at the time, to "a spirit of compromise on both sides". The spirit of compromise is of the essence of negotiation; it may be born during consultations, but as soon as it emerges and is at work, the borderline between consultation and negotiation is crossed.

24. Basing themselves upon the organisation's assertion that in all the matters recorded in paragraphs 6 to 11 above and right up to April 1976 it was acting under Article VIII and not otherwise, the complainants argue that, by its actions performed consistently over a long period of years, the organisation has given a meaning to the obligation to consult, maybe wider than that which it would literally bear, wide enough to commit the Director-General to exhausting the possibilities of compromise before reaching a unilateral decision to fix wages. The complainants' contend that this obligation, so interpreted, was broken.

25. The Tribunal finds that, if the obligation to consult under Article VIII is literally interpreted, it was not broken: but that, if it is interpreted in the sense contended for by the complainants, it was broken. The literal interpretation is that set out in paragraph 21 above, i.e. to listen and to exchange views. The use of the word "joint" in Staff Rule 108.2 to describe the administrative machinery to be set up under that rule does not change the consultation from an interchange of views into negotiations. The organisation gave ample opportunity for consultation both before and after the ICSC made its recommendations and was in full possession of the staff association's views; any further consultation would without negotiation have been quite useless.

26. If the obligation under Article VIII extends to negotiation, the relevant subject matter of negotiation under Staff Rule 108.1(a) is any question relating to policy on salaries. It would not be open to the Director-General to close part of this field and label it not negotiable. There is no evidence that the complainants' staff association were

unwilling to join any negotiations or discussions which covered the whole of the field; their refusal was to negotiate within the framework of the ICSC recommendations. If the Director-General was prepared to negotiate (as distinct from consulting), which is doubtful, he was not prepared to discuss anything except the application of the ICSC recommendations or perhaps the possibility of "extreme error" in them.

27. So the question, if it has to be decided within this framework, would be whether the duty of consultation in Article VIII had by 1977 been qualified by the practice of the preceding ten years or more and expanded to embrace negotiation. If negotiation is different from consultation, it is difficult to see how the change could be made otherwise than by an amendment made in accordance with the Staff Regulations. If what is relied on is the practice of the organisation, it would be necessary to examine minutely how the machinery of Article VIII was used so as to see what implications could properly be drawn.

28. But there is not a shred of evidence in the dossier that the machinery of Article VIII was ever used at all. There is no record in the dossier of any meeting either between the executive head and the Staff Committee (whether of the United Nations or of the defendant organisation) under Staff Rule 108.1, or of the Joint Advisory Committee under Staff Rule 108.2. In the submission mentioned above it is said that the joint working bodies and joint meetings (being those referred to in paragraphs 6 to 11 above) were "conducted within the legal framework of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2". Of the United Nations or of the defendant organisation or of both? And what of the other Geneva organisations? The Tribunal finds no evidence that the joint inter-agency bodies which successfully negotiated the April Agreement and its predecessors were acting or purporting to act as the organs of any particular organisation or under any particular set of regulations. In this situation the Tribunal cannot found its judgment on the hypothesis that in the discussions between the executive heads and the staff associations up to 1976 nothing was involved except the application of Article VIII.

29. Accordingly the Tribunal will give judgment in the terms of the reasoning set out in paragraphs 16 to 18 above. It has been recorded that the three members of the Tribunal, acting personally, have expressed their opinion that the April Agreement either created an obligation on the executive heads to negotiate en bloc with representatives of their staff associations or recognised that one was already in existence. This forms no part of the formal conclusion of the Tribunal in this case, being a matter outside its jurisdiction. The conclusion of the Tribunal in this case is that the breach of such an obligation, if any such obligation exists, would not be a non-observance of the complainants' terms of appointment or of any staff regulation.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

Updated by PFR. Approved by CC. Last update: 7 July 2000.