*Registry's translation of 8-16,*
*the French text of that part*
*alone being authoritative.*

**SEVENTY-FIFTH SESSION**

# *In re* ALMAZAN-AGUIRRE, BARREDA, BARRIENTOS and CHACON

**Judgment 1279**

THE ADMINISTRATIVE TRIBUNAL,

Considering the common complaint filed by Mrs. Miriam Magaly Almazán-Aguirre, Mr. Julio Roberto Barreda, Mr. Edgar Barrientos and Mr. Edwin Rolando Chacón against the Pan American Health Organization (PAHO) (World Health Organization) on 11 December 1991 and corrected on 14 April 1992, the PAHO's reply of 5 August, the complainants' rejoinder of 29 September and the Organization's surrejoinder of 21 October 1992;

Considering the applications to intervene filed by:

P. Aguilar

P. Aguirre

M.E. Alborna

R. Aldo

C. Alegre

S. Alfonso

M.E. Alva

N. Anamisis

C. Anderson

M. Araujo

R. Arauz

L. Argueta

Y. Arteta

R. Avila

R. Bartucevic

L. Beckner

A. Beltran

E. Benzi

P. Berg

N. Bergara

L. Blanco

B. Bocanegra

L. Bocanegra-Vasquez

J. Bolanos

L. Bonilla

I. Bradshaw

G. Burbano Mora

A. Burns

P. Cabrejo

B. Caceres

L. Callaghan

N. Candia

M.T. Carrillo

N. Castro

J. Ceruti

C. Chand

S. Chavarry

D. Cheng

J. Claudio

R. Coo

M.M. Craft

C. de la Barra

P. de los Rios

A.M. Doria-Medina

J.E. Duran

A. Ellauri

A. Erazo

A. Espinal de Russo

J. Eybers

N. Fabara

P. Fano

M.E. Farjam

A. Farrington

H. Fernandez

K. Foster-Tallon

A. Freeman

C.L. Fretwell

E. Fuentes

M.C. Gamarra

F. Garra

V. Garrido

G. Gomez de la Torre

A.M. Gooch

A. Grover

R. Harpster

M. Hazlewood

R. Heraud

V. Herrera

A. Huaman

V. Huizenga

E. Joskowicz

E. Kanashiro

M. Kelly

J. Khoddami

M. La Cruz

R. Leiva

M. Leon-Bedoya

A.V. Leone

M. Linares

E. Lopez

F.W. Lopez

P. Machicado

D. Mantilla-Hoyer

F. Matho

I. May

I. Medina

A.M. Melas

L. Mena-Placeres

C. Mendez

P. Mendez

V. Merino

M. Mesa

A.M. Metz

S. Mey-Verme

B. Molina

L. Mollinedo

N. Montanaro

M. Morales

S. Moran

M. Moreira

M. Moreno

H. Munoz

L. Nedjar

J. Newhall

M. O'Brien-Goldie

C. Oliva

D. Onetti

P. Ortega

M.V. Palazuelos

F. Palenque

E. Parham

A. Perdomo

M. Perez

T. Perez

C.A. Ponze

L. Proano

S. Reichert

C. Reid

O. Ringgold

N. Rivera-Hercules

C.I. Rodriguez

I. Rodriguez

S. Roggiero

F. Rojas

M.T. Rosales

I. Ross

L. Rossignuolo

C.I. Rubiano-Lisiewski

J. Russell

C. Saenz

M. Sainz

R. Salinas

R. Sanchez

S. Sanchez

N. Savopoulos

M. Sguaitamati

G. Stukey

F. Suchicital

A. Tafur

C. Tejada

M. Todman

N. Toro

I. Torres

M. Vaccarezza

M. Valdivia-Delgado

C. Vargas

A. Vazquez

R.M. Villalta

A. Yath-Cruces

L.F. Zelaya

Considering the PAHO's observations of 20 November 1992 on the applications to intervene;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 2, of the Statute of the Tribunal, Article 17 of the Rules of Court, Articles III, 3.2, and VIII, of the PAHO Staff Regulations and PAHO Staff Rules 580.1 and 1230.7;

Having examined the written submissions and disallowed the complainants' application for hearings;

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

A. PAHO Staff Regulation 3.2 reads:

"... The salary and allowance plan shall be determined by the Director following basically the scales of salaries and allowances of the World Health Organization, provided that for staff occupying positions subject to local recruitment the Director may establish salaries and allowances in accordance with best prevailing local practices ..."

The PAHO, which has its headquarters in Washington, forms part of what is known as the United Nations "common system".

As was explained in Judgment 1160 (in re Banota and others) under A, the salary scales that apply to staff of the United Nations agencies in the General Service category, who are locally recruited, are reviewed every few years on the strength of comprehensive surveys of local practice. Interim adjustments are made in between on the strength of "mini-surveys". The International Civil Service Commission (ICSC) approved as from 1 January 1985 a new "general methodology" for making the surveys and the Consultative Committee of the United Nations on Administrative Questions (CCAQ) has published a Manual on how to apply it. Paragraph A.2.2 of the Manual says that at each duty station a body known as the Local Salary Survey Committee should make the arrangements and that if none yet exists the "designated agency" for the duty station should establish one. The World Health Organization (WHO) is the "designated agency" for Washington.

Having made a comprehensive survey of salaries in Washington in the second half of 1990, the Local Salary Survey Committee established by the WHO recommended in its report of 14 November 1990 new scales for General Service category staff that showed a weighted average increase in salary of 19.14 per cent.

The Director of the PAHO disapproved the recommended scales and explained why at a meeting on 19 December 1990 with staff representatives. The upshot was that he lowered the average increase to 11.25 per cent. He announced the new scales, which took effect as from 1 August 1990, by general information bulletin HQ-91-13 of 11 February 1991. They were first reflected in pay slips dated 27 February and 7 March 1991.

The new scales at once aroused discontent among the staff. In a referendum on 14 February and at an assembly on 19 March they voted strongly in support of their representatives' objections.

The complainants are all officials of the PAHO in the General Service category. They hold contracts with the

PAHO and are subject to its Staff Rules and Staff Regulations. No fewer than 128 holders of appointments, including the complainants, wrote letters dated 10 April 1991 to the Director. They said:

"1. Under Staff Rule 1230.7.2 of the Pan American Sanitary Bureau [the secretariat of the PAHO], I have the honour to submit to you a request concerning my appointment status, with a view to obtaining a final action within the meaning of Staff Rule 1230.7.1 or Staff Rule 1230.7.2, which will enable me, if necessary, to have recourse to the means of appeal available to me under Staff Rules 1230.1 and 1240.

2. My normal pay slip for the month of February 1991, combined with the exceptional pay slip for the adjustment paid to me in early March 1991, shows, for the period commencing 1 August 1990 (effective date of the scale) until the month of February 1991 inclusive, a base salary corresponding to the scale appearing in General Information Bulletin No. HQ-91-13.

3. It appears to me that the individual decision to apply to my particular case, as from the month of August 1990, the salary scale mentioned in the preceding paragraph, is illegal since the whole process resulting in the establishment of the above-mentioned salary scale has been conducted in violation of the General methodology for surveys of best prevailing conditions of service at non-headquarters duty stations approved for promulgation, effective 1 January 1985, by ICSC, as well as of the CCAQ Standard methodology.

4. Inter alia, it seems to me that:

- some employers have been substituted,

- some outside working hours, allowances and benefits have not been taken into account (nor even quantified in some instances) for comparison purposes, and

- a method has been used for constructing the scale (i.e. setting the salary at each grade and step), in disregard of all the relevant applicable rules.

[Paragraphs 5 and 6 are about access to background documents.]

7. I have obviously suffered prejudice from the decision referred to in paragraph 3 above, since the scale which is applied yields at my grade and step, a lower salary than that which would have resulted from the application of a scale established in compliance with all the relevant applicable rules.

8. These, in summary, are the main reasons for my requesting you to review the decision to apply to me as from the month of August 1990 until the month of February 1991 inclusive, the scale appearing in General Information Bulletin No. HQ-91-13, and not a scale established in compliance with all the relevant applicable rules, especially as concern the three issues mentioned in paragraph 4 above. On the assumption that decisions concerning each month following February 1991 will be merely a repetition of the above decision - which was the case in March 1991 - the present request should be construed to cover all such decisions.

9. It is my hope that, in the final action you take within the meaning of Staff Rule 1230.7.1 or of Staff Rule 1230.7.2, you will give favourable consideration to my request, taking into account the arguments set forth above, and that you will thus set the matter back into conformity with the law. However, should you not deem it possible to grant that request, I herewith solicit your agreement to consider the above mentioned final action as a final decision within the meaning of Staff Rule 1240.2, so that I may be entitled to bring my case directly before [the Tribunal] without going through the competent Board of Appeal. ...

10. Finally, if you would have objections with my interpretation of the Staff Regulations and Rules concerning appeals, I would be obliged to you if you could advise me so at your earliest convenience, taking into account any potential deadlines, since it is my definite and irrevocable intention to lodge an appeal and to bring my case eventually before [the Tribunal], unless I obtain total satisfaction through internal appeal."

The president of the executive committee of the PAHO/WHO Staff Association and the chairman of the Washington local organization forwarded the 128 letters to the Director on 11 April.

In individual replies dated 25 April the Chief of Personnel summed up the "long process" that had led to the announcement of the salary scales on 11 February 1991. He went on:

"We wish to reconfirm that the above actions constitute a final decision, taken in consultation with WHO. It is a matter of record that WHO Headquarters' decision on the Washington survey has been taken in the light of the Survey Committee recommendations and has taken into account the strict application of the Salary Survey Methodology Manual. Furthermore, the scale has already been homologated by the ICSC and distributed to other agencies of the UN System. We see no reason to review the decision ... [or] to provide a waiver of internal means of appeal ..."

By letters of 26 April to the secretary of the headquarters Board of Appeal of the PAHO each of the four complainants gave notice of intent to appeal under Rule 1230.7.3 against the "individual decision, reflected on my pay slips dated 27 February and 7 March 1991, to apply to my particular case, as from the month of August 1990, the salary scale appearing in General Information Bulletin No. HQ-91-13 dated 11 February 1991, as confirmed by the letter dated 25 April from the Chief of Personnel rejecting my written request relating to my appointment status, submitted on 10 April 1991 under Staff Rule 1230.7.2".

The complainants filed formal statements of appeal on 14 May 1991.

In a single report dated 1 October 1991 the Board of Appeal unanimously held the four internal appeals to have been filed in time and therefore to be receivable. On the merits it recommended treating the new scales as mere interim adjustments as from 1 August 1990 and having the Local Salary Survey Committee draw up new scales to apply eventually as from the same date.

By letters of 26 November 1991 the Director informed each of the complainants that he rejected the Board's conclusion on receivability and recommendations on the merits. Those are the decisions that the complainants are impugning.

B. The complainants contend that since they have exhausted the internal means of redress their complaint is receivable under Article VII(1) of the Tribunal's Statute.

On the merits they submit that the new salary scales are flawed in several respects. Their main plea is breach of the methodology approved by the ICSC and of the Manual adopted by the CCAQ that gives effect to it. In their submission the methodology is binding on the PAHO. In breach of it two of the five local employers originally taken for the purpose of comparison were later replaced with two that did not grant such good terms of employment to its employees, and the total number of working hours of local employees and some of the benefits and allowances they enjoyed were discounted.

Secondly, they plead breach of their right under Article VIII of the Staff Regulations to take part through representatives in negotiations or at least consultations on the new scales.

They seek the quashing of the decisions they impugn; the application to them as from 1 August 1990 of the salary scales recommended by the Local Salary Survey Committee in its report of 14 November 1990; the carrying out of a new survey with particular regard to the provisions of the methodology they contend have been disregarded; the application to them of the resulting new scales as from 1 August 1990; and awards of 20,000 French francs each in costs.

C. In its reply the Organization argues that the complaint is irreceivable. Under Staff Rule 1230.7 an official must submit a written statement of his intention to appeal to the Board of Appeal within sixty calendar days of notification of the action he objects to. In the instant case that time limit ran from the publication in the General Information Bulletin on 11 February 1991 of the Director's decision on the new salary scales. The decision was final and notified to all General Service staff at Washington in writing. Though the last day on which an appeal against that decision would have been receivable was 12 April the complainants did not go to the Board until 26 April 1991.

The Board's position was unclear: it acknowledged that the Chief of Personnel's letter of 25 April 1991 confirmed the general decision of 11 February, yet it overlooked the mandatory character of the sixty-day limit. The PAHO describes the complainants' internal appeal against the letter of 25 April as an "ingenious device" to mask their failure to act in time. Judgment 1160 is about a similar case in which the complainants also tried - to no avail - to get round the time bar by asking for a "final action" when one had already been notified.

In subsidiary pleas on the merits the Organization denies breach of the rules and methodology in making the 1990 salary survey. The substitution of two employers was dictated by the methodology to ensure that the comparators included a reasonable cross-section of economic sectors without excluding other organisations that the PAHO competes with for staff. It was proper for the survey to omit such entitlements as home leave and the education grant since they are not ordinarily extended to locally-recruited staff.

The complainants' allegation of breach of Article VIII of the Staff Regulations is "absurd". That article provides for participation by the staff in discussion on relations with management. Salary matters come under Article III, which makes no provision for staff consultation. In any event the staff have their own representatives on the Local Salary Survey Committee and so amply voiced their views.

D. In their rejoinder the complainants comment on the appeal procedure. As the case law requires, they had to wait for individual decisions - their pay slips - applying the general decision of 11 February 1991. It was to ensure that they had exhausted the administrative channels open to them that they asked on 10 April 1991 for review of the individual decisions announced in their February pay slips. Not until 25 April did they have an assurance - from the Chief of Personnel - that they had exhausted the available channels, and they lodged their appeals the next day. Whatever the final decision may have been - whether it was the individual decision notified in their pay slips dated 27 February, the Chief of Personnel's letter of 25 April or even the bulletin of 11 February - their complaints are receivable. Precedent has it that even a mis-

directed appeal is receivable if filed before expiry of the time limit. That would make timely appeals of their letters of 10 April. Besides, the Administration was bound in good faith to tell them at once, as they asked, that it rejected their interpretation of the appeals procedure so that they might appeal in time. In any event their complaints are not time-barred as to salary payments for March and later months since application of the offending scale recurs monthly.

Their case was unlike those the Tribunal ruled on in Judgment 1160. It was illogical of the PAHO to describe their letters of 10 April 1991 as an ingenious device while alleging that they recognised as final the general decision of 11 February. Had they done so, all they had to do was file a statement of appeal, which would have been easier than drafting the letters to the Director. In any event those letters stated their irrevocable intention of appealing and did so in time.

On the merits they observe that the defendant drew a wrong conclusion from the evidence in assuming that the new scale complied with the prescribed methodology and the Fleming principle. They reject the reasons given for the choice of comparators: the overriding consideration was to choose employers who offered less favourable conditions than others in the same category. As to the breach of Article VIII of the Staff Regulations they reject the PAHO's arguments: the staff had a right to be heard after the Organization decided to reject the Local Salary Survey Committee's recommendations; being undeniably a matter of concern to staff, salaries obviously come under "policies relating to staff questions".

They press their claims and increase the amounts they seek in costs to 25,000 French francs for each of them.

E. In its surrejoinder the Organization submits that the complainants raise no new issues of fact or law in the rejoinder. The final decision within the meaning of Staff Rule 580.1 was that of 11 February 1991. Since the complainants addressed their letters of 10 April to the Director of the PAHO rather than to the Board of Appeal those letters do not qualify under the rules as appeals. The Organization presses its pleas on the merits.

CONSIDERATIONS:

1. The complainants belong to the General Service category of staff of the Pan American Health Organization and are stationed at PAHO headquarters in Washington. They want the quashing of decisions applying to them a new salary scale that came in as from 1 August 1990 and was published in a General Information Bulletin, No. HQ-91-13, of 11 February 1991.

2. After publication of the scale the staff were first paid the adjusted sums in salary for March 1991 as shown in pay slips dated 27 February. Arrears for the earlier period were reflected in pay slips dated 7 March.

3. On 10 April 1991 the complainants sent the Director of the PAHO identical letters challenging the new scale. They asked him to review the matter before taking a final decision within the meaning of the Staff Rules and, if he

refused, to waive the requirement of internal proceedings so that they might go straight to the Tribunal. They concluded:

"Finally, if you would have objections with my interpretation of the Staff Regulations and Rules concerning appeals, I would be obliged to you if you could advise me so at your earliest convenience, taking into account any potential deadlines, since it is my definite and irrevocable intention to lodge an appeal and to bring my case eventually before the ILO Administrative Tribunal, unless I obtain total satisfaction through internal appeal."

4. The Chief of Personnel answered in letters of 25 April 1991 that the scale published on 11 February 1991 was the final decision, that the Administration had no intention of reviewing the matter and refused to waive the internal appeal procedure, and that the report on the salary survey had already been communicated to the staff representatives and "any other correspondence could be made available to the Board of Appeal, as necessary".

5. On getting those letters the complainants filed suit with the Board of Appeal on 26 April. In the ensuing proceedings the defendant Organization objected that the final decision within the meaning of the Staff Rules had been the bulletin of 11 February 1991, the time limit set in Rule 580.1 had expired at 12 April and the appeals were out of time and therefore irreceivable.

6. The Board reported on 1 October 1991. In the introduction it said that it had given "careful attention" to the issue of receivability. It went over the features of the case set out above and unanimously held that, the appeals being receivable, it must go into the merits.

7. The Director having rejected the Board's recommendations on 26 November 1991, the complainants came to the Tribunal on 11 December. The Organization has raised the preliminary objection that their complaint is irreceivable on the grounds that the Board of Appeal was wrong to declare their internal appeals receivable.

Receivability

8. In their rejoinder the complainants maintain that their complaint is receivable and put forward three main pleas in reply on that score.

The first is that the scale in the bulletin of 11 February 1991, since it affects the provisions of the Staff Rules, was not challengeable anyway. Such a general measure must ordinarily be followed by individual decisions. In this instance they took the form of the pay slips, and the first of them did not go out until 27 February. So the time limit cannot have started to run before the date of receipt of the pay slips and the internal appeals were in time. In Judgment 624 (in re Giroud No. 2 and Lovrecich), say the complainants, the Tribunal held that appeals lodged against a salary scale before it had prompted individual decisions had been premature. And in many other judgments the Tribunal treated pay slips as challengeable administrative decisions.

Secondly, the complainants argue that even if the publication of the scale on 11 February 1991 set off the time limit for appeal it did not expire until 12 April, and good faith requires treating their appeals as receivable in that their letters of 10 April 1991 gave clear notice of their intention of appealing to the competent body.

Their third plea is that, even if the first two fail, they may in any event rely on Judgments 323 (in re Connolly-Battisti No. 5) and 978 (in re Meyler), in which the Tribunal held that recurring decisions set off a new time limit where the general decision they were based on was in itself unlawful. And in this case it was.

9. The Tribunal's first comment on those pleas is that the purpose of time limits is to make for the stability in law that both sides require. Management has an interest in knowing that the decisions it takes are beyond challenge; and the staff too need to know, especially when administrative action is taken at successive stages from the general to the particular, just when they may act without fear of having their suit rejected as premature or time-barred.

10. The rules on the internal appeal procedure are:

Rule 1230.7.1:

"No staff member shall bring an appeal before the Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

Rule 1230.7.2:

"If the staff member has submitted a written request relating to his appointment status, the request shall be deemed to have been rejected and such rejection shall be subject to appeal as if final action had been taken on it as in Rule 1230.7.1 above if no definite reply to that request has been made within:

(1) two months for staff at Headquarters;

(2) three months for staff assigned to other duty stations."

and Rule 1230.7.3:

"A staff member wishing to appeal against a final action must dispatch to the Board, within sixty calendar days after receipt of such notification, a written statement of his intention to appeal, specifying the action against which appeal is made ..."

11. It is plain from those provisions that appeal will lie to the Board of Appeal only on two conditions: one is that all the "existing administrative channels have been tried", and the other that the action complained of has become final, which presupposes that the staff member has received written notification of it.

12. On the facts as set out above the complainants strictly complied with those requirements. They were told of the new salary scale by the bulletin of 11 February 1991 and got individual decisions of 27 February and 7 March 1991 in their pay slips. On 10 April they wrote to management citing Rules 1230.7.1 and 1230.7.2 and seeking review of the individual decisions or else an assurance that they had exhausted "all the existing administrative channels". Their letters evinced their intention of going to the Board of Appeal as soon as possible.

13. According to the replies of 25 April from the Chief of Personnel he regarded the publication of the new scale as management's last word on the subject and expected the dispute to go to the Board of Appeal. Only after referral to the Board did the Organization first raise objections to receivability on the grounds that the appeals had been filed after the time limit set off by the general decision of 11 February.

14. The complainants did indeed have to write to the Administration before they might go to the Board since according to Rule 1230.7.1 no-one may appeal to the Board until "all the existing administrative channels have been tried". But that provision is inherently unclear in that it requires exhaustion of prior remedies without saying what they are. So the complainants were at pains to warn of their intention of going to the Board as soon as they had the assurance that they had exhausted such remedies.

15. The defendant was therefore not free in good faith to treat the complainants' internal appeals to the Board as being out of time by taking a date that made it impossible for them to satisfy the prior condition set in Rule 1230.7.1.

16. The conclusion is that the complaint is receivable.

The merits

17. The complainants put forward two main arguments on the merits:

(a) failure to observe the approved methodology of the International Civil Service Commission and the Manual of the Consultative Committee on Administrative Questions, and

(b) failure to consult the staff on a matter which concerned them, in breach of Article VIII of the Staff Regulations.

18. The binding nature of the methodology and Manual, though discussed by the PAHO, is not at issue in this case. The Organization decided to apply them in carrying out the survey and it is bound by its own decisions. In any event, it maintains that it applied both correctly.

19. Under the head of breach of the Commission's methodology the complainants raise two issues:

(1) the substitution of two comparator local employers for two chosen by the Local Salary Survey Committee; and

(2) failure to take into account for the sake of comparison the total hours of work of local employees and certain allowances and benefits such employees enjoy.

The substitution of local employers

20. The CCAQ's Manual prescribes a step-by-step plan to be followed by the Local Salary Survey Committee in application of the Commission's methodology. The selection of "comparator" local employers belongs to the first phase. The Manual states that the salary survey should where possible cover six to nine local employers. Five of them are to be chosen for the purposes of analysis - step C - and the initial construction of the salary scale - step D. The criteria to be met by each of those employers are set out at step A.5 as follows:

"(a) Employers selected should represent a reasonable cross-section of competitive economic sectors (including the public service or parastatal institutions), with no one sector unduly dominating the sample;

(b) The employers to be surveyed should have been established in the locality for several years;

(c) There should be a considerable degree of continuity in the employers surveyed from one survey to the next, with a majority of employers from the previous survey normally being retained for the analysis and salary scale construction;

(d) The employers chosen should have both an established salary structure and a personnel system, and should preferably have at least 20 employees engaged in office work;

(e) An employer who uses the United Nations salary scales as the primary basis for setting salaries should not be selected for comparison."

The Manual says that the search for suitable employers should begin by considering employers already used in previous or similar local salary surveys. Step A.5 ends with the "finalization of a list of six to nine employers to be surveyed" as well as a few names which the Manual says are useful to have in reserve.

21. In the 1990 survey nineteen employers were approached; eleven were chosen, and eight of those were kept for the survey. The list included the five comparators retained for final analysis in the 1986 survey. In that survey twenty employers had been approached and ten of them kept for the sake of comparison. According to the report on that survey the World Bank, the Inter-American Development Bank, the International Monetary Fund (IMF) and the Organization of American States (OAS) were put in the category of "international organisations" and the Organization for Personnel Management (OPM) and Fairfax County Government came under "Government". In the report on the 1990 survey, however, the comparator employers were not put into categories.

22. Of the eight retained for the survey in 1990 the Local Salary Survey Committee chose the following five for the final analysis and the construction of the salary scale:

Fairfax County Government Inter-American Development Bank

International Monetary Fund

Washington Gas and Light

World Bank

It did not include the Organization for Personnel Management or the Organization of American States, though they had been included for final analysis in the 1986 survey. The reason it gave in its report for its choice was that after considering different combinations of five comparators it found those five employers to provide the highest overall weighted average increase. It said: "Other combinations of employers would have reflected higher increases; however, the above combination [i.e. the five chosen] was retained in order to comply with the requirement in the salary survey methodology for non-headquarters duty stations that the retained employers should represent a cross section of the economy". The data on that combination, as against United Nations salaries in effect at 1 October 1989, provided an average increase of 18.88 per cent weighted by the number of staff at each grade.

23. The Administration substituted the Organization for Personnel Management for Fairfax County Government and the Organization of American States for the International Monetary Fund so as to yield an overall weighted average increase of only 12.2 per cent.

24. The first reason given by the Organization to justify such substitution is that the substituted employers were used in the last salary survey in Washington in 1986. That is not a valid reason: the Manual does not require that all the previous comparators be kept, but recommends that the majority normally be retained. And the Local Salary Survey Committee had indeed kept the majority.

25. The Organization further relies on the reasons given in the review of the Committee's recommendations by WHO headquarters in Geneva as approved by the Director of Personnel on 14 April 1991. The text of that review reads:

"After a thorough review of the LSSC report, it was concluded that the employers recommended for selection and retention closely followed the criteria developed in the local salary survey methodology. However, it was also considered that the employers to be retained should represent a reasonable cross-section of all economic sectors. Consequently, it was agreed to replace Fairfax County with OPM as it is one of the most important employers in Washington and in fact represents the US government as a whole.

The excessive weight of international financial institutions in the survey was also closely examined. In HQ's view the IMF and the World Bank could be considered for purposes of the survey as one employer due to their concerted movement in salaries, the similarity in their salary scales and the fact that both institutions undertake a joint salary survey for salary setting purposes. Consequently, due to its size (more than 6000 staff) and its dynamic hiring policy the World Bank was determined to be the predominant employer and representative of both the Bank and IMF. As a fifth employer, therefore, the OAS was retained as it is the next in rank to those considered to be the best employers in the Washington area. On this basis the data has been recalculated and the results show an overall weighted average increase of 12.2 percent."

26. If the PAHO accepts that the employers recommended for selection and retention closely followed the criteria in the methodology, that should put an end to the matter since one of the criteria is that the employers selected should represent a cross-section of the economy. But the Organization contradicts its initial statement by introducing the question of a reasonable cross-section as if that were not already one of the criteria followed.

27. The reason given for replacing Fairfax County Government with the Organization for Personnel Management does not stand up to examination. Since they both belong to the same sector, substituting one for the other does not make for a different cross-section. The comment that the Organization for Personnel Management is "one of the most important employers" and represents the United States Government as a whole affords no sound reason for preferring it to Fairfax County Government.

The only reason for such preference to be valid according to the methodology and Regulation 3.2 would be that the Organization for Personnel Management provided the best prevailing conditions in the locality for similar work. But that is not proven. The Organization's decision to prefer it is flawed because the stated reason is not a valid one.

28. The Organization offers two reasons for replacing the International Monetary Fund with the Organization of American States. One is that keeping the Fund would have given one particular economic sector, viz. international financial institutions, undue dominance in the sample; the other is that the Fund and the World Bank may be treated as just one employer because of concerted movement in pay, the similarities in salary scales and the fact that they carry out joint surveys for the purpose of setting salaries.

29. Whether the list of local employers makes a reasonable cross-section of economic sectors and whether the Fund and the World Bank are too closely linked to be taken separately are matters of appreciation that must ultimately be decided by the Director in the exercise of his discretion. The Tribunal may not substitute its own opinion for the Director's. The conclusion is that this change of employers was within the scope of the Director's discretionary authority and was a decision he was entitled to make.

Comparison of hours of work, allowances and benefits

30. In the complainants' submission the other breach of the methodology and Manual is the failure to include in the

survey working hours, home leave, education grant and indemnities connected with repatriation.

31. The Manual provides that at step C.5.l adjustment must be made to account for the difference in hours of work - i.e. the length of the working week - between staff of the employers retained and staff of the United Nations organisations in the locality. The report by the Local Salary Survey Committee says that the data obtained from the five employers retained were calculated on the basis of a standard forty-hour working week. In the three international organisations retained, the "official" working week, though stated to be 40 hours, includes a one-hour lunch break in each 8-hour day. The number of working hours in the week being 37, there should have been a proportional adjustment to salaries. None, however, was made.

32. The complainants contend that since the methodology refers to "hours worked" the comparison must relate to hours actually worked. The Organization does not specifically answer the plea: its remarks on entitlements granted to international and not to local staff seem intended to cover it. But the reckoning of working hours is a matter of concern to international and locally recruited officials alike. Since the Organization failed to adjust salaries paid by the comparator employers to allow for the differences in hours worked the complainants' argument succeeds.

33. The Organization observes that home leave, education grant and indemnities on repatriation are granted only to international staff. Since the material rules do not confer those entitlements on locally recruited staff there was no reason for the survey to take account of them. This plea therefore fails.

Breach of Article VIII

34. Lastly, the complainants plead breach of Article VIII of the Staff Regulations. That article stipulates that "The Director-General shall make provision for staff participation in the discussion of policies relating to staff questions". (The French version refers to "discussion des mesures qui les interessent".)

35. The Organization replies that the article relates to general issues and not to the question of salaries because it comes under the section headed "Staff Relations". Salary and allowances are dealt with under Article III and there is neither reference nor cross-reference to consultation. Besides, the Local Salary Survey Committee is composed of representatives of both the staff and the Administration.

36. The Tribunal sees no reason to hold that Article VIII does not cover discussion with the staff on the subject of salaries, one of the questions in which the staff take the greatest interest. The requirement of Article VIII would ordinarily be met by staff participation in the work of the Local Salary Survey Committee. The CCAQ's Manual itself envisages the Committee as having a balanced representation of administration and staff, describes proper staff-management consultation as a vital ingredient of a salary survey and says that as a forum for consultation at the local level the Committee has a central role to play (step A.2.3). The Manual provides, at step F.7, for a "report back to the field office", in this case the PAHO, the purpose of which is "to ensure the proper communication to the field of decisions taken at the approval stage and the reasons for those decisions". It says that "Prompt submission is an essential step in the survey process, contributing to better understanding by staff in the field and to more effective surveys in the future".

37. But such reporting occurs after the decisions on the salary scale have been taken and does not serve the purpose of participation. In the present case two of the comparator employers chosen by the Committee as representing, with the other three, the best local employers were discarded by the Organization and replaced with two others, and the result was a drop of over 6 per cent in the recommended increase. In those circumstances there should, if Article VIII was to have any meaning at all, have been a properly informed exchange of views between staff and Administration before the adoption of the final scale. The conclusion is that the Organization failed to satisfy the requirements of Article VIII.

The applications to intervene

38. The applications to intervene, which are receivable under Article 17 of the Rules of Court, are allowed: the interveners shall have the same rights as the complainants themselves insofar as they are in like case in fact and in law.

DECISION:

For the above reasons,

1. The impugned decisions of 26 November 1991 are set aside.

2. The case is sent back to the Director for a new decision on the salary scale to be taken in the light of the present judgment.

3. The interveners shall have the same rights as the complainants insofar as they are in like case in fact and in law.

4. The Organization shall pay the complainants a total sum of 50,000 French francs in costs.

DISSENTING OPINION BY MISS MELLA CARROLL

1. I regret I cannot agree with the other members of the Tribunal that this complaint is receivable, either on the grounds stated in the majority decision or for any of the reasons put forward by the complainants. My reasons are as follows.

2. On 11 February 1991 the new General Service salary scales effective 1 August 1990 were announced by general information bulletin HQ-91-13. It sets out annual gross and net salary after application of staff assessment for all General Service grades and steps with dependency allowances and language allowances. Individual applications of this general decision were translated into salary payments on 27 February. The pay slips showed a base salary corresponding to the scale set out in the bulletin.

3. On 10 April 1991 the complainants, in common with over 100 other PAHO staff members, wrote to the Chief of Personnel saying that the individual decisions to apply the pay scales were illegal since the establishment of the scale was in violation of the approved methodology. They asked for a review of the decision to apply the scales to them. The Chief of Personnel replied on 25 April 1991. He referred to the promulgation of the salary scale on 11 February 1991 and said there had been a final decision which he saw no reason to review.

4. The complainants lodged an appeal with the Board of Appeal on 26 April 1991. The Board of Appeal held that the appeals were receivable and it found in favour of the complainants. The Chief of Personnel did not accept its recommendations and so informed the complainants on 26 November 1991. This is the decision impugned.

5. The Organization contends that the complaints are irreceivable because the original appeals to the Board of Appeal were lodged outside the time limit provided under the PAHO Rules. It maintains that the final decision was contained in the bulletin of 11 February 1991 and the complainants did not despatch to the Board of Appeal, within sixty days of receipt of such notification, written notice of their intention to appeal (Staff Rule 1230.7.3). The appeals should have been lodged by 12 April 1991 and they were not lodged until 24 April 1991.

6. The complainants argue:

(1) Even if the appeals were late they were late only in respect of the salary for February 1991 and were valid for subsequent months: Judgments 323 (in re Connolly-Battisti No. 5) and 978 (in re Meyler).

(2) The Tribunal requires that complaints be made in respect of individual decisions. In spite of Article VII(2) of its Statute the Tribunal has declared an appeal against a general decision irreceivable because it ought normally to be followed by an individual decision: in Judgment 624 (in re Giroud No. 2 and Lovrecich).

(3) The first individual decision capable of being appealed was the pay slip of 27 February 1991. In Judgment 830 (in re Kossovsky and Shafner-Cherney) an appeal against the decisions contained in individual pay slips was held receivable: see also Judgments 825 to 830, 831 to 838, 862 to 866, 986 and 1086.

(4) In order not to run the risk of making a premature appeal the complainants had to ensure that all administrative channels had been tried and that the decision had become final. The reason why the complainants wrote on 10 April 1991 asking for reconsideration of the individual decisions represented by the pay slips was to get a final decision within the meaning of Rule 1230.7.1 or 1230.7.2. They also asked, if the Director had objections to their interpretation of the Rules and Regulations, to be advised at his earliest convenience, taking into account any potential deadlines, since it was their "definitive and irrevocable intention to lodge an appeal" unless satisfaction was obtained. They claim that time should run only from receipt of the reply of 25 April 1991 from the Chief of Personnel, in which case the appeals were lodged in time.

(5) Alternatively, they claim that if time runs from the date of the pay slips, the appeals were lodged in time.

(6) Alternatively, if time runs from the bulletin of 11 February 1991, the letter of 10 April 1991 ought to be considered a valid appeal because they said they had a definite and irrevocable intention of appealing.

7. In order to deal with the points raised by the complainants it is necessary to consider the decisions cited to see whether they support the propositions of the complainants.

8. In Judgment 323 the main question concerned commissary savings as a fringe benefit to be taken into account in adjustment of salaries. The Council of the FAO made a decision on salaries which was announced to the staff by the Director-General on 11 December 1974 and on 27 May 1975 an administrative circular giving a wage index figure was published. Under the FAO Staff Rules it was the Director-General who fixed the salary scales for the General Service staff, having regard to guiding principles in Appendix F. The complainant appealed against the decision in the circular on 10 June. The FAO claimed that the appeal was time-barred. The Tribunal held that the Organization was wrong in believing that a decision of the Council altered a staff member's rights from the moment it was made and before it was executed. It held that it was the Director-General who was to fix the salary scales. It said that the way in which the decisions were recorded was probably not intelligible to an official. General decisions about staff members were to be read as an instruction to the Director-General. It was his duty to put them into a form which clearly conveyed to the official in question precisely in what way his rights were affected. It was the Director-General's decision which the official was entitled to have and which constituted the decision for the purpose of the time bar.

9. The Tribunal also discussed recurring breach and gave an example. 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 about the next underpayment though he will not be able to recover past underpayments. But the Tribunal also said that a decision which is no more than reiteration of a previous decision does not give rise to a new cause for complaint.

10. In Judgment 978 there was another illustration of recurring breach. The Organization had a rule providing that no non-resident's allowance would be paid to a staff member whose husband was a national of the duty station. The complainant was refused the allowance. She failed to appeal that refusal, and appeal became time-barred. She subsequently made another claim which the Organization submitted was irreceivable because it was subsidiary to the time-barred claim. The Tribunal held that the rule was unlawful because it discriminated against women and, since it was unlawful, it could never become lawful by lapse of time or acquiescence. Each month in which the non-resident's allowance was withheld there was a new cause of action and the complaint was therefore receivable.

11. In Judgment 624 the decision appealed against was general in character. It provided inter alia for a levy on basic salaries of staff in certain categories at a compound rate of 1.5 per cent per annum for three years. The salary increase due on account of a rise in the cost of living was to be payable only if it was at least 3 per cent and not 2 per cent. Pension rights were also affected. The decision put no exact figure on the entitlement of staff members. The Tribunal held that the fact that the decision was general in character was not in itself sufficient to make the claim irreceivable. Decisions which may be challenged before the Tribunal do not have to be individual in nature. But a complaint against a general decision will not perforce be receivable. There is also the requirement in Article VII(1) that the internal means of redress must have been exhausted. The Tribunal said that it would declare irreceivable a complaint impugning a general decision against which there can be no direct internal appeal but which must ordinarily be followed by individual decisions against which such appeal can lie. The Tribunal gave two reasons. First, the Tribunal is relieved of ruling on the validity of a general decision to which it may be unable to foresee exactly how effect would be given. The second reason is that the Tribunal will not be acting on an application from a single complainant to set aside a general decision which other staff may not object to.

12. In my opinion nothing in those judgments contains precedents to prevent a general decision which clearly conveys to the officials concerned precisely in what way their rights are affected from being a decision capable of being appealed and thus fixing the date from which time runs. The Tribunal has already held to be receivable appeals against pay scales, i.e. general decisions. In Judgments 1160 (in re Banota and others) and 1190 (in re Bansal No. 2 and others) three different pay scales were challenged. The Tribunal held in 1160 that the first scale could not be challenged because the appeal was made late, but that the second one could be because the appeal was made in time. In 1190 the third scale was challenged within the time limit, so the issue of receivability did not arise at all.

13. There is a distinction to be made between legal decisions and illegal decisions. An underpayment of salary is not legal and therefore an individual cause of action arises each time an underpayment is made. But payment made in accordance with a pay scale which has not been set aside is a legal payment. Whilst a cause of action will arise with the promulgation of a new pay scale, provided it is formulated so clearly that it is appealable, each individual payment is merely the reiteration of the general decision contained in the pay scale and, accordingly, a new cause of action does not arise each time.

14. It is important to note that the rationale in Judgment 624 is based on the proposition that it concerns a general decision against which there can be no direct internal appeal. In the present case there could have been an appeal against the general decision itself: see Judgments 116O and 1190. Other examples of the Tribunal's refusing to accept an appeal against a general decision as receivable because it did not set out precisely how effect would be given to it are to be found in Judgments 961 (in re Fairfax Jones No. 2 and others): no figure on entitlements, 1148 (in re Scheu Nos. 1 and 2): cryptic allusions, and 1101 (in re Cassaignau and Karran No. 3): a general decision of abstract and hypothetical interest.

15. There was a similar rationale in Judgment 1081 (in re Albertini and others). The case concerned an implied general decision - implied because the Organization did not reply within the time limit for a request for a decision - and the Tribunal held that the impugned decision did not put figures on the entitlement of each of the complainants to which it applied. The figures would be known only when individual decisions had been taken. In the circumstances the complainants could not challenge the validity of the general decision they were objecting to.

16. There is no case law to support the complainants' claim that the Tribunal requires that complaints must be made in respect of individual decisions. This would be contrary to Article VII(2) of the Tribunal's Statute. An appeal against an individual decision is required only where there is a general decision against which there can be no appeal.

17. The complainants are correct in submitting that pay slips represent individual decisions capable of being appealed.

Pay slips have often formed the basis of appeals, and the complainants cite a series of cases. But decisions which are a repetition of previous decisions did not give rise to a new cause for complaint. Therefore, if the pay slip is a repetition of a prior general decision clearly set out in a pay scale, there is no new cause of action.

18. In the context of this case the salary scales promulgated on 11 February 1991 clearly informed all members of staff affected about their rights. It was not necessary to wait and see what was contained in the pay slips for each person to know precisely how his or her pay was affected. It was a final decision within the meaning of Staff Rule 1230.7.1, having been made by a duly authorised official and notified to the staff members. Therefore the date from which time began to run was 11 February 1991. The complainants had a choice to appeal the general decision or the individual decisions represented by the pay slips, provided the appeal was lodged with the Board of Appeal within sixty days of 11 February 1991. A new cause for complaint did not arise with each pay slip.

That disposes of grounds (1), (2), (3) and (5) of the complainants' argument.

19. As for grounds (4) and (6), unlike many other organisations in the United Nations family, the Staff Regulations and Rules of the PAHO do not make any provision for procedural re-examination of a contested administrative decision. The rules provide for a direct appeal to the appropriate Board of Appeal when all the existing administrative channels have been tried and the action complained of has become final, i.e. when it has been taken by a duly authorised official and the staff member has received written notification of it. That is what happened here when the decision made by the Director was promulgated by the bulletin of 11 February 1991.

20. The complainants were mistaken in their interpretation of the rules in asking in their letters dated 10 April 1991 for a ruling under Rule 1230.7.2 with a view to obtaining a final ruling within the meaning of Rule 1230.7.1 or 1230.7.2. What Rule 1230.7.2 deals with is a time limit for the Organization to reply to a request for a ruling, after which there is deemed to be a refusal which can be appealed as a final decision. There already was a final decision in existence, so a request for a ruling, followed by a refusal, did not set off any new time limit: see Judgment 3 (in re Perrasse).

21. I do not agree with my colleagues that Rule 1230.7.1 or the succeeding sub-articles are inherently unclear and

that because of that the complainants had to ask the Administration for a final decision. There have been many appeals in this Organization where the complainants had no difficulty in recognising that no procedural re-examination existed and therefore that time began to run from the communication of a decision made by a duly authorised official. They initiated their appeals in time. This is not a case where the complainants did not know that a decision had been made by the Director. What they were asking for was, to use their own word, a "re-examination".

22. It follows also that I do not agree with my colleagues that the PAHO could not in good faith rely on late filing of the appeal. In my opinion there was no absence of good faith. The Organization was entitled to rely on the provisions of the Staff Rules and Regulations relating to time limits. The proper time to raise this defence was at the internal appeal stage. The Organization was under no obligation to inform the complainants in the letter of 25 April 1991 that it would be relying on a defence of irreceivability in the event of appeal.

23. The letter of 10 April 1991 cannot be considered to initiate a valid appeal as it was not addressed to the Board of Appeal. The complainants cannot get round the requirements of the Staff Rules by asking the Administration to give legal advice. It is up to each staff member to ensure that the time limits are observed.

24. In my opinion none of the arguments put forward by the complainants can be sustained and therefore the Organization should succeed in its plea of irreceivability.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
Mella Carroll
P. Pescatore
A.B. Gardner

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