Registry's translation, the French text alone being authoritative.

FIFTY-FIFTH ORDINARY SESSION

In re JARQUIN and NAVARRETE

Judgment No. 650

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the Pan American Health Organization (PAHO) (World Health Organization) by Mr. Roberto Jarquín and Miss Delia Navarrete on 16 March 1984 and corrected on 13 May, the PAHO's reply of 5 July to the complaints, as corrected by its telegram of 19 July to the Registrar of the Tribunal, the complainants' single rejoinder of October and the PAHO's single surrejoinder of 30 November 1984;

Considering Article II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 335.1, 1040 and 1230.8.3 of the PAHO Staff Rules;

Considering that both complaints raise the same issues and should be joined to form the subject of a single decision;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Mr. Jarquín joined the staff of the Pan American Sanitary Bureau, the secretariat of the PAHO, in 1960; Miss Navarrete in 1957 and again, after a break, in 1972. They were stationed in Guatemala City, where they held fixed-term appointments as Professional officials at the Institute of Nutrition of Central America and Panama, known as INCAP. The Institute was founded in 1946. According to a basic agreement on INCAP concluded between the six founder Member States in 1953 the PAHO runs the Institute. Mr. Jarquín held a P.4 post and Miss Navarrete a P.2 one. The PAHO informed Mr. Jarquín by telegram of 29 September 1981 that his appointment would end on 31 December 1981 in accordance with Staff Rule 1040 ("Completion of temporary appointments"). The PAHO informed Miss Navarrete by a telegram of 9 September 1981 that her appointment would end, also under 1040, on 31 January 1982. But before the old appointments lapsed INCAP offered them new ones as INCAP officials. Both of them accepted the offers. The terms of the new appointments were, to their mind, in some ways not so good, and on 24 March 1983 they filed appeals with the PAHO headquarters Board of Inquiry and Appeal in Washington. In their report of 16 November 1983 four of the five Board members recommended rejecting the appeals, which they believed to be time-barred on the grounds that the complainants had failed to challenge within the 60 days prescribed in Staff Rule 1230.8.3 the decisions to terminate their contracts. By letters of 15 December 1983, which are the impugned decisions and reached the complainants on 19 December, the Director of the PAHO informed them that he accepted the recommendation.

B. The complainants submit that the PAHO is in breach of their contracts of employment. They were offered the new appointments, along with 18 other INCAP staff members, in anticipation of the ratification of a new basic agreement on INCAP which had been concluded in 1981. The practice had always been for the PAHO to engage Professional category staff for INCAP, who were subject to PAHO rules; INCAP recruited locally the General Service category staff, who came under its own rules. Under the 1981 agreement INCAP was to break off from the PAHO altogether and manage itself. But the agreement has not actually come into force and never will, because the Council of INCAP, its governing body, has since had a change of heart about leaving the PAHO. Since its foundation INCAP has formed part of the PAHO, and it still does. Any change in the terms of the complainants' employment must therefore abide by PAHO rules. Article 335.1 requires, for one thing, the payment of the post adjustment allowance; yet they do not get it any more. They have lost membership of the United Nations Joint Staff Pension Fund and the PAHO credit union, and the right to appeal to the Tribunal, and have suffered changes for the worse in health and life insurance arrangements. The breach of their contracts being continuous, they may challenge it at any time. They invite the Tribunal to order the Director of the PAHO to reconvene the Board of Inquiry and Appeal to hear their case on the merits as at the date of filing their original appeals, viz. 24 March 1983.

C. In its reply to the two complaints the PAHO submits that the complainants' internal appeals against termination of their appointments were, as the Board held, time-barred, that they therefore failed to exhaust the internal means of redress, and the complaints are irreceivable. The PAHO explains that INCAP is an independent entity in international law and not a part of the PAHO. The PAHO used to finance the appointment of Professional category staff for technical co-operation work in nutrition, and such staff were PAHO officials; but, as it was competent to do, INCAP also recruited both Professional and General Service category staff under its own rules. It is mistaken to suggest that all Professional staff were formerly PAHO officials and all General Service staff INCAP officials. Under the 1981 agreement INCAP was to take over administration as well, but for want of ratification the agreement has not come into force and the one of 1953 holds good. At its 29th Session the Directing Council of the PAHO agreed that PAHO should continue to run INCAP but appoint only its Director and Administrator, other staff being appointed by INCAP itself. That was how the complainants came to have their PAHO appointments terminated and to get new ones from INCAP. The PAHO is not a party to their new contracts and it is mistaken to complain to the PAHO that INCAP has treated them as INCAP employees. If dissatisfied with the terms of their employment they must appeal, not under PAHO rules, but under INCAP ones. These do not allow appeal to the Tribunal. There was no breach of contract by the PAHO and there is no continuance of any such breach: the precedents on continuing breach are irrelevant.

D. In their single rejoinder the complainants submit that their complaints are receivable. They maintain that the PAHO was in continuing breach of their contracts of employment, that the PAHO Board was bound to consider the issue as so submitted to them, and that since it did not there was a flaw in the internal procedure. The case should on that account be sent back for further hearing by the Board.

E. In its surrejoinder the PAHO explains why in its view the Tribunal should reject the pleas in the rejoinder and declare the complaints irreceivable on the grounds of failure to exhaust the internal means of redress. In the Organization's view the plea of continuing breach of contract is unsound because, as it showed in its reply, the PAHO and INCAP have always been and still are distinct entities both de facto and de jure.

CONSIDERATIONS:

The relationship between the PAHO and INCAP

1. Under an agreement dated 24 May 1949 the Pan American Health Organization serves as the Regional Office of the World Health Organization (WHO) for the Americas. It is a person with full capacity in international law, and it belongs to the United Nations system. It is administered by the Pan American Sanitary Bureau.

As part of the WHO it is subject to the Tribunal's jurisdiction.

2. The Institute of Nutrition of Central America and Panama, known as INCAP, was founded on 20 February 1946 by the representatives of Costa Rica, El Salvador, Guatemala, Honduras and Panama, and the Pan American Sanitary Office (later known as "Bureau"), with the support of the Kellogg Foundation.

On 17 December 1953 the founder members of INCAP concluded a basic agreement. Nicaragua subscribed later. The agreement defines the legal status of INCAP and its relationship with the PAHO. It has legal capacity on the territory of its Member States. It has a Directing Council. It enjoys tax exemption and other immunities. It receives technical assistance from the PAHO which is in charge of administration, i.e. co-ordinating and carrying out projects, though the INCAP Council may countermand it.

For several years some of its staff were recruited by the Institute itself and subject to its rules, some by the PAHO and subject to PAHO rules.

3. On 25 September 1981 the parties to the basic agreement of 1953 signed another, the main purpose being to relieve the PAHO of responsibility for administration. Having been ratified by only two States and the PAHO, the new agreement is not yet in force, and on 19 August 1983, at its 34th Session, the Directing Council of INCAP adopted Resolution VII noting that the 1953 agreement held good.

On 29 September 1983 the Directing Council of the PAHO agreed, in keeping with that resolution, to continue for the time being to administer the Institute. But the PAHO had in the meantime decided to cut down the number of staff it appointed to INCAP and appoint only the Director and the Administrator, and it had accordingly terminated

the appointments of all other PAHO officials assigned to INCAP.

The complainants' position

4. Mr. Jarquín became an INCAP staff member in April 1960 and resigned on 30 November 1970.

On 1 December 1970 the PAHO appointed him to its own staff and assigned him to INCAP. After several renewals it terminated his appointment, on 31 December 1981, under PAHO Staff Rule 1040.

On 30 December 1981 INCAP offered him an appointment and he accepted it.

On 24 March 1983 he appealed to the PAHO Board of Inquiry and Appeal.

5. Miss Navarrete was a research officer at INCAP from 1957 to 1959.

On 10 June 1972 the PAHO appointed her to its own staff and assigned her to INCAP. On 9 September 1981 it informed her that her appointment would end on 31 January 1982 under Rule 1040.

INCAP then sent her an offer of appointment, and she accepted it.

She associated herself with Mr. Jarquín's appeal of 24 March 1983.

Receivability

6. According to Article VII(1) of the Statute of the Tribunal a complaint is receivable only if the means of redress available under the Staff Regulations have been exhausted. To comply with this requirement the complainant must respect the time limits and procedure prescribed for the internal appeal.

The PAHO Board of Inquiry and Appeal rejected the complainants' appeal on the grounds that it was time-barred. In fact it was wrong not to hear the merits. In determining whether a time limit has been respected what matters is the statement of the legal position in the appellant's pleadings; otherwise questions of receivability will not be properly distinct from the merits. The complainants' case was that the PAHO had been in continuous breach of its obligations by failing, after terminating their appointments on 31 December 1981 and 31 January 1982, to safeguard their enjoyment of entitlements they had before. In other words their plea was that since their appointment by INCAP the PAHO had been acting unlawfully. The impugned decisions therefore recurred right up to the date of the internal appeal, and that appeal was in time. The internal means of redress must be deemed to have been exhausted even though the Board did not go into the merits.

7. The PAHO argues that the complainants have improperly altered their submissions: whereas at first they maintain that the PAHO was the same legal entity as INCAP, their rejoinders acknowledge that there is only factual identity. The PAHO submits that the Tribunal should confine itself to the original issue, namely that of legal identity.

It is immaterial whether the complainants shift ground in their rejoinders. The Tribunal may rule on any issue of law and will hear all the submissions, whether put forward in the complainants' rejoinder or in their original brief.

The merits

8. The complainants contend that they have been worse off since becoming INCAP officials. They are not paid post adjustment allowance; they get lower insurance benefits and they have lost membership of the United Nations Joint Staff Pension Fund and access to the Tribunal. To their mind the PAHO and INCAP are one and the same, and the PAHO has a duty to guarantee them the benefits they enjoyed before being appointed by INCAP. The plea is unsound in law and in fact.

9. The PAHO and INCAP both enjoy legal capacity: each has its own rights and duties. Each may appoint staff who are subject to its own rules. Although under the basic agreement of 1953 the PAHO shares in administering INCAP the two are separate entities in law. The PAHO terminated the complainants' appointments, and indeed the complainants have never challenged its decisions. It thereby discharged any obligation it may have had towards them and in particular cannot be held liable for the disadvantages they allege derive from the transfer. They have

concluded contracts with INCAP, their claims are based on those contracts, and it is only against INCAP that a case will lie. Though competent to hear complaints against the PAHO, the Tribunal may not hear disputes between INCAP and its staff.

10. Since being terminated by the PAHO the complainants cannot be treated as PAHO staff. There is no reason to believe that what the two organisations did was just a ruse to hide the fact that the complainants were still on the PAHO staff. In fact what happened reflected the clear intent of the draft agreement of 1981, namely that the PAHO should cut its costs and INCAP have greater administrative independence. It is immaterial that, because fewer than four States have ratified, the agreement of 1981 is not in force. The 1953 agreement, which was still in force at the time, did not prevent the PAHO and INCAP from taking the action they took with regard to the complainants.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

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