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

FORTY-FOURTH ORDINARY SESSION

In re GARCA and MÁRQUEZ

Judgment No. 408

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the Pan American Health Organization (PAHO) (the World Health Organization) by Mr. Juan César García and Mr. Miguel Márquez on 17 May 1979, the PAHO's reply of 30 August, the complainants' rejoinder of 1 October, supplemented on 7 January 1980, and the PAHO's surrejoinder of 29 January 1980;

Considering the applications to intervene filed by

M. Alonso,
E. Ambler,
J.C. Areitio,
A. Barahona,
M. Beaudry-Darisme,
A. Betbeder,
L.V. Cerezo,
B. Chiari,
M. Dicancro,
J.A. Dinelli,
D. Dobosch,
S. Espinola,
E. Fernandez,
J. Garcia,
H. Gillepsie,
O.M. Glorioso,
L.M. Gluecksmann,
N.E. Gurisatti,
S.M. Lopez-Calleja,
A.C. de Martinez,
B. Mejia,
M. Muñoz,
M.I. O'Connell,
V. Ortega,
M. Perez Esandi,
J.C. Perrone,
U. Prezioso,
E. Quiñones,
C.L. Reyes,
P. Rodriguez,
L.M. Seba,
H. Silva,
N. Subiela,
J.R. Teruel,
A. Trenchi,
M. Troncoso,
I.J. Woods,
E. Zepeda;

Considering Article II, paragraph 5, Article VII, paragraphs 1, 2 and 3, and Article X, paragraph l(c), of the Statute

of the Tribunal and Article 17, paragraph 2, of the Rules of Court;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor order by the Tribunal;

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

A. In 1978 Mr. García was Chairman and Mr. Marquez Vice-President of a committee representing the staff of the PAHO, known the "Staff Committee". In the course of a dispute which arose in that year between the Staff Committee and the Director of the Pan American Sanitary Bureau (PASB), the secretariat of the PAHO, communications facilities such as the telex and telephone services were withdrawn from the Staff Committee. On 31 October 1978 Mr. García and 14 other staff members appealed to the Board of Inquiry and Appeal alleging breaches of freedom of association and terms of their contracts of service safeguarding such freedom. At the request of the Pan American Health Conference which had been held from 25 September to 3 October 1978, the Director instructed his staff to seek settlement of the dispute with the staff representatives and accordingly, after further talks, an agreement was signed on 13 January 1979. The agreement provided: (1) that the Staff Association should be given full facilities for the exercise of trade union activities (office space, secretarial support, collection of membership dues, time off, use of communication services and a cash contribution from the PAHO); (2) that the Administration would review certain "personnel actions", namely the reassignment of one member of the Staff Committee and the renewal of the appointments of three others; and (3) that the appeal submitted to the Board of Inquiry and Appeal would be amended to take account of the agreement. One clause provided that breach of any provision would make the whole agreement null and void. As early as 17 January 1979, however, the Assistant Director who had negotiated the agreement and the Chief of Personnel informed Mr. García that the staff representatives had already violated the agreement by "showing" the text to several units in order to obtain the agreed services; it was, in their view, for the Administration alone to give instructions for carrying out the terms of the agreement and the Administration had therefore no choice but to "develop guidelines before engaging in discussions" with the staff representatives about the use of facilities. As Chairman of the Staff Committee Mr. García wrote back the next day pointing out that the remark about guidelines was in itself a breach of the agreement, and on the same day the Chairwoman of the Legal Sub-Committee of the Staff Committee wrote to the Secretary of the Board of Inquiry and Appeal asking that the Board proceed with the hearing of the appeal. In the meantime, on 12 October 1978, the Director had set up an ad hoc Committee to investigate allegations of "non-compliance by staff members with their duties, obligations and privileges" under the Staff Regulations and Staff Rules. At the instance of the complainants the Board of Inquiry and Appeal asked the Administration to disclose the ad hoe committee's report. The Administration refused on the grounds that under the agreement the complainants were bound first to amend the terms of their appeal. Feeling that the dispute had reached an "impasse", on 17 May 1919 the complainants filed their complaint with the Tribunal.

B. The complainants state that what they are impugning is "the silence of the Administration to [their] request of 30 November 1978 ... to have the provisions of Staff Rules 910 and 920 and Manual provision II.17 honoured; also rejection by the Administration of all representative facilities ...; violation of Agreements of June 1976 ... and Agreement of 13 January 1979 ...".

C. Pleading that the complaint is receivable, the complainants maintain that they have tried "all administrative channels". The PAHO has refused, they point out, to withdraw its allegation that the staff representatives violated the agreement and so made it null and void. At the same time the PAHO is making a contradictory demand that the terms of the agreement stipulating amendment of the internal appeal should be honoured and is refusing to meet the requests of the Board of Inquiry and Appeal until the amendments are made. The complainants therefore take the view that they cannot exhaust the internal means of redress and that their complaint is therefore receivable.

D. As to the merits, the complainants contend that they and more than fifteen interveners whom they mention have been harassed by the Director of the PASB. The harassment consists of warranted transfers, by-passing in work, non-renewal of appointment, bad annual reports, unfair criticisms of their work, and so on, and they believe that all this is in reprisal for opposing the Director in their capacity as staff union representatives. It constitutes a flagrant breach of the Staff Regulations and Staff Rules which guarantee free exercise of trade union activities. In their claims for relief they ask the Tribunal to order: (1) that the Administration honour existing agreements; (2) that "the right of the staff, the complainants and the interveners to have their conditions of service represented to the Administration by duly elected representatives" be immediately restored in accordance with Staff Rules 920 and 930; (3) that facilities be restored to the Staff Association so that the complainants' right to rely on its assistance be

protected on the basis of existing agreements and a custom dating back 28 years; (4) that the expenses incurred by the Association because of the denial of facilities be repaid; (5) that appropriate compensation be paid to the complainants and to all interveners whose reputation has been damaged by the Director's "widely stated remarks" about their personal and professional competence; (6) that the right and freedom of association be respected and that the harassment by the Administration cease so that the complainants and interveners may exercise their trade union activity without fear, in accordance with the relevant provisions of the Staff Regulations and Staff Rules; and (7) payment of costs.

E. In its reply the PAHO asks the Tribunal to declare: (1) that the complaint is irreceivable on the grounds of non-compliance with Article VII, paragraph 1, of the Statute of the Tribunal, which requires that the internal means of redress shall have been exhausted; and (2) that the applications to intervene are inadmissible on the grounds that they do not satisfy the conditions set in Article X, paragraph l(c), of the Statute of the Tribunal and Article 17 of the Rules of Court. The PAHO does not agree that the dispute has reached an "impasse" within the Organization. The Secretary of the Board of Inquiry and Appeal informed the Administration that there was no question of suspending the complainants' appeal. In any event lt is for the Board, not the complainants, to decide whether or not the internal proceedings should go ahead, and indeed the Board decided that they should: on 21 March 1979 it informed the Administration that it would proceed with the appeal as submitted on 1 December 1978. In point of law argues the PAHO, the agreement of 13 January 1979 cannot directly influence the Board's consideration of the appeal, whether in amended form or not. It is an administrative agreement and, as it were, a collective bargain and, since its clauses have not been incorporated into the conditions of service of the staff, falls outside the Board's and the Tribunal's competence, in particular the clauses on trade union facilities and even those relating to four staff members (whose applications to intervene are in any case irreceivable). It is mistaken to accuse the Administration of causing delays since only ten weeks elapsed between the date of the agreement - 13 January 1979 - and that of the Board's decision to proceed with the appeal in its original form. The complaint is therefore premature. As for the applications to intervene, they are irreceivable: the interveners are not in the same personal position as the complainants and their alleged wrongs, which relate to transfer, non-renewal of appointment and performance reports, are not at all the same either. Not even the ten interveners who were on the Staff Committee at the same time as the complainants are in the same position as they. Lastly, two of the interveners, Mr. Dicancro and Mrs. Subiela, have themselves appealed to the Board of Inquiry and Appeal, and that is not compatible with an application to the Tribunal to intervene which has the same purpose.

F. In their rejoinder the complainants contend that according to a general principle of law any complainant should be entitled to go to the Tribunal when his internal appeal is held up with "inordinate delays". Mr. García informed the Administration as long ago as 28 October 1978 of his intention to appeal and submitted his original memorandum of appeal to the Board of Inquiry and Appeal on 1 December 1978. The Administration did not reply until 18 January 1979 and in its reply it referred to the work of the ad hoc committee. At Mr. García's instance the Board asked it on 23 January, 12 February and 21 March to disclose the ad hoc committee's report. Not having received it, on 10 May 1979 the Board asked the Administration to state within five days whether it refuse a discovery. Three days after the time limit had passed, the Administration had not yet replied and the complainants therefore filed the present complaint. As regards the applications to intervene, the complainants point out that from the outset the dispute has been one of concern to a whole category of officials. Article VII, paragraph 2, of the Statute of the Tribunal envisages the possibility of impugning a "decision affecting a class of officials". All the interveners are alleging the same wrong, namely breach of the provisions on the right of association in Staff Regulation 8.1 and Staff Rules 910, 920 and 930, and on the same grounds, namely membership of the Staff Association and exercise of the trade union rights embodied in the Staff Rules. All of them have the same interest, namely the termination of practices which are in breach of the terms of their appointment. In Judgment No. 366 (in re Biggio) the Tribunal held that the intervener's position need not be identical but only "similar" to the complainant's. Lastly, the complainants argue that there is no incompatibility between the applications by some staff members to intervene and their concurrent appeals to the Board of Inquiry and Appeal, since in the latter they are alleging breaches of the Staff Regulations and Staff Rules different from those alleged in the complaint.

G. In its surrejoinder the defendant organisation contends that it has not caused delay. There was a fairly short lapse of time, from December 1978 to January 1979, while the two sides were negotiating. Delay since then has been caused by dispute over discovery of the ad hoc committee's report. The Administration having failed to reply by the 15 May deadline set by the Board, it was for the Board to draw its own conclusions and decide whether to proceed with the appeal, and the Administration's position gave the complainants no right to go straight to the Tribunal. As to the applications to intervene, the complainants draw a false parallel with the notion of class action in national law to argue for an improper enlargement of the notion of intervention as set out in the Statute and

Rules of Court. One thing is beyond dispute: the interveners are alleging not at all the same wrongs, and that indeed is why same of them have themselves appealed to the Board of Inquiry and Appeal. Lastly, the PAHO observes that, whereas in their rejoinder the complainants argue that the question of the validity of the agreement of 13 January 1979 is not before the Tribunal, in their original memorandum they stated that one purpose of the complaint was to put an end to breaches of that agreement by the Director.

CONSIDERATIONS:

The rule that the internal means of redress shall have been exhausted

1. According to Article VII, paragraph 1, of the Statute of the Tribunal a complaint shall be receivable only if the internal means of redress provided in the Staff Regulations have been exhausted. That rule requires the complainant not just to appeal to an internal body but to await the decision on his appeal before filing his complaint.

The rule is not a hard-and-fast one, even though the Statute does not expressly allow any derogation from it. A complainant may, even before there is a decision on his appeal, abandon the internal proceedings and appeal straight to the Tribunal provided the appeals body cannot or will not give a decision within a reasonable period. That it cannot or will not do so must, however, be quite clear from the circumstances. Only by way of exception will the Tribunal allow that the condition is met. Otherwise it would in many instances forgo material evidence obtainable only from the hearings of the internal appeals body, which is more familiar with the position of the staff in the organisation.

Application of the rule to the present case

2. At the end of October 1978 Mr. García lodged an appeal with the Board of Inquiry and Appeal. In May 1979 he and Mr. Márquez each filed a complaint with the Tribunal, although the Board had not yet given its decision. In other words, they have not exhausted the internal means of redress as Article VII, paragraph 1, of the Statute of the Tribunal requires. They plead, however, that the defendant organisation resorted to tactics to delay the Board's decision.

It does appear from the evidence that, instead of facilitating the internal proceedings, the Organization was partly responsible for delaying them. First, it applied for extensions of the time limits on the grounds of difficulties in communicating with its agent, who was resident in Europe. Secondly, it made several applications for suspension of the proceedings on the grounds that the terms of the appeal should be amended in accordance with an agreement it had signed on 13 January 1979 with the staff representatives. Such applications were inconsistent with a letter dated 17 January in which it contended that the agreement had been broken and was, therefore, under its own terms voided. Thirdly, although the Organization was asked several times to disclose the report of an ad hoc committee set up to investigate events which had occurred before and during the 20th Pan American Health Conference, it failed to reply and did not even give an explanation.

Although the Organization's attitude was open to reproach, the complainants were not on that account entitled to forgo a decision from the Board of Inquiry and Appeal. The Organization may have been remiss, but the Board was still able to hear the appeal. If it could not get a prompt response to its requests for discovery, its function was to decide on the evidence which it did have and, if it saw fit, to decide against the Organization in the matters under dispute. In short, there were no valid grounds for divesting it of an appeal which it was in no way prevented from hearing.

3. The complainants would have benefited from a derogation from the rule only if the Board either by its statements of by its conduct had evinced an intention not to give a decision within a reasonable period. It did not state any such intention.

Doubtless it showed the Organization too much forbearance. Not only did it grant extensions of the time limits; but it asked three times for discovery of the ad hoc committee's report. Yet the evidence casts no doubt on its willingness to hear the appeal before it. Indeed it rejected the Organization's applications for suspension of the proceedings and on 10 May 1979 asked it to file its arguments on the merits by 10 May. In other words, while the complainants were lodging their complaints with the Tribunal the Board was on the point of giving a decision. In the circumstances there are no grounds for allowing any derogation from the rule that the internal means of redress shall have been exhausted.

Another material point is that, although the appeal lodged with the Board at the end of October 1978 was still pending in the following May, the delay was partly caused by the conclusion of the agreement on 13 January 1979, which the two sides differed on how to apply.

4. The complainants also argue that the Board merely gives advisory opinions, that the Director-General usually disregards them and that appeals to the internal appeals body, far from serving the staff's interests, are actually detrimental in that they hold up the settlement of disputes.

This argument overlooks the fact that a decision by the Director-General is subject to appeal in that it may be impugned before the Tribunal, which will settle questions of fact and of law. Even if the Director-General does not endorse the Board's recommendations, the Tribunal often bases its decisions on the Board's findings in matters with which the Board is familiar. The decision in this case turns at least as much on appraisal of oral statements as on that of written evidence, and the Tribunal would be hard put to it to pass judgment without knowing the Board's views. The appeal to the Board is therefore no empty formality.

5. The substitute chairman of the Board of Inquiry and Appeal resigned on 19 April 1979 and several months later had not yet been replaced. The complainants argue that the Board was therefore not competent to hear appeals. The plea fails. It would succeed only if, after being asked by the Board to make up its membership, the Director-General had refused to do so within a reasonable period. The Board made no such request and so the Director-General made no such refusal.

The applications to intervene

6. The interveners cannot as such possess greater rights than the complainants in whose ease they have applied to intervene. Since, as appears from the foregoing, the complaints must be dismissed, so must the applications to intervene. Whether the applicants are entitled to intervene is therefore immaterial.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, Vice-President, tho Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy 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 24 April 1980.

(Signed)

André Grisel
Devlin
H. Armbruster

Bernard Spy

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