in Staff Rule 111.3 (*a*) was due not so much to oversight or indolence as to genuine doubts about the applicability of the prescribed procedure to the subject-matter of his complaint. He may also have felt unable to pursue the matter effectively as long as his request for copies of the transcript had gone unanswered; he may also not have wished to push matters too far while his status under his new contract with the United Nations was not finally formalized. These considerations taken by themselves could have constituted a basis for "exceptional circumstances" in which under Staff Rule 111.3 (*d*) time-limits may be waived at the discretion of the Board. But in the Tribunal's view these considerations cannot be taken by themselves. On the basis of the evidence cited, the Tribunal considers that the Applicant was perfectly aware of the implications and limitations of a formal appeal against an administrative decision under Staff Regulation 11.1; that he was reluctant for reasons of his own, and with his eyes open, to initiate such an appeal; that this reluctance persisted even after September 1975 when his contractual status was no longer in doubt and he had obtained the documentation he had been seeking; and that the delay in submitting the appeal which he eventually formulated was the result of the exercise of a choice on the part of the Applicant and cannot be attributed to exceptional circumstances beyond his control. The Tribunal concludes that in his understandable search for an appropriate remedy for his alleged grievance the Applicant omitted to have recourse in time to the only line of action open to him under the Staff Regulations and Rules.

VIII. The Tribunal accordingly determines that the non-compliance with the time-limits prescribed for the presentation of an appeal was the responsibility of the Applicant and that the decision of the Joint Appeals Board that the appeal was not receivable was valid and must be upheld.

IX. The merits of the application are not therefore appropriate for consideration by the Tribunal and the pleas of the Applicant fail accordingly.

X. The application is therefore rejected.

(Signatures)

R. VENKATARAMAN
President

Roger STEVENS
Member

Francisco A. FORTEZA
Member

Jean HARDY
Executive Secretary

New York, 20 October 1978

Judgement No. 236

(Original: English)

Case No. 225:
Belchamber

Against: **The Secretary-General of the United Nations**

Request for rescission of the decision to introduce a new salary scale for General Service staff in Geneva.

Applications for intervention.—Receivability of the applications.

Scope of the application.—The Respondent contests the competence of the Tribunal to order the rescission of the decision to introduce the salary scale.—Competence of the Tribunal to hear and pass judgement on the application.

Question whether there was an obligation on the part of the Secretary-General to negotiate with the Staff Council prior to the introduction of a revised salary scale.—Absence of an enforceable right to collective bargaining apart from statutory or contractual obligations.—Question whether such an obligation exists in the case at issue.—There is no statutory or express contractual obligation.—The agreement of 23 April 1976 created no contractual obligation as to collective bargaining.—The Tribunal must examine whether an obligation to negotiate with the staff is implicit in the agreements of 1968-1969 and 1976 or in the facts and circumstances of the case.—Examination of the past history of the manner in which General Service salaries were fixed at Geneva.—Discussions between representatives of the Executive Heads and of the staff prior to the Secretary-General's fixing of the new salary scale.—Respondent's contention that the Secretary-General cannot enter into collective bargaining agreements in derogation of his authority to fix the salary scales of staff in the General Service category.—The conduct by the Secretary-General of prior negotiations with the staff does not involve any derogation from that authority.—Respondent's contention that the agreements of 1968-1969 and 1976 were preceded by consultations and not negotiations.—Irrelevance of the terminology used.—Staff Regulations 8.1 and 8.2.—Staff Rule 108.2.—Conclusion of the Tribunal that there is a long-established practice of joint consultations between the representatives of the Executive Heads and of the staff.—Respondent's contention that the establishment of the International Civil Service Commission (ICSC) altered the situation.—Consideration of the consequences of the establishment of ICSC.—Conclusion of the Tribunal that after ICSC made its recommendation there should have been consultations with the staff.—Consideration of the procedure followed in the case at issue.—Conclusion of the Tribunal that there was an implied obligation on the part of the Respondent to hold joint consultations with the staff representatives prior to the revision of the salary scale.—Question whether there was a breach of that obligation by the Respondent.—Failure of the staff representatives to avail themselves of the opportunities offered for such consultations.—Decision of the Tribunal that there has been no breach of an obligation on the part of the Respondent and that the salary scale promulgated by the Respondent is not vitiated.—Scope of the decision.—Application rejected.—Applications for intervention rejected on merits.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Endre Ustor, alternate member;

Whereas, on 17 April 1978, Elizabeth Marie Belchamber, a staff member of the United Nations, filed an application the pleas of which read as follows:

"(*a*) Find that the Secretary-General of the United Nations has unilaterally and arbitrarily broken the Agreements concluded between him and representatives of his staff in 1968/69 and in 1976,

"(*b*) Additionally, find that the Secretary-General of the United Nations has based his decision on the ICSC [International Civil Service Commission]'s report and therefore that the said decision is tainted by errors of law and of fact,

"(*c*) Additionally, find that the implementing decision of the Secretary-General of the United Nations established a dual scale of salaries for General Service staff in contradiction with the general principle . . . 'equal pay for equal work',

"*and therefore*

"(*a*) To quash the decision of the Secretary-General of the United Nations dated 20 January 1978, introducing as from 1 January 1978, a new salary scale for General Service staff in the United Nations,

"(*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 and on the basis of the 1968/69 Agreements on the methodology of surveys on General Service salaries in Geneva, the processing of data arising out of such surveys and the negotiation of salary scales between the Secretary-General of the United Nations and the staff representatives on the basis of the results of such surveys,

"(*c*) To order the fulfillment of the obligation emanating from the aforementioned Agreements, *i.e.*, that a survey be carried out in the year 1979, in conformity with the said Agreements,

"(*d*) To assign to the defendant organization any expenses incurred by the complainant in the preparation of his case before the Tribunal, including lawyer's fees, on the basis of documentary evidence which will be submitted to that effect by the complainant on completion of the proceedings before the Tribunal.";

Whereas the application contained a request for oral proceedings;

Whereas, on 28 April 1978, counsel for the Applicant asked the Tribunal to note his appearance in behalf of the [Geneva] Staff Council, to accept the statements he had made and would make in the future in behalf of the Staff Council as well as the Applicant, and to accept his appearance in behalf of the Inter-Agency Defence Committee and the Federation of International Civil Servants' Associations;

Whereas the Respondent filed his answer on 9 June 1978;

Whereas, on 13 June 1978, applications for intervention in the case were submitted by René Boccard, Francesco Commisso, Françoise Dusonchet, Josephina Fraga Ribeiro, Pierre Gobber, Agrippino Greco, Juan Mateu, Z. Milosevic, Brian Racher, Elena Tejero and Pierre Vangeleyn, staff members of the United Nations, on the ground that the judgement to be rendered by the Tribunal would affect directly the rights of the interveners since the case concerned a decision of the Secretary-General of the United Nations which also constituted a unilateral breach of the contracts of the interveners;

Whereas, on 30 June and 19 July 1978 and on 20 July 1978 respectively, the Applicant and the Respondent submitted at the request of the Tribunal additional statements commenting on the relevance to the case of an opinion given by the members of the Administrative Tribunal of the International Labour Organisation (ILO) on 16 May 1978 concerning the fixing of General Service category salaries in ILO at Geneva;

Whereas in her statement of 30 June 1978 the Applicant informed the Tribunal that she wished

"to conform her application to the findings and conclusions in the Opinion and thereby to narrow her claim to the contention that the Secretary-General breached the agreement of 23 April 1976 by revising the salary scale without prior negotiations with the Staff Organization of the United Nations of Geneva signatory to the agreement of 23 April 1976.";

Whereas in her statement of 19 July 1978, which was also submitted as her written observations on the Respondent's answer, the Applicant requested the Tribunal to conclude that:

"1. The Secretary-General has the power to negotiate salary scales with the representatives of the employees in the General Service category and to fix such

salary scales as he may agree upon and that such powers are contained in the authority vested in him by the United Nations.

"2. The Secretary-General has the power to agree to negotiate salary scales at a future date and further to agree that he will not exercise his authority to fix salary scales at a future date without prior negotiations in good faith with the representatives of the employees.

"3. The Secretary-General negotiated a salary scale with the Staff Council as representative of the General Service category at Geneva as set forth in the agreement of 23 April 1976 and fixed such salary scale as the result of such negotiations.

"4. The Secretary-General agreed that he would engage in good faith negotiations with the Staff Council before revising the salary scale he set pursuant to the agreement of 23 April 1976 and the Staff Council agreed that it would engage in good faith negotiations with the Secretary-General on any proposed revisions of the salary scale.

"5. The Secretary-General breached the agreement on prior negotiation by introducing a revised salary scale with effect from 1 January 1978 for the General Service category at Geneva without prior negotiations with the Staff Council.

"6. The Secretary-General should be directed to rescind the salary scale of the General Service category at Geneva he unilaterally introduced with effect from 1 January 1978 without prior negotiations with the Staff Council and to make no revisions in such salary scale unless and until he has negotiated in good faith with the Staff Council.";

Whereas, on 15 and 17 September 1978, the General Secretary of the Staff Union of the United Nations at Geneva requested to be heard or alternatively to submit a written statement in the case as representative of the Staff Union;

Whereas the Tribunal denied that request on 21 September 1978;

Whereas, on 25 September and 5 October 1978, written statements were submitted by the General Secretary of the Staff Union of the United Nations at Geneva, with the authorization of the Tribunal, on behalf of René Boccard, Francesco Commisso, Françoise Dusonchet, Josephina Fraga Ribeiro, Pierre Gobber, Agrippino Greco, Juan Mateu, Z. Milosevic, Elena Tejero and Pierre Vangeleyn, interveners in the case;

Whereas, on 27 September 1978, the Tribunal informed counsel for the Applicant that he would be heard in that capacity only;

Whereas the Tribunal heard the parties at a public session held on 28 September 1978;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 July 1962 as Secretary with the Economic Commission for Europe at Geneva under a permanent appointment at the G-4 level on transfer from the Food and Agriculture Organization. She was promoted to the G-5 level on 1 June 1964 and to the G-6 level on 1 July 1968. On 1 January 1972 her functional title was changed to Administrative Secretary. On 12 June 1974, at its sixtieth meeting, the Joint Advisory Committee of the United Nations Office at Geneva, after discussing an item on its agenda entitled "Renegotiation of the Agreement on General Service Salaries and Allowances", decided to request the Director-General of the Office to explore with other Geneva-based agencies in the common system the establishment of

a joint Working Party to undertake a review and survey of emoluments of General Service staff. The previous survey had been conducted in 1968-1969. On 19 June 1974, at the sixty-first meeting of the Joint Advisory Committee, the representatives of the Director-General questioned the propriety of the term "renegotiation" used in the title of the agenda item, recalling the advisory role attributed to the Committee under chapter VIII of the Staff Regulations and Rules. On 29 January 1975, at a plenary meeting of representatives of the Executive Heads and of the staff of the seven Geneva-based Organizations, it was decided to set up two Working Parties to conduct the review, one to deal with salaries, the other with allowances. At the next meeting, held on 30 April 1975, the representative of the ILO's Administration took note of the consensus reached on the binding character of the results of the survey and "all parties confirmed that they strictly adhered to the binding character of the results of the survey and to the methodology used in 1968-1969". The actual survey was carried out in the last quarter of 1975 by the Battelle Institute, an independent institution. Its results revealed, according to the Joint Inspection Unit, a difference of 24.7 per cent at the accounts clerk level and of 17.6 per cent at the junior clerk level between the salaries actually paid on 1 August 1975 and those which, according to the results of the survey, should have been paid on that date. On 11 February 1976, in a statement reflecting their agreed position on the survey, the representatives of the Executive Heads of the Geneva-based Organizations expressed "very serious misgivings about the validity of the preliminary conclusions" of the survey report and their belief that "the statistical results could not be adequately interpreted without further examination" by the appropriate Working Party. This statement was regarded by the staff as a breach of the commitment to treat the results of the survey as binding and, from 25 February to 3 March 1976, a strike took place at the United Nations Office at Geneva. On 3 March 1976 the Executive Heads issued a declaration reaffirming *inter alia* the agreement reached on 30 April 1975, confirming that in carrying out the salary review the methodology used in respect of the 1968-1969 survey should be applied without alteration, agreeing that in view of the need to analyse the Battelle Institute's results the findings of its report should be checked jointly with a view to the construction of the new salary scale and the establishment of revised rates of family allowances, and expressing the intention to implement the new salary scale with effect from 1 August 1975 and the revised family allowances from 1 April 1975; the staff representatives expressed their full agreement with the statements contained in the declaration. In April 1976 the Controller of the United Nations was designated sole negotiator by the Secretary-General of the United Nations and the Executive Heads of the Geneva-based agencies. A series of meetings took place between him and the representatives of the staff. These meetings culminated on 23 April 1976 in an agreement that the net salaries of staff members under the General Service salary scales in effect on 1 August 1975 would be increased by 15 per cent for G-1 and G-2, 14 per cent for G-3 and G-4, 12 per cent for G-5 and 11 per cent for G-6 and G-7, that the new salary scales would be applied retroactively from 1 August 1975, and that these salaries would be adjusted on 1 February 1976 in accordance with the current procedure for interim adjustment of General Service salaries. In June 1976 the Joint Inspection Unit issued a report on some aspects of the strike. In July 1976 the ICSC, at its fourth session, took note of requests from the Governing Body of ILO and from the World Health Assembly that it assume its functions under article 12, paragraph 1 of its Statute as soon as possible, particularly with respect to Geneva. It decided to assume those functions in respect of headquarters duty stations from the close of its fourth session. This decision was reported to the General Assembly

and the other legislative bodies. On 1 September 1976 the representatives of the Executive Heads and of the staff of the seven Geneva-based Organizations agreed on a new method for interim adjustments of the Geneva General Service salaries; the arrangement was without prejudice to the outcome of the examination of the question of General Service salaries by the ICSC. On 22 December 1976, in its resolution 31/193 B the General Assembly, after considering the report of the Joint Inspection Unit and noting with satisfaction the decision by the ICSC to advance the assumption of its functions under article 12, paragraph 1 of its Statute, requested the ICSC, *inter alia*, to have a survey made of local employment conditions at Geneva, to make recommendations as to the salary scales deemed appropriate and to inform the General Assembly of the actions taken in that regard. The ICSC accordingly carried out a survey in Geneva as a result of which it recommended a salary scale which represented reductions from the existing scale ranging from 15.9 per cent to 19.5 per cent, the over-all average being 17.1 per cent. The ICSC communicated its findings and recommendations to the Executive Heads concerned, for action by the appropriate organs of each organization in accordance with its own rules and procedures, as well as to the General Assembly in response to the latter's request. On 27 September 1977, in acknowledging receipt of the ICSC's report on behalf of the Secretary-General, the Under-Secretary-General for Administration and Management expressed the Secretary-General's intention to engage in consultations with the other Executive Heads involved and with staff representatives concerning the ICSC's recommendations. On the same day the Acting Director of the Administrative and Financial Services of the United Nations Office at Geneva, in a letter to the Chairman of the Staff Committee of that Office, expressed a wish to hold consultations with him on the matter, adding that he realized that this might be difficult in view of what he understood was the staff position, namely that the report of the ICSC in its entirety was unacceptable and therefore not negotiable and also in view of his own position as representing only one of the seven agencies involved. On 30 September 1977 the Chairman of the Staff Committee replied that he would be glad to meet with the Acting Director, together with the Members of an Inter-Agency Defence Committee of the Staff Council; he drew the Acting Director's attention to a letter sent on that day by the Defence Committee to the Director-General of the United Nations Office at Geneva. In that letter the Defence Committee called upon the Director-General to honour the agreement of 23 April 1976. During the following weeks the Secretary-General and his representatives held consultations with representatives of the staff. On 22 November 1977 the Secretary-General announced to the Fifth Committee of the General Assembly his intention and that of the other Executive Heads concerned to implement the ICSC's recommendation and to adopt certain transitional arrangements. On 21 December 1977, in its resolution 32/200, the General Assembly noted with appreciation the ICSC's report on its action with respect to the salaries of the staff in the General Service category at Geneva as well as the Secretary-General's intention to implement the ICSC's recommendation and the transitional arrangements under the authority vested in him by paragraph 7 of Annex I to the Staff Regulations. The new salary scale was introduced effective 1 January 1978. On 30 January 1978 the Applicant apparently wrote to the Secretary-General asking him to revise the decision to give effect to the new salary scale. On 16 February 1978 the Assistant Secretary-General for Personnel Services advised her that the Secretary-General maintained the decision and agreed to direct submission of an application to the Tribunal. On 17 April 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. (*a*) The 1968-1969 agreements and the 1976 agreements on General Service salaries in Geneva were entered into in good faith by parties which were fully empowered to enter into such contractual commitments;

(*b*) The two sets of agreements 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*) Therefore, since the results of such agreements were, through constant and unchallenged practice over a period of nearly ten years, incorporated into the salary scales promulgated from 1969 to 1977—such scales being themselves incorporated into the Staff Rules—the Applicant's contractual rights under the said 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 her right to negotiate her salary with her employer on the basis of the results of such surveys;

(*d*) Since these agreements have never been denounced by the Secretary-General and therefore have not been renegotiated by him with representatives of his staff, they continued to apply to the Applicant and to determine her conditions of appointment;

(*e*) General Assembly resolution 31/193 B of 22 December 1976, the subsequent action by the ICSC and the decision announced by the Secretary-General to the Fifth Committee on 22 November 1977, being "res inter alios acta", cannot be adduced as supporting the decision of the Secretary-General unilaterally and arbitrarily to breach the contractual relationship between him and the Applicant in the matter of the General Service salaries.

2. (*a*) The ICSC's survey and subsequent recommendations were tainted by errors of law: the ICSC did not fully respect in substance paragraphs 1 and 2 of its terms of reference under General Assembly resolution 31/193 B and it went beyond its terms of reference in considering that its recommendations under article 12, paragraph 1 of its Statute were, to all intents and purposes, binding upon the Executive Heads of the Geneva-based organizations;

(*b*) The ICSC's findings and recommendations were tainted by errors of fact: they were the result of a logically defective method and were based on inadequate and insufficient data;

(*c*) Therefore, as the decision of the Secretary-General to implement a new scale of salaries is based on the findings of the ICSC, which are tainted by errors of law and of fact, the said decision is tainted by the same errors of law and of fact.

3. The *de facto* implementation of a dual scale of salaries for General Service staff in Geneva is causing a moral prejudice to the Applicant, in that she is forced to work under a system which creates inequities in terms of remuneration between her and her new colleagues and which is contrary to international labour legislation.

Whereas the Respondent's principal contentions are:

1. The Applicant's contractual rights were not violated:

(*a*) The agreement of 23 April 1976 was fully implemented and had no application to future surveys or revisions. No agreement was reached in 1976 with respect to timing, conduct or effect of future surveys or with procedures preceding future salary revisions. The 23 April and 1 September 1976 agreements bore only on salary scales derived from

the 1975 survey which were duly established as of 1 August 1975; accordingly these agreements had been fully observed as of the time when the new salary scales based on the ICSC recommendation were promulgated by the Secretary-General with effect from 1 January 1978;

(*b*) The agreements reached at the end of the 1968-1969 and 1975-1976 joint meetings were reached within the joint administrative machinery with staff participation provided in Staff Regulation 8.2 and Staff Rule 108.2 and not within a collective bargaining system. The establishment of salary scales in 1976 was done by the Secretary-General subsequent to consultations or negotiations with staff representatives which had resulted in agreement on the action that the Secretary-General should take; and that action having been taken, the purpose of the consultations or negotiations was accomplished. Similarly, interim adjustments were made in accordance with the 1 September 1976 agreement, and once revised salary scales were adopted, the purpose of that agreement was accomplished. Those agreements were not themselves collective bargaining contracts nor did they establish a collective bargaining system. They did not purport to have and could not have had future effect on the authority of the General Assembly or the Secretary-General or the ICSC to revise salary scales thereafter and to provide for other interim adjustment measures;

(*c*) Provisions for participation of staff representatives are statutory, not contractual in nature. Therefore, even if the procedures followed in 1968-1969 and 1975-1976 had actually been (as they were not) provided and formalized under Regulations and Rules, they could properly have been superseded or changed. In fact, there is no dispute that the role played by staff representatives in the 1968 and 1975 surveys and consequent salary revisions was altered when the ICSC assumed its functions under its Statute.

2. The Secretary-General's decision to adopt the Geneva General Service salary scale as recommended by the ICSC was not based on error of law or fact, and the General Assembly noted with appreciation not only the ICSC's report, but also the Secretary-General's intention to accept its recommendation.

3. The Applicant's complaint about the transitional allowance does not constitute an allegation of non-observance of any legally cognizable right.

4. The Applicant's requests for relief exceed the Tribunal's competence.

The Tribunal, having deliberated from 27 September to 20 October 1978, now pronounces the following judgement:

I. The Tribunal has before it eleven applications for intervention submitted on 13 June 1978 under article 19 of the Rules. Since the applicants for intervention are staff members in the General Service category at Geneva, they have rights which may be affected by the Tribunal's judgement. The Tribunal therefore rules that those applications are admissible.

II. The Tribunal notes that, though the Applicant raised several pleas set out in detail in the earlier part of the judgement, she stated in her additional statement of 30 June 1978 that she wished "to narrow her claim to the contention that the Secretary-General breached the agreement of 23 April 1976 by revising the salary scale" of the staff in the General Service category at Geneva "without prior negotiations" with the Staff Council. During the oral proceedings, the Applicant confined her case specifically to the relief that "the Secretary-General should be directed to rescind the salary scale of the General Service category at Geneva he unilaterally introduced with effect from 1

January 1978 without prior negotiations with the Staff Council and to make no revisions in such salary scale unless and until he has negotiated in good faith with the Staff Council".

III. The Respondent has raised an objection that the Tribunal is not competent under article 9 of its Statute to order rescission of the promulgation of the salary scale of General Service staff at Geneva and that the Applicant's request for the said relief should be denied.

The Tribunal observes that, under article 2 of its Statute, it is competent to hear and pass judgement upon applications from staff members of the United Nations alleging non-observance of their contracts of employment or terms of appointment, including all pertinent regulations and rules. The Applicant claims that the requirement of negotiations between the Secretary-General and the Staff Council prior to fixing the salary scale of the staff in the General Service category at Geneva is part of the conditions of service of such staff and alleges breach of that condition. Besides, the case involves consideration of the scope and effect of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2 concerning staff relations. The Tribunal therefore rules that it is competent to hear and pass judgement on the application. The Respondent's objection to the competence of the Tribunal to grant the relief sought does not affect the competence of the Tribunal to hear and pass judgement in the case.

IV. According to the Applicant, the salary scale fixed under the agreement of 23 April 1976 could not be altered unilaterally by the Secretary-General and an obligation to negotiate with the Staff Council prior to making any revision in the salary scale agreed to between the parties was implicit in the 1968-1969 and 1976 agreements. The Respondent argues that the commitments undertaken under the 1976 agreements were fully performed, that the consultative procedures prior to these agreements were pursued under Staff Regulations 8.1 and 8.2, that none of the terms of the Applicant's appointment were established by collective bargaining contracts and that there was no breach in the terms expressly or implicitly agreed upon between the parties.

V. The points that arise for determination in the case are:

1. Was there an obligation, statutory or contractual, express or implied, on the part of the Secretary-General to negotiate with the Staff Council prior to the introduction of a revised salary scale for the staff in the General Service category at Geneva?

2. Did the promulgation of the salary scale effective from 1 January 1978 constitute a breach of such obligation?

3. Is the Applicant entitled to the relief requested?

VI. The Applicant has elaborately dealt with the principles of collective bargaining, with the ILO Convention on Employment in the Public Service and with the need to promote machinery for negotiation of the terms and conditions of employment by public authorities. Without going into the merits of the general proposition, the Tribunal wishes to point out that the legal "right" and "duty" to collective bargaining, if any, arises out of statute or contract. Thus there are laws in some countries imposing obligations on employers and employees to bargain in good faith while in some others there are agreements between employers and employees undertaking such obligations. Apart from statutory or contractual obligations, the Tribunal is not aware of an enforceable right to collective bargaining based on general principles of labour law. Therefore the relevant question before the Tribunal is whether such an obligation exists in this case.

VII. The Tribunal notes that, while provisions for consultations with the staff exist

in chapter VIII of the Staff Regulations and Rules and in the Statute of the ICSC, there are no provisions in the Staff Regulations and Rules for "collective bargaining" or "negotiation in good faith" between the staff and the Administration. Nor is it contended that there is such a statutory obligation on the part of either the staff or the Administration. On the contrary, paragraph 7 of Annex I to the Staff Regulations provides that "the Secretary-General shall 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 of the United Nations office concerned". Neither the agreement of 23 April 1976 nor the earlier agreements of 1968-1969 provided *in express terms* for "collective bargaining" or "negotiation in good faith" with respect to any future salary agreements. The Tribunal therefore concludes that there is no statutory or express contractual obligation to "collective bargaining" or "negotiation in good faith" with the staff representatives prior to the introduction of a salary scale for the staff in the General Service category at Geneva.

VIII. The Applicant argues that the agreement of 23 April 1976 either created an obligation of prior negotiation or recognized an already existing one on the part of the Respondent and that as the agreement had not been validly modified in the absence of such negotiation, the salary scale prescribed therein continued to apply to the staff in the General Service category at Geneva. The Tribunal is unable to read any such obligation into the agreement. *Ex facie* there is no such obligation in the agreement. Secondly, the agreement, which came into effect from 1 August 1975, had not prescribed any time-limit for its duration. Since there is no limitation in the agreement on the powers of the Secretary-General to revise from time to time the salary scale of the staff in the General Service category at Geneva so as to bring it in accord with the best prevailing conditions in the locality, the Tribunal reaches the conclusion that no contractual obligation has been created by the agreement of 23 April 1976 as to "collective bargaining" or "negotiation in good faith" with the staff representatives prior to the revision of the scale.

IX. The Applicant further argues that such an obligation was implicit in the agreements of 1968-1969 and 1976. The Tribunal in its jurisprudence has held that the terms and conditions of employment may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances (Judgements Nos. 95: *Sikand* and 142: *Bhattacharyya*). Hence the Tribunal has to examine whether an obligation to negotiate with the staff is implicit in the agreements of 1968-1969 and 1976 or in the facts and surrounding circumstances.

X. It is necessary for this purpose to go into the past history of the manner in which the General Service salaries were fixed at Geneva. As the Tribunal has already observed, the Staff Regulations enjoin on the Secretary-General the duty to fix the salary scales for staff in the General Service category "normally on the basis of the best prevailing conditions of employment in the locality of the United Nations office concerned". Since the best prevailing conditions are not something definite that can be measured by a yardstick, a survey was invariably carried out prior to the fixing of the salary scale for the General Service staff at Geneva. These surveys were followed by joint discussions between the Executive Heads and the staff representatives of the Geneva-based Organizations. In 1956, for instance, a survey was carried out under the direction of a joint interagency committee composed of the Executive Heads and the staff representatives of the Geneva-based Organizations, followed by prolonged negotiations between the parties. In 1966, at the suggestion of the International Civil Service Advisory Board (ICSAB),

the survey was entrusted to an outside institution, namely the Battelle Memorial Institute, an industrial research institution based at Geneva. A joint interagency committee evaluated the Institute's data and found that it could not reach any agreement. The matter was then referred to an ICSAB panel and thereafter the report of the ICSAB panel was again discussed at joint interagency meetings before the salary scales were fixed by the Secretary-General. In Information Circular No. 1418 dated 22 May 1969, the Director-General of the United Nations Office at Geneva stated:

> "The Secretary-General, in agreement with the Executive Heads of the Geneva Organizations, and after full consultation with the staff representatives, has decided to increase the salaries of staff in the General Service and Full-time Maintenance categories with effect from 1 January 1969."

At an earlier meeting held on 7 May 1969 it had also been agreed between representatives of the Executive Heads and of the staff of the Geneva Organizations that "unless exceptional circumstances occur in the meanwhile, the next survey will take place in early 1974, to cover rates paid in 1973."

The next survey was undertaken by the Battelle Institute in 1975 pursuant to a decision of the full meeting of representatives of the Executive Heads and of the staff of the Geneva Organizations held on 29 January 1975. The Chairman of the meeting stated: "The administrations agreed to conducting such a review, especially since the last agreement on determination of General Service salaries called for a review to be held in 1974." At the next meeting, held on 30 April 1975, the representatives of the Executive Heads and of the staff of the Geneva Organizations agreed in advance to abide by the results of the survey of the Battelle Institute. When the results of the survey proved unacceptable to the Executive Heads, they questioned the data on which the survey was based. At the joint interagency meeting on General Service salaries held on 11 February 1976, the representatives of the Executive Heads of the Geneva-based Organizations stated:

> " . . . the representatives of the Administrations believe that the statistical results could not be adequately interpreted without further examination for which purpose we request you, Mr. Chairman, to refer the matter to the Working Group. It is our understanding that the Battelle Institute's representative is willing to meet with the Working Group."

This was interpreted by the staff as a breach of the earlier undertaking to treat the results of the survey as binding and a strike occurred at the United Nations Office at Geneva from 25 February to 3 March 1976.

As a result of further discussions between the Executive Heads and the staff, a joint declaration dated 3 March 1976 was issued stating *inter alia*:

> "It is further agreed that, in view of the need to analyse the Battelle Institute's results, the findings of its report should be checked *jointly* with a view to the construction of the new salary scale and the establishment of revised rates of family allowances." (Emphasis added.)

It was as a result of these joint discussions that the agreement of 23 April 1976 was signed between the Controller of the United Nations, "sole negotiator" designated by the Secretary-General of the United Nations and the Executive Heads, and the representatives of the staff of the Geneva-based Organizations. That at these joint meetings the methodology of the survey, the choice of the agency for conducting it, and the results

of the survey were discussed is not in dispute.

XI. From the foregoing narration of events, it is clear that since 1957 there have invariably been discussions between representatives of the Executive Heads and of the staff of the various Geneva Organizations in the form of interagency committees, joint advisory committees, joint working parties, etc. prior to the fixing of the salary scale of General Service staff.

XII. The Respondent argues that under the Staff Regulations, the authority to fix the salary scale of the staff in the General Service category at Geneva rests with the Secretary-General and that he cannot enter into collective bargaining agreements in derogation of his authority. The Tribunal observes that it is not the Applicant's case that a salary revision cannot be made by the Secretary-General without the consent of the representatives of the staff. On the other hand, it is her case that there should be "negotiations" with the staff representatives concerned before promulgating a new salary scale. The past history of wage fixing for the General Service staff at Geneva shows that there have been agreements on salary scales on a few occasions and no agreements on others, and that the Secretary-General's authority to fix such salary scales has not been challenged on the ground that there had been no agreement. The Secretary-General has a wide discretion to consult with the staff and he has done so on almost every occasion in the past through the instrument of joint consultative machinery or otherwise. The conduct by the Secretary-General of prior "negotiations" with the staff does not involve any derogation from his authority. In fact, in agreeing in advance to abide by the results of the survey carried out by the Battelle Institute in 1975, the Secretary-General exercised the wide discretion he has in the matter.

XIII. The Respondent contends that what preceded the agreements of 1968-1969 and 1976 were "consultations" in accordance with chapter VIII of the Staff Regulations and Rules and not "negotiations" or "collective bargaining". The Tribunal observes that in the agreement of 23 April 1976 the Controller of the United Nations is described as "sole negotiator" and that the Respondent in his answer also uses the word "negotiations" to describe the joint discussions. On the other hand, at the Joint Advisory Committee meeting on 19 June 1974, the representatives of the Director-General recalled the advisory role of the Joint Advisory Committee under chapter VIII of the Staff Regulations and Rules and sought replacement of the word "renegotiation" used in the minutes of the previous meeting by the words "review and possible revision"; the minutes were not changed but the Committee noted that it would bear the point in mind to avoid difficulties in future discussions. It may also be noted that in paragraph 42 of its report of June 1976 the Joint Inspection Unit suggested the appointment, on the side of the employer agencies, of a "sole negotiator" who should be "equipped with unquestioned powers of discussion and decision so as to be able properly to conduct *negotiations* with the staff representatives." (Emphasis added.)

XIV. The Tribunal considers that it is not the words used but the substance of the procedure that has to be deduced from the circumstances. According to the Respondent, the procedures such as joint advisory committees, joint interagency committees and joint working parties are part of the consultative process envisaged in Staff Regulations 8.1 and 8.2 and Staff Rule 108.2. The provisions relevant to the case read as follows:

> "REGULATION 8.1: (*a*) A Staff Council, elected by the staff, shall be established for the purpose of ensuring continuous contact between the staff and the Secretary-General. The Council shall be entitled to make proposals to the Secretary-General

for improvements in the situation of staff members, both as regards their conditions of work and their general conditions of life.

". . .

"REGULATION 8.2: The Secretary-General shall establish joint administrative machinery with staff participation to advise him regarding personnel policies and general questions of staff welfare and to make to him such proposals as it may desire for amendment of the Staff Regulations and Rules."

"Rule 108.2

"JOINT ADVISORY COMMITTEE

"(*a*) The joint administrative machinery provided for in regulation 8.2 shall consist of a Joint Advisory Committee composed as follows:

"(i) A Chairman selected by the Secretary-General from a list proposed by the Staff Council;

"(ii) Four members and three alternates representing the Staff Council;

"(iii) Four members and three alternates representing the Secretary-General.

". . .

"(*d*) Special joint committees to advise on special problems may be set up as the occasion arises.

". . ."

In applying those provisions, the Respondent constituted in the past joint advisory committees, joint interagency committees and joint working parties to resolve differences. The committees had joint consultations, discussing matters relating to the methodology of the survey, the agency for conducting it, and the analysis of the results of the survey over which there were differences. Whether called "negotiations" or "joint consultative machinery", the substance, namely, direct discussion between the representatives of the Executive Heads and of the staff, always took place.

XV. The Tribunal therefore reaches the conclusion that, whether under the Staff Regulations and Rules or otherwise, there is a long established practice of joint consultations between the representatives of the Executive Heads and of the staff of the Geneva-based Organizations on the revision of salary scales of the staff in the General Service category at Geneva.

XVI. Before the introduction of the salary scale effective from 1 January 1978, no joint working party, interagency committee or joint advisory committee was constituted. According to the Respondent, the earlier practices had become irrelevant after the establishment of the ICSC. The Tribunal has therefore to examine whether the establishment of the ICSC had altered the situation.

The Tribunal observes that the ICSC is a subsidiary organ established by the General Assembly under Article 22 of the Charter and forms part of the United Nations system. Under article 1 of its Statute, the ICSC has been established "for the regulation and coordination of the conditions of service of the United Nations common system". Under article 12, paragraph 1 the ICSC "shall establish the relevant facts for, and make recommendations as to, the salary scales of staff in the General Service and other locally recruited categories." Thus, while Annex I to the Staff Regulations prescribes no instrument for ascertaining the best prevailing conditions of employment for staff members

in the General Service category, the General Assembly entrusted to the ICSC the task of establishing the relevant facts and making recommendations as to the salary scales of such staff members. Under article 12, paragraph 3 of its Statute the ICSC, in exercising its functions under paragraph 1, "shall, in accordance with article 28, consult executive heads and staff representatives". Article 28 makes provisions for Executive Heads of the organizations and staff representatives to present, collectively or separately, facts and views on any matter within the competence of the ICSC. Rule 37 of the ICSC provides that the representatives designated by the Executive Head and the staff representatives of a participating organization may attend meetings and may address the Commission on matters of particular interest to that organization. The Tribunal considers that those provisions form part of the régime governing the staff of the United Nations. The Tribunal is therefore of opinion that the earlier procedures established by practice for constituting joint committees to decide on the methodology of the survey or on the choice of an agency for conducting it became inapplicable after the establishment of the ICSC, which has been charged with the same responsibilities under article 12 of its Statute. The Tribunal notes that provision exists for the Executive Heads and the staff representatives making representations in respect of those matters to the ICSC and holding discussions with it. It may be noted that the ICSC, after reaching preliminary conclusions but before making its final recommendation, invited the Executive Heads and the staff representatives to present their views at a meeting, which was held in Geneva on 12 April 1977. After the ICSC had completed its recommendation regarding the salary scale for the staff in the General Service category at Geneva, the staff representatives had a further opportunity to comment. The Tribunal therefore finds that the Statute of the ICSC and its Rules of procedure afford fair and reasonable opportunity for the staff to make representations to the Commission and discuss issues with it both before and after completion of its recommendations.

XVII. The Tribunal observes that the ICSC exercised its functions under article 12, paragraph 1 of its Statute and made a recommendation regarding the new salary scale. It did not exercise functions under article 12, paragraph 2 of its Statute according to which, under certain conditions, it can determine the salary scales instead of making a recommendation. The question arises whether, after the receipt of the recommendation of the ICSC and before the promulgation of the revised salary scale effective 1 January 1978, there was an obligation on the part of the Respondent to engage in consultations with the staff representatives through "joint administrative machinery" in application of Staff Regulations 8.1 and 8.2. That such consultations were not precluded and that in fact they were contemplated by the ICSC appears from paragraph 196 of its third annual report wherein it stated:

> "The recommendation that a sole negotiator should be appointed to act on behalf of all the executive heads in Geneva (A/31/137, paras. 42–48), could not modify the Commission's relations, under its statute and rules of procedure, with the executive heads but was for them to consider in so far as *they might have negotiations with the staff after the Commission had presented its recommendation.*" (Emphasis added.)

It is also important to note that in paragraph 47 of its report of June 1976 the Joint Inspection Unit defined the role of the sole negotiator as follows:

> "The functions of this negotiator would, if the Commission is able to accelerate the application of article 12, paragraph 1, of its statute, essentially consist of *de-*

termining the salary scales in consultation with the staff and in the light of the 'relevant facts and recommendations' presented by the Commission." (Emphasis added.)

The Tribunal therefore infers that after the ICSC had made its recommendation, there should have been consultations with the staff on the salary scale for the General Service staff at Geneva.

XVIII. On receipt of the report of the ICSC, the Under-Secretary-General for Administration and Management acknowledged such an obligation in a letter to the Chairman of the ICSC dated 27 September 1977 stating that:

> "The Secretary-General intends to engage in consultations with the other executive heads involved, and with staff representatives, concerning the recommendations of the Commission, and he will inform the Commission, in due course, of the action he intends to take in implementation thereof."

On the same day, the Acting Director of Administrative and Financial Services of the United Nations Office at Geneva wrote to the Chairman of the Staff Committee, expressing a wish to hold consultations with him on the matter.

XIX. The representatives of the staff met with the Secretary-General on 22 October 1977 and with senior officials at Headquarters in New York several times between 21 October and 18 November 1977. According to the Respondent, "Mr. Tholle, Mr. Albright, and Mrs. Schwab met repeatedly with senior officials at Headquarters including Mr. Davidson, Under-Secretary-General for Administration and Management as well as Mr. Debatin, the Controller, and members of the Salaries and Allowances Section and discussed their objections to the ICSC survey. During these discussions they were advised of proposed transitional arrangements which they declined to discuss but of which they took note." On 7 November 1977, the Chairman of the Staff Committee of the United Nations Office at Geneva submitted to the Secretary-General the results of an analysis by a consultant engaged by the Staff Committee of data used by the ICSC. This document was transmitted to the Chairman of the ICSC who called for additional data which the consultant claimed to have obtained. On the failure of the Staff Committee to furnish those data, the Chairman of the ICSC examined the document in detail and informed Mr. Davidson and Mrs. Schwab that he (the Chairman) had not found in the material submitted anything "which would warrant the Commission reconsidering its recommendation". Thereafter no discussions with the staff took place. On 22 November 1977 the Secretary-General made a statement to the Fifth Committee of the General Assembly outlining his proposals regarding the salary revision. The Fifth Committee had before it a written statement by the United Nations Staff Council at Geneva circulated as a General Assembly document. The Fifth Committee report, together with the draft resolution, was adopted by the General Assembly in resolution 32/200.

The Tribunal observes that, though joint advisory committees, joint interagency committees and joint working parties were constituted in the past in pursuance of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2, no such procedure was followed before the introduction of the new salary scale effective 1 January 1978.

XX. Considering that the action of the ICSC on the salary scale applicable to the staff in the General Service category at Geneva was not a determination under article 12, paragraph 2 of its Statute, considering that the ICSC itself had contemplated further

discussions with the staff representatives after the recommendation was made, considering further that the obligation to consult with the staff representatives after the recommendation of the ICSC was received had been recognized by the Under-Secretary-General for Administration and Management, and considering the uniform practice of establishing joint machinery in pursuance of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2, the Tribunal concludes that there was an implied obligation on the part of the Respondent to hold joint consultations with the staff representatives prior to the revision of the salary scale.

XXI. The next question that the Tribunal has to determine is whether there has been a breach of that obligation by the Respondent. The Tribunal considers that the staff representatives did not fully realize the consequences of the statutory changes that had occurred with the establishment of the ICSC charged *inter alia* with the responsibility of making a recommendation or a determination, as the case might be, as to the salary scale of the staff in the General Service category at Geneva. In the joint statement issued on 1 September 1976 by the representatives of the Executive Heads and of the staff concerning the method for interim adjustments of the Geneva General Service salaries, it is specifically mentioned that "the present arrangement is without prejudice to the outcome of the examination by the ICSC of the question of General Service salaries with full participation of Administrations and staff . . .". Thus the staff representatives were aware of the role of the ICSC in recommending the future salary scales of the General Service category. They did not avail themselves of the opportunity offered to them of co-operating with the ICSC and reaching appropriate conclusions. When the ICSC, after reaching preliminary conclusions, invited the Executive Heads and the staff representatives to attend a meeting in Geneva on 12 April 1977, the spokesman for the staff representatives stated at the meeting *inter alia* that "the Commission should not pronounce on any part of the survey until it was ready to decide on the methodology as a whole", that "full participation by staff representatives was essential; there had so far been no real consultations" and that "the Commission's role was only to make recommendations, the acceptance and implementation of which would ultimately be the subject of negotiation between the staff and the executive heads". After the ICSC had completed its recommendation, the staff representatives made the following statement quoted in paragraph 182 of the ICSC's third annual report:

> "Despite the arguments put forward by the Commission in its report, the representatives of the staff remain convinced that the method used for the survey was not valid; they are moreover convinced that the method used, apart from its questionable character, could have produced much better data if it had not suffered from certain limitations, which the Commission recognizes to have existed but which it does not admit to have had any effect. Consequently, the staff representatives cannot subscribe to the Commission's conclusions and recommendations."

Thus the staff representatives contested the report of the ICSC and even its right to review the salary scale. The Tribunal is therefore of the view that by their refusal to co-operate with the ICSC the staff representatives rendered article 12, paragraph 3 and article 28 of the Statute of the ICSC infructuous.

XXII. At the next stage, when by a letter of 27 September 1977 the Administration invited the staff representatives for consultations, the staff representatives reiterated their objection to the role of the ICSC in a letter of 30 September 1977 to the Director-General of the United Nations Office at Geneva, stating: "Enfin, certains éléments nous permettent

de considérer que l'intervention de la CFPI a été conçue comme un moyen d'arriver à des fins prédéterminées et qu'elle pourrait constituer ainsi un détournement de droit". Nevertheless the staff representatives were afforded ample opportunity to discuss the salary scale with the Secretary-General and senior officials in New York between 21 October and 18 November 1977 but, as stated earlier, the staff representatives refused to accept the report of the ICSC as a basis for discussion.

The Tribunal further observes that the objections of the staff representatives based on the consultant's opinion were fully considered by the ICSC and rejected by it. The Tribunal also notes that throughout this drawn-out confrontation, the staff representatives never invoked the provisions of Staff Regulations 8.1 and 8.2 nor invited the Administration to constitute a joint consultative machinery. The Tribunal cannot help feeling that the staff representatives relied on the contention that the agreement of 23 April 1976 could not be altered except by another agreement. The Tribunal has fully dealt in paragraph VIII above with the legal effects of the agreement of 23 April 1976. It now wishes to add that this agreement must be read consistent with and subject to the statutory changes introduced earlier by the establishment of the ICSC.

XXIII. The Tribunal finds that, though there was a uniform practice of consultations with the staff representatives prior to revision of the salary scales of the staff in the General Service category at Geneva, the staff representatives failed and neglected to avail themselves of the several opportunities offered for such consultations. The Tribunal also notes that the staff representatives, in their statement to the Fifth Committee, severely criticized the report of the ICSC, its survey and the classification of the staff and concluded with a warning against the adoption of the recommendation of the ICSC. The Tribunal reaches the conclusion that in view of the negative attitude adopted by the staff representatives, the Respondent could not reasonably be expected to follow the procedures utilized in the past. The Tribunal therefore decides that there has been no breach of an obligation on the part of the Respondent and that the salary scale promulgated by him effective 1 January 1978 is not vitiated.

XXIV. The Tribunal notes that the Secretary-General has said in his statement of 22 November 1977 to the Fifth Committee that the arrangements as of 1 January 1978 will remain in effect for a limited period of time and that the Chairman of the ICSC has agreed to initiate a new survey in the late months of 1979. Though in the circumstances of the case the Tribunal has rejected the application, it wishes to emphasize that its decision in this case does not constitute a precedent for not following the consultative procedures adopted in the past in pursuance of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2.

XXV. In view of the decision in paragraph XXIII above, the question of the competence of the Tribunal under article 9 of its Statute to grant the relief requested by the Applicant does not arise.

XXVI. For the foregoing reasons, the application is rejected.

XXVII. The applications for intervention submitted by René Boccard, Francesco Commisso, Françoise Dusonchet, Josephina Fraga Ribeiro, Pierre Gobber, Agrippino Greco, Juan Mateu, Z. Milosevic, Brian Racher, Elena Tejero and Pierre Vangeleyn are rejected on merits.

(Signatures)

R. VENKATARAMAN
President

Endre USTOR
Alternate Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

Francis T. P. PLIMPTON
Vice-President

New York, 20 October 1978

Judgement No. 237

(Original: English)

Case No. 234: Powell

Against: **The Secretary-General of the United Nations**

Request for tax reimbursement on a partial lump sum commutation of pension benefits.

The very special legal situation in which the Tribunal is called upon to render its judgement.—Various essential facts relating to the implementation of the principle of immunity from taxation of United Nations staff are recalled.—Reimbursement of tax payable in respect of commuted retirement benefits.—Financial consequences for the United States.—Representations by the United States Government to the Secretary-General.—Origin of reimbursement of taxes payable by United Nations staff members.—Article 105 of the Charter.—General Assembly resolution 13 (I).—Means used to attain the objectives set in that resolution.—Section 18 of the Convention on the Privileges and Immunities of the United Nations.—Reservation of the United States.—General Assembly resolutions 239 A (III) and 239 C (III).—The Tax Equalization Fund system.—General Assembly resolutions 973 (X) and 1099 (XI).—Staff Regulation 3.3.—The Secretary-General's discretionary power in framing the Staff Rules and in applying the Staff Regulations.—Force and effect of administrative orders and information circulars issued by the Secretary-General.—Information Circular ST/ADM/SER.A/1828.—Legal effect of the circular.—Previous decisions of the Tribunal relating to the legal effect of information circulars and the rights flowing therefrom.—Decision of the Tribunal that the information circular in question created a right which the Applicant could claim.—Previous decisions of the Tribunal relating to the meaning of respect for acquired rights.—Conclusion of the Tribunal that the right to reimbursement established in the Applicant's favour must be respected by the Respondent.—The Tribunal is not competent to rescind erga omnes *a decision in the nature of a regulation.—The Tribunal has to examine the validity of the system of tax reimbursement on partial commuted lump sum retirement benefits.—Respondent's contention that the tax levied on a one-third commuted lump sum pension benefit cannot be reimbursed as it does not constitute either salaries or emoluments within the meaning of Staff Regulation 3.3 (f).—This contention assumes that the payment in question is a pension payment.—Question whether the payment partakes of the character of other lump sum payments under articles of the Pension Fund Regulations or of periodic payments of retirement benefits.—Examination of the relevant provisions of the Pension Fund Regulations and the practices followed by the United Nations.—Conclusion of the Tribunal that the law and practice applicable to full lump sum payments apply with equal force to partial lump sum payments.—The one-third lump sum payment may be regarded as a terminal payment.—Respondent's contention that a retired staff member*