

Judgement No. 344*(Original: French)***Case No. 329:
Banerjee****Against: The Secretary-General
of the United Nations**

Request by a former staff member of the United Nations to determine that he was entitled to the rank of Assistant Secretary-General and that he was entitled to an extension of his appointment beyond retirement age; request for compensation.

Conclusion of the Joint Appeals Board that, while a "promise of some sort" was made by the Secretary-General to assign the Applicant to a post of Assistant Secretary-General, such a promise did not create a legal obligation for the Secretary-General to promote the Applicant.—Conclusion that there was no breach of the obligation to extend the Applicant's appointment.—Recommendation to reject the application.—Dissenting opinion of one member of the Board.

Applicant's claim that he had a right to be assigned to a post of Assistant Secretary-General.—Consideration of the circumstances of the case.—Finding that the Applicant, who was appointed at D-2 level, as well as the Government of his country, were given an assurance that the Applicant would become an Assistant Secretary-General as soon as possible.—The claim that such an assurance was given was never contested during the Applicant's six years of service.—While there was no firm commitment, there was a promise to proceed with the promotion as soon as possible.—Finding that the Secretary-General had an obligation to take all adequate and reasonable measures.—Finding that the Secretary-General's failure to do so was not due to the Applicant's performance.—Tribunal's conclusion that the Respondent is liable for his failure to keep the promises made to the Applicant.

Applicant's plea that he was entitled to a further extension of his appointment beyond the mandatory retirement age.—General Assembly resolution 33/143 required the Secretary-General to limit the granting of extensions to certain circumstances.—Finding that the Applicant had no entitlement to a further extension.

Award of a sum of \$US 2,000 as damages.—All other pleas rejected.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. T. Mutuale, President; Mr. Luis de Posadas Montero;
Mr. Roger Pinto;

Whereas, the application not having been filed within the time-limit of 90 days provided for in article 7, paragraph 4, of the Statute of the Tribunal, at the request of Purnendu Kumar Banerjee and with the agreement of the Respondent, the Tribunal decided on 26 October 1983 to grant the Applicant the benefit of the provisions of article 7, paragraph 5, of the Statute and extended the time-limit for the filing of an application to 1 February 1984;

Whereas, at the request of the Applicant and with the agreement of the Respondent, the President of the Tribunal extended the time-limit for the filing of an application successively to 21 February 1984 and 18 March 1984;

Whereas, on 19 March 1984, the Applicant filed an application which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, after having made the necessary corrections, the Applicant resubmitted the application on May 1984;

Whereas, in the pleas of the application, the Applicant requested the Tribunal to determine that:

“(a) The Appellant’s service be recognized as being at the rank of Assistant Secretary-General and that he be paid the resulting emoluments effective 1 September 1975; or

“(b) The Appellant was entitled to an appointment at the level of Assistant Secretary-General and that on account of the failure of the Respondent to carry out the legal and contractual undertakings given to the Appellant by the Respondent, the Appellant is entitled to the difference between the emoluments, retirement benefits and other perquisites of an ASG and of a D-2 Director at which level he was compensated; and

“(c) That the Appellant was legally and morally entitled to the extension of his services up to 31 August 1981 by virtue of contractual and legal expectancy of extension of services and that he be compensated for the breach of such terms and conditions of his employment at the level of ASG from 1 January 1980 to 31 August 1981; and

“(d) For . . . preliminary measures . . . [i.e., a request for oral hearings]; and

“(e) For such other and further relief as to this Tribunal may seem meet.”

Whereas the Respondent filed his answer on 24 January 1985;

Whereas, on 3 May 1985, the Executive Secretary of the Tribunal informed the parties that the President of the Tribunal had decided that no oral proceedings would be held in the case;

Whereas the Applicant filed written observations on 20 May 1985;

Whereas, on 20 May 1985, the Tribunal submitted two questions in writing to the Respondent, to which he replied in writing on 24 May 1985;

Whereas the facts in the case are as follows:

In March of 1973, the post of Deputy to the Under-Secretary-General for Political and Security Council Affairs became vacant. The post, at the D-2 level, had been occupied by an Indian national, Mr. Mangalam E. Chacko, who died suddenly on 12 March 1973.

The Applicant, then Ambassador Extraordinary and Plenipotentiary of India to the United Nations at Geneva, was approached by the Secretary-General regarding the possibility of joining the United Nations Secretariat. On 17 April 1973, the Permanent Representative of India to the United Nations sent the following message to the Foreign Secretary of India in New Delhi:

“Waldheim telephoned me last night and said that last week at Geneva he met Ambassador Banerjee. He is ready to appoint him in Chacko’s vacancy and has requested our agreement soonest possible. Apparently Dr. Banerjee has agreed to begin as Director II with prospect and assurance for Assistant Secretary-General in about two years time. Can we tell Waldheim to go ahead?”

On 1 May 1973, the Under-Secretary-General for Political and Security Council Affairs informed the Assistant Secretary-General for Personnel Services that he wished to recommend the Applicant for the post of Deputy to the Under-Secretary-General for Political and Security Council Affairs, which had “fallen vacant owing to the death of Mr. M. E. Chacko in March”, and asked

him to process the Applicant's appointment "at the D-2 level for a fixed-term of three years beginning 1 August 1973".

In a note verbale dated 29 May 1973, the Secretariat of the United Nations informed the Permanent Mission of India to the United Nations that the Applicant's appointment had been approved. The Applicant entered the service of the United Nations on 1 September 1973 as Deputy to the Under-Secretary-General for Political and Security Council Affairs, at step IV of the Director (D-2) level, under a three-year fixed-term appointment due to expire on 31 August 1976.

In a memorandum dated 26 November 1975 addressed to the Assistant Secretary-General for Personnel Services, the Under-Secretary-General for Political and Security Council Affairs recommended that the Applicant's appointment should be extended for three years, until 31 August 1979. In a letter dated 11 December 1975 addressed to the Under-Secretary-General for Administration and Management, the Permanent Representative of India to the United Nations stated that he was glad to learn that the Secretary-General had decided to extend the Applicant's contract by three years. Moreover, he noted:

"2. May I in this context reaffirm my Government's interest in the promotion of Dr. Banerjee to a post of Assistant Secretary-General, as and when circumstances make it possible. As you know, when he was released from the Government, we were given to understand that he would be designated to a post of Assistant Secretary-General as soon as possible. May I express the hope that during his extended tenure his promotion would become possible."

In a letter dated 12 December 1975, the Applicant thanked the Under-Secretary-General for Political and Security Council Affairs for recommending the extension of his appointment for three years, and stated in addition:

"You are aware that when I was offered the present assignment by the Secretary-General, he gave me a personal assurance that he would promote me to a post of Assistant Secretary-General as soon as possible. Simultaneously, he gave an official assurance to the Government of India that I would be designated to a post of Assistant Secretary-General as soon as possible. The Government of India have reminded him of this and in particular the Foreign Minister of India, when he was here, reminded the Secretary-General on 2 October 1975 about the same matter. The Secretary-General was kind enough to reassure him about the official assurance and asked for some more time. You have been kind enough to discuss this matter with the Secretary-General also . . ."

In a reply dated 16 December 1975, the Under-Secretary-General for Political and Security Council Affairs stated *inter alia*:

"Regarding the question of your promotion to a post of Assistant Secretary-General, I have, as you know, discussed this matter with the Secretary-General. He has confirmed many times during our discussions that he is committed to the Personal Assurance he had given to you and an official assurance he gave to the Government of India. He pointed out that at this moment there is no suitable vacancy for you but that the matter will continue to be under active consideration."

In the end, the Secretary-General decided to extend the Applicant's appointment for a period of two years, instead of three years as had been recommended by the Under-Secretary-General for Political and Security

Council Affairs. The expiration date of his new appointment was to be 31 August 1978—eight months after the date on which the Applicant was to reach age 60, the statutory age of separation from service under the Staff Regulations and Rules.

In a memorandum dated 24 December 1975 addressed to the Assistant Secretary-General for Personnel Services, the Under-Secretary-General for Administration and Management stated:

“Without prejudice to decisions which may be taken in future, the Secretary-General does not think it would be appropriate to extend the terms of senior personnel on fixed-term contracts unreasonably beyond his own term. In extending Dr. Banerjee to 31 August 1978 he has gone as far as he has in the case of any other senior official.”

On 31 December 1975, the Under-Secretary-General for Administration and Management informed the Permanent Representative of India to the United Nations of the Secretary-General's final decision on the extension of the Applicant's fixed-term appointment and stated in connection with the possibility of the Applicant's appointment at the level of Assistant Secretary-General:

“I note your comments with respect to a post at the level of Assistant Secretary-General in the case of Dr. Banerjee. I will of course be glad to bring these to the attention of the Secretary-General but cannot comment further on this aspect of the matter, since decisions with respect to posts at the Assistant Secretary-General level are exclusively the concern of the Secretary-General himself.”

On 18 February 1976, the Applicant signed his new letter of appointment for a fixed-term contract of two years due to expire on 31 August 1978.

In a memorandum dated 21 December 1976 addressed to the Secretary-General, the Under-Secretary-General for Political and Security Council Affairs recommended that the Applicant should be appointed as an Assistant Secretary-General on the following grounds:

“I may recall that Mr. Banerjee's predecessor, Mr. M. E. Chacko, was appointed to the level of Assistant Secretary-General in March 1973, holding that rank until his death. In view of the increasing responsibilities of the Department of Political and Security Council Affairs I think it justified that the Deputy to the Under-Secretary-General should be an Assistant Secretary-General. The growing importance of the tasks dealt with in the Department is illustrated by the fact that one of its specialized divisions—the one which is responsible for disarmament affairs—has been upgraded into a centre, and its new head . . . will be of the Assistant Secretary-General level.

“I wish to add that the Indian ambassador has recently reaffirmed his Government's interest in the appointment of Mr. Banerjee to the Assistant Secretary-General rank. . . . The financial implications of a positive decision would be minimal as the difference between the remuneration of an Assistant Secretary-General and a D-2, Step IV is small.”

On 21 July 1977, the Applicant informed the Office of Personnel Services that on and from 7 December 1976 he had retired from the Indian foreign service and was no longer on secondment from the Government of India to the United Nations.

On 2 December 1977, the Under-Secretary-General for Political and Security Council Affairs recommended that the Applicant's appointment should

be extended for a further term beyond 31 August 1978, "in the interest of efficient continuity and high quality of work required in the United Nations Secretariat and considering carefully the ability and achievements of [the Applicant]". The recommendation stated:

"I have, therefore, discussed this matter with the Secretary-General and I understand that my recommendation to give Dr. Banerjee an extension of two years from 31 August 1978 is accepted in principle. However, in compliance with the present practice of the United Nations, I recommend that Dr. Banerjee be given initially an extension of one year now, that is, up to 31 August 1979."

On 22 December 1977, the Assistant Secretary-General for Personnel Services recommended to the Secretary-General that he should approve a further one-year extension of the Applicant's appointment up to 31 August 1979. In an undated letter (PRU 77) from a Personnel Officer at the Office of Personnel Services, the Applicant was informed that:

"With reference to Staff Regulation 9.5 which provides that the normal age for retirement of staff members from active service shall be sixty years, this is to advise you that, in view of exceptional circumstances in your case, the Secretary-General has decided that it would be in the interest of the Organization to extend the period of your active service for one year, to expire 31 August 1979."

The Applicant accepted the offer on 17 February 1977 and on 26 April 1978 signed his new letter of appointment for a further year.

In October 1978, the Applicant prepared a draft memorandum addressed to the Secretary-General, for the signature of the Under-Secretary-General for Political and Security Council Affairs. The draft memorandum requested and set forth the grounds for the Applicant's appointment as Assistant Secretary-General. On the Under-Secretary-General's own admission during the Joint Appeals Board's proceedings, the memorandum was drafted by the Applicant, but was not signed by the Under-Secretary-General and therefore was not sent to the Secretary-General. However, the Under-Secretary-General asserted that he had conveyed orally to the Secretary-General the substance of the Applicant's claim contained in the draft.

On 8 December 1978, the Under-Secretary-General for Political and Security Council Affairs recommended that the Applicant's contract should be extended in principle for two years and that he should initially be given an extension of one year, that is, up to 31 August 1980.

On 20 December 1978, the General Assembly at its thirty-third session requested the Secretary-General:

"to apply the regulations regarding the age of retirement and not grant extensions beyond the established age of retirement except for the minimum time required to find a suitable replacement, which shall be initially until the end of 1979 and thereafter not normally for more than six months after the established age of retirement".

In a memorandum dated 5 February 1979, the Assistant Secretary-General for Personnel Services informed the Under-Secretary-General for Political and Security Council Affairs that:

"Mr. Banerjee reached 60 years of age in December 1977 . . . In view of the Regulations governing the age of retirement and the General Assembly resolution passed this year requesting the Secretary-General to

observe the Regulations, I find it difficult to agree to your requests. However, we are publishing the vacancy announcements for the two posts and a final decision concerning the extension of Messrs. . . . and Banerjee will be made after we have considered the qualifications of applicants for the two posts."

On 27 February 1979, the Permanent Representative of India to the United Nations addressed a letter to the Under-Secretary-General for Political and Security Council Affairs. The letter read in part as follows:

"You will remember my having represented to you about the case of Dr. P. K. Banerjee's extension as well as his promotion. This matter was taken up by me with the Secretary-General during the last four years on the instructions of three Foreign Ministers of India.

"2. The Secretary-General was always good enough to express his sympathy and interest in Dr. Banerjee, whose promotion has unfortunately not been feasible because of unavailability of a suitable vacancy. However, I was informed last year by you as well as by Mr. George Davidson [Under-Secretary-General for Administration and Management] that Dr. Banerjee would be granted extension of service for two years i.e. up to 31 August 1980. My Government accepted this decision, as there was no prospect of promotion for Dr. Banerjee.

"3. As you know, the post occupied by Dr. Banerjee has been traditionally held by an Indian official on the recommendation of the Government of India. We would expect this tradition to be maintained, as it is in accordance with balanced distribution of high level positions."

On 2 March 1979, the Applicant asked the Secretary-General to issue appropriate instructions to extend his contract under the terms already agreed upon, without further delay and hindrance, i.e., in principle for two years and initially for one year up to 31 August 1980, as recommended by the Under-Secretary-General for Political and Security Council Affairs in his memorandum of 8 December 1978. The Applicant contested the decision to advertise his post and alleged that General Assembly resolution 33/143 could not have "in justice, equity and law, retroactive application in a matter which had been agreed upon before its adoption."

In a memorandum dated 2 May 1979, the Under-Secretary-General for Political and Security Council Affairs asked the Assistant Secretary-General for Personnel Services for support and favourable consideration of his request to grant the Applicant an extension of his contract beyond retirement age "as it was understood from the very outset by all concerned that this would be the case".

On 24 May 1979, the Assistant Secretary-General for Personnel Services informed the Under-Secretary-General for Political and Security Council Affairs that he had given careful consideration to his request for an extension of the Applicant's contract. He stated, however:

"Owing to the many requests for exceptional treatment with respect to extensions beyond the age of retirement, the Office of Personnel Services felt obliged to undertake a thorough review of the matter with a view to formulating a consistent guideline.

"As a result of this review, it has been agreed that, in accordance with the directive of the General Assembly on this question, extensions beyond the age of retirement should be approved for a six-month period, except for

those extensions made during the course of 1979, which can go up to 31 December. Furthermore, in those cases where a staff member had previously been granted an extension of one year, extensions during 1979 will be granted only up to the end of 1979.

"Owing to the above considerations, I regret that I am not in a position to recommend an extension of Dr. Banerjee's appointment beyond the age of retirement up to 31 August 1980. Taking into account that Dr. Banerjee's contract has already been previously extended for one year, I am prepared to recommend an extension for a further period, up to 31 December 1979."

In a letter dated 4 October 1979, a Personnel Officer informed the Applicant that the Secretary-General had authorized a further extension of his active service beyond the normal retirement age of 60 "for a period of four months to expire on 31 December 1979" and asked him whether that was acceptable to him. On 2 November 1979, the Applicant asked the Secretary-General to review the decision to extend his appointment for only four months, until 31 December 1979, and stated, in addition:

"Though the assurances that have been given of granting me the rank of Assistant Secretary-General have yet to be realized, I have nevertheless, as you, Sir, are aware, been given an expectancy of continuance in the service until 31 August 1981. I am therefore confident that your review of situation will lead to a favourable reconsideration of the decision conveyed to me in the letter of 4 October 1979, referred to above."

On 20 November 1979, the Assistant Secretary-General for Personnel Services replied on behalf of the Secretary-General as follows:

"The Secretary-General fully appreciates the valuable contribution you have made to the work of the Organization as well as your offer of continued service. However, in the matter of extension of active service beyond the age limit of 60 years, the Secretary-General is enjoined by Staff Regulation 9.5 to grant such extensions only in exceptional cases and by the more specific directive contained in General Assembly resolution 33/143 to limit such extensions normally for not more than six months beyond the established age of retirement. The discussions in the Fifth Committee at the current Session of the General Assembly have confirmed the view that this directive should be strictly adhered to. Since in your case the extension will have covered two full years by 31 December 1979, I very much regret to inform you that it will not be possible for the Secretary-General to authorize any further extension beyond that date."

On 12 December 1979, the Applicant accepted the offer of employment until 31 December 1979, "without prejudice to [his] claims for (a) further extension of [his] present contract through the end of August 1981 and (b) reclassification to the rank of Assistant Secretary-General, which has been the subject of earlier and continuing correspondence and discussion". The Applicant retired from the Organization on 31 December 1979 and signed the last letter of appointment retroactively on 4 January 1980.

On 7 February 1980, the Applicant lodged an appeal with the Joint Appeals Board. On the same date, he requested the agreement of the Office of Personnel Services for direct submission to the Administrative Tribunal. On 18 March 1980, that request was denied. In the course of its proceedings, the Joint Appeals Board asked the representative of the Secretary-General whether the latter had denied promising the Applicant or his Government to promote him to an Assistant Secretary-General post. In a memorandum dated 24 June 1980

addressed to the Assistant Secretary-General for Personnel Services, the Chef de cabinet stated that no personal or official assurances had been given to the Applicant by the Secretary-General regarding promotion to the Assistant Secretary-General level. The content of the memorandum was brought to the attention of the Joint Appeals Board. The Board adopted its report on 12 April 1982. Its conclusions and recommendations read as follows:

"Conclusions and recommendations"

"As to the first appeal"

"150. The Board decides that it has competence to consider the appeal.

"151. The Board declares that the appeal is receivable.

"152. The Board finds that it is undeniable that the question of the appellant's promotion to the Assistant Secretary-General level had been discussed at various moments by the Secretary-General with the appellant as well as with various officials of the Indian Government and that a promise of some sort had been made by the Secretary-General on the occasion of these discussions. Such promise was not, however, in the nature of a firm commitment by the Secretary-General to assign the appellant to a post of Assistant Secretary-General within two years from his appointment, but rather an undertaking, with no time limit being set for its implementation, to consider the appellant's candidacy to a post at that level should a suitable vacancy become available.

"153. The Board further finds that such a promise was not a condition of the appellant's employment and therefore did not create a right for the appellant with a corresponding legal obligation for the Secretary-General to promote the appellant within a certain time limit.

"154. The Board, in its majority, makes no recommendation in support of this appeal.

"As to the second appeal"

"155. The Board finds that there is evidence that the Secretary-General accepted in principle the recommendation to give the appellant an extension of two years from 31 August 1978. The Board also finds that by so doing, the Secretary-General committed himself to consider the appellant for another extension at the expiration of the first year, but did not relinquish his discretionary power to review the situation in the light of the circumstances prevailing at that time in order to determine whether it was still in the interest of the United Nations to retain the appellant in active service.

"156. The majority of the Board felt that the Secretary-General's commitment was limited to the obligation to consider the appellant's case and that the Secretary-General fulfilled it when, after consideration, he granted the appellant an extension of four months until 31 December 1979. They also felt that the decision to take into account the wishes of the General Assembly as expressed in resolution 33/143 was a reasonable exercise of the Secretary-General's discretionary powers. One member of the Board, however, was of the opinion that the Secretary-General's obligation applied also to the duration of the extension so that if, as a result of the consideration, the Secretary-General decided to retain the appellant in service, he was bound to grant him an extension for the full year to which he had previously agreed. In his view, the appellant was entitled to

compensation equal to his emoluments for the period 1 January to 31 August 1980, less any amount he earned during that period from his service with the Office of the UNHCR in Geneva.

"157. The Board further finds that there is no basis for the appellant's claim that the Secretary-General had promised the Under-Secretary-General for PSCA to retain the appellant in service until 31 August 1981 and that he was therefore entitled to an extension until that date.

"158. The Board, in its majority, makes no recommendation in support of this appeal.

"159. Mr. A. Castellanos, Alternate Member elected by the Staff, dissents from . . . the conclusions in paragraphs 152 and 153 of the Board's report. In accordance with Staff Rule 111.3 (j), his dissenting opinion is attached.

"Separate opinion of Mr. A. Castellanos, Alternate Member elected by the Staff"

"1. In accordance with Staff Rule 111.3 (j), I should like to avail myself of the privilege of having my dissenting opinion . . . included in the report of the Board.

"As to the first appeal"

"2. While agreeing with the reasoning expressed . . . as to the time limit to promote the appellant, such a promise in my view would, however, become binding on the Secretary-General, once a suitable post became available at the Assistant Secretary-General level in a field of competence to which the appellant could be promoted.

"3. . . . since it was obvious that a promise of some sort had been made by the Secretary-General to the appellant, the appellant did not have to claim the post of Secretary of the Committee on Disarmament created by the General Assembly on 30 June 1978 in order to reassert his right to be promoted to the Assistant Secretary-General level in fulfilment of the promise which had been made to him.

"4. As to the conclusions reached by the Board in paragraphs 152 and 153 of the report, it is my further conclusion that the absence of a formal denial of the alleged commitment made to the appellant could be the source of an obligation to compensate him for the lack of promotion. Taking into consideration that the Secretary-General could only fulfil his promise if and when a post were to become available, I consider that the undertaking referred to in paragraph 152 became binding on the Secretary-General with regard to the appellant's promotion once a post at the Assistant Secretary-General level became available in the field of Disarmament, a field which was within the appellant's competence. Accordingly, I recommend that the appellant be compensated for the lack of promotion, effective 14 June 1979, the date at which the Disarmament post was filled. Such compensation should be equivalent to the difference between the emoluments of an Assistant Secretary-General and those of a D-2, step IV.

"As to the second appeal"

"5. . . . I wish to stress that in my view the discretionary powers of the Secretary-General could not . . . be used capriciously or arbitrarily in order to avoid fulfilling a promise previously given to the appellant as to the duration of the extension of his contract. Such a promise could have been maintained for an additional full year instead of four months, as per

the existing practice. That practice was recognized in the memoranda regarding the appellant's extensions. In the past, although two years was the maximum period normally granted under the policy applied before General Assembly resolution 33/143, there had been cases, nevertheless, in which staff members had been exceptionally retained beyond age 62. Accordingly, I differ with the conclusion and recommendation of the majority of the Board in paragraphs 157 and 158, and find that the appellant could have been extended beyond 31 December 1979 until 31 August 1980 or compensated for that period."

On 7 June 1982, the Assistant Secretary-General for Personnel Services informed the Applicant that:

"The Secretary-General has taken note of the Board's report, including the minority opinion, and, in accordance with the decision of the majority of the Board to make no recommendation in support of the appeal, has decided:

"(a) in respect of the first appeal, to take no action on the matter; and

"(b) in respect of the second appeal, to maintain the contested decision and to take no further action on the matter."

On 10 May 1984, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Government of India agreed to release the Applicant from the Indian foreign service and the Applicant accepted the offer of employment with the United Nations on condition that the Secretary-General would assign him to a post at the Assistant Secretary-General level within two years of his entry into the service of the United Nations. The Secretary-General failed to carry out his agreement to do so, and is therefore in breach of his contractual obligation.

2. The Applicant relied on the Secretary-General's promise and must be compensated by virtue of the principle of promissory estoppel, which requires that the Applicant be compensated for the loss he has suffered as a result of the reliance he placed on the Secretary-General's promise.

3. Appointments at the Assistant Secretary-General level are entirely at the discretion of the Secretary-General. They are political assignments in nature and are not strictly governed by the Staff Rules. A post at the Assistant Secretary-General level was available in January 1977 within the department concerned, and no claim to impossibility of performance because of lack of post can prevail.

4. The Secretary-General initially made a commitment to the Applicant and the Government of India to extend the Applicant's appointment for two years from 31 August 1978 to 31 August 1980. This commitment gave rise to a legal obligation and created a legitimate expectancy on the part of the Applicant that his services would in fact be retained until 31 August 1980. The Secretary-General gave an additional undertaking to extend the Applicant's appointment for a further period of one year from 31 August 1980 to 31 August 1981 in order to keep in line with the United Nations practice of granting extensions for one year at a time.

5. The Secretary-General agreed to extend the Applicant's appointment beyond the statutory age of retirement in the interests of the Organization and as an exception under Staff Regulation 9.5. General Assembly resolution 33/143 does not detract from the Secretary-General's right to extend a staff member's appointment for more than six months—without limitation. In any event,

whatever the terms of General Assembly resolution 33/143, it cannot be applied retroactively—and cannot affect the Applicant's acquired legal right of expectancy of service.

Whereas the Respondent's principal contentions are:

1. The Applicant's acceptance in writing of a series of appointments after 1975 at the Director level vitiates his claim to appointment at the level of Assistant Secretary-General from 1975. In any event, the Applicant's claims are based on oral conversations in social settings with the former Secretary-General, which conversations do not give rise to legal rights.

2. Neither the terms of the Applicant's appointment nor the circumstances surrounding his appointment created a legal right for the Applicant to remain in the service of the United Nations beyond the end of 1979.

The Tribunal, having deliberated from 20 May to 11 June 1985, now pronounces the following judgement:

As to the first plea

I. The record shows that when the Applicant received a three-year appointment with the rank of Director (D-2, highest step) as the Deputy to the Under-Secretary-General for Political and Security Council Affairs, he was given an assurance that he would become an Assistant Secretary-General as soon as such an appointment was possible. That assurance was given by the Secretary-General of the United Nations himself to the Applicant and to the Government of India. The Secretary-General has never contested that fact.

II. When his contract was extended for two years, from 31 August 1976 to 31 August 1978, the Applicant drew the attention of the Under-Secretary-General for Political and Security Council Affairs to the Secretary-General's undertaking to promote him to an Assistant Secretary-General post "as soon as possible" (letter dated 12 December 1975). In his reply dated 16 December 1975, the Applicant's supervisor noted that the Secretary-General had "confirmed many times during [their] discussions that he is committed to the personal assurance he had given to [the Applicant] and an official assurance he gave to the Government of India". He went on to state: "He [the Secretary-General] pointed out that at this moment there is no suitable vacancy for [the Applicant] but that the matter will continue to be under active consideration."

III. In a memorandum dated 21 December 1976, that senior official, the Under-Secretary-General for Political and Security Council Affairs, recommended that the Secretary-General should promote the Applicant to the Assistant Secretary-General level in his current post. He noted that the increasing responsibilities of the Department of Political and Security Council Affairs and the growing importance of the tasks dealt with in the Department justified such action. He added that the head of one of the divisions of the Department (disarmament affairs) would be at the Assistant Secretary-General level, the implication being that it would appear strange for the Deputy to the Under-Secretary-General for Political and Security Council Affairs to be merely a D-2. The Secretary-General thus had an opportunity to satisfy the Applicant's expectations, in the interests of the Organization.

IV. The Applicant persisted in his efforts to be promoted to the Assistant Secretary-General level. In 1978, he prepared for signature by the Under-Secretary-General for Political and Security Council Affairs a memorandum addressed to the Secretary-General requesting promotion and setting forth the grounds for the request. The Under-Secretary-General did not forward the

memorandum to the Secretary-General but conveyed the substance orally to him.

V. The Permanent Representative of India to the United Nations, in a letter dated 27 February 1979 addressed to the Under-Secretary-General for Political and Security Council Affairs, recalled that the Applicant had been promised promotion and that he (the Permanent Representative) had repeatedly brought the matter up with the Secretary-General.

VI. In a letter dated 2 March 1979, the Applicant reminded the Secretary-General of the assurance that he had given to the Government of India and the Applicant concerning promotion to the Assistant Secretary-General level. The letter was indeed received by the Secretary-General, whose initials are on it, but apparently there was no reply in writing.

VII. It follows from the above that at no time during the Applicant's six years of service with the United Nations did the Secretary-General deny the claims made by the Applicant, the Government of India and the Under-Secretary-General for Political and Security Council Affairs concerning the Secretary-General's assurances about promoting the Applicant to the Assistant Secretary-General level. The Tribunal concludes that such assurances were indeed given; the expectation thus created cannot be called in question by the observations addressed by the Secretary-General's Chef de cabinet to the Assistant Secretary-General for Personnel Services and forwarded to the Joint Appeals Board.

VIII. It was not until a meeting on 20 September 1979 that the Secretary-General informed the Applicant that he was unable to promote him to the Assistant Secretary-General level.

IX. In matter of law, the Tribunal notes that while the Secretary-General had not made a firm commitment to promote the Applicant to the Assistant Secretary-General level, the fact remains that there was a promise to proceed with such a promotion as soon as possible.

X. Accordingly, the Secretary-General had an obligation to take all adequate and reasonable measures to keep that promise.

XI. There is no evidence that the Secretary-General diligently took concrete action to that end, either in terms of promoting the Applicant in his current post or in terms of offering him a new post created by the General Assembly.

XII. Moreover, this failure on the part of the Respondent was not justified by the Applicant's performance. The Secretary-General had nothing but praise for the Applicant's dedication, efficiency and competence in carrying out his delicate and ever-increasing assignments.

XIII. Accordingly, the Tribunal considers that the Respondent is liable for his failure to keep the promises made to the Applicant, since he did not seriously seek ways and means of assigning him the rank of Assistant Secretary-General. The Applicant's legitimate expectations were thus dashed. The Tribunal shall determine hereinafter what injury was sustained by the Applicant.

As to the second plea

XIV. It is a fact that the Applicant reached the age of retirement (60) on 7 December 1977, in the course of his second two-year fixed-term contract, which was to expire on 31 August 1978. On that date, the Under-Secretary-General for Political and Security Council Affairs recommended that the Applicant's

contract should be extended for two years, but, in keeping with United Nations practice, for one year at a time, i.e., until 31 August 1979.

XV. On 8 December 1978, the Under-Secretary-General for Political and Security Council Affairs again recommended a two-year extension of the Applicant's contract, with effect from 31 August 1979, but for one year at a time, i.e., until 31 August 1980.

XVI. However, during its thirty-third session, the General Assembly, on 20 December 1978, requested the Secretary-General to grant extensions only under the following conditions: "initially until the end of 1979 and thereafter not normally for more than six months after the established age of retirement".

XVII. The Secretary-General, strictly interpreting the provisions adopted by the General Assembly, decided to extend the Applicant's contract until 31 December 1979. The Applicant believes that he was entitled to an extension up to 31 August 1981.

XVIII. In matter of law, the Tribunal has to consider whether the Applicant was entitled to have his contract extended initially until 31 August 1980, and then until 31 August 1981.

XIX. As far as the second extension is concerned, the Tribunal can only note that the Secretary-General made no commitment and, *a fortiori*, no decision. The Applicant can invoke no right to such an extension.

XX. The Tribunal considers that the same applies to the extension from 31 August 1979 to 31 August 1980 claimed by the Applicant. While this extension was recommended by the Under-Secretary-General for Political and Security Council Affairs on 2 December 1977, the Secretary-General's decision (letter PRU 77) was simply to extend the Applicant's period of active service "for one year, to expire 31 August 1979". It made no provision for a further extension for a second year ending on 31 August 1980. Such being the case, the Tribunal considers that the Applicant had no entitlement to such an extension. In granting him an extension up to 31 December 1979, the Secretary-General was purely and simply implementing the General Assembly recommendation.

As to damages

XXI. The Tribunal has found that the Respondent is liable for his failure to act with due diligence in an effort to keep the promise to promote the Applicant to the Assistant Secretary-General level. As a result, the Applicant suffered losses which the Tribunal, in the light of all the elements of the case, assesses at \$US 2,000.

For the above reasons, the Tribunal decides:

1. That the Respondent shall pay the Applicant the sum of \$US 2,000 in damages;
2. To reject all the other pleas.

(Signatures)

T. MUTUALE
President

Luis M. de POSADAS MONTERO
Member

Geneva, 11 June 1985

Roger PINTO
Member

R. Maria VICIEN-MILBURN
Executive Secretary