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ADMINISTRATIVE TRIBUNAL

Judgement No. 447

Case No. 445: ABBAS

Against: The Secretary-General  
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, First Vice-President, presiding;  
Mr. Jerome Ackerman, Second Vice-President; Mr. Samar Sen;

Whereas, on 26 October 1987, Syed Asghar Abbas, a staff member of the United Nations Conference on Trade and Development, hereinafter called UNCTAD, filed an application which he completed on 10 and 11 February and 14 March 1988;

Whereas the pleas of the application read as follows:

"(a) The Applicant requests the Tribunal to hold that 'the fullest regard' was not given by the Respondent to the Applicant's qualifications in filling four D-2 vacancies in UNCTAD announced on 24 January 1985 and the adverse decision with respect to the Applicant was a consequence of extraneous factors.

(b) The Applicant requests the rescinding of the administrative decision not to advertise the vacancy of Director, Support Services Division, UNCTAD which arose in April 1985.

(c) The Applicant requests the rescinding of the administrative decision not to advertise the vacancy of the Director of the Transfer of Technology Division, which arose in September 1985 when Mr. José Riper to whom the post was earlier offered, found himself unable to accept it.

(d) The Applicant requests the Tribunal to hold that Mr. Patrizio Civili was not transferred as Director, Programme Support Services Division to UNCTAD as erroneously presented to the Joint Appeals Board by the Respondent. As a

matter of fact, as reported on page 90 of document A/C.5/41/L.2 submitted to the General Assembly, Mr. Patricio Civili upon his transfer from UN Headquarters, held the post of Deputy Director, Programme Support Services Division, UNCTAD, at the D-1 level. He was subsequently promoted to D-2 which adversely affected the fullest consideration of the Applicant's qualifications for the above-mentioned post. The Applicant was several years senior to Mr. Civili as a D-1 and there was no Deputy Director's post in the Division.

(e) The Applicant invokes the obligations of the Secretary-General of the United Nations under Article 101, paragraph 3 of the United Nations charter; article IV of the Staff Regulations, in particular regulations 4.2 and 4.4 and staff rule 104.14(a)(ii).

(f) The Applicant requests the Tribunal to determine whether a 'minimal showing' that the staff member's right was honoured as interpreted by the Joint Appeals Board, Geneva, supersedes and overrides the 'Paramount Consideration' in paragraph 3 of Article 101 of the United Nations Charter and 'Fullest Regard' in regulation 4.4. The words 'at least' used in Judgement No. 362 (Williamson) signify that more than a 'minimum showing' may be called for in other cases depending upon the nature and the circumstances of a particular case. The Applicant respectfully submits that Judgement No. 362 (Williamson) cited by the Joint Appeals Board, Geneva, as the sole criteria for rejection of the Applicant's Appeal is ill-founded and insufficient.

(g) The Applicant requests the Tribunal to direct the Secretary-General of the United Nations to hold an inquiry, through the mechanism of a specially constituted 'Board of Enquiry', into the malicious libel perpetrated in the UNCTAD Secretariat against the Applicant.

(h) The Applicant requests the specific ratification of his contractual rights violated and failing the same, appropriate compensation for the injury sustained.

(i) The Applicant requests the Tribunal to determine that the Secretary-General of UNCTAD was not acting in good faith when he assigned the Applicant temporarily as 'Special Adviser'. As a matter of fact he was removing the Applicant from his established D.1 post without any justification and despite Applicant's outstanding performance reports as Chief of Technical Co-operation Service and without following the established procedures of a Personnel (P.5) Action for which the Applicant claims damages in the sum of Dhrs. 5,000."

Whereas the Respondent filed his answer on 30 September 1988;  
Whereas the Applicant filed written observations on  
16 November 1988;

Whereas, on 12 and 16 May 1989, the Respondent produced  
additional documents and information at the request of the Tribunal;  
Whereas the Applicant submitted observations thereon on  
22 May 1989;

Whereas the facts in the case are as follows:

The Applicant, who had served with the United Nations for three months in 1961 and for three months in 1965, entered the service of UNCTAD on 16 September 1965 under a probationary appointment as an Economic Affairs Officer at the P-4 level. Having resigned on 31 December 1965, he rejoined UNCTAD on 10 June 1967 under a probationary appointment as a Senior Economic Affairs Officer at the P-5 level. On 1 March 1968 he became Chief of the National Merchant Marine Section and on 1 June 1969 his appointment was converted to a permanent appointment. On 1 June 1970 the Applicant was reassigned as Chief of the Export Policy, Country and Sectoral Studies Section. On 1 April 1980 he was promoted to the D-1 level as a Principal Economic Affairs Officer and on 12 September 1980 he became Chief of the Technical Cooperation Service, one of the three services comprising the Division for Programme Support Services (later called Division for Management and Support Services).

On 24 January 1985 UNCTAD issued vacancy announcements for four D-2 posts, namely those of Directors of the Economic Policy Evaluation and Coordination Unit, of the Shipping Division, of the Transfer of Technology Division, and of the Manufactures Division. The Applicant did not apply for any of those posts. In May 1985 the Secretary-General of the United Nations approved the appointment of external candidates to the four posts. The external candidate originally selected for the post of Director of the Transfer of Technology Division, however, did not accept the appointment and the

vacancy was filled on 1 October 1986 by the transfer of Mr. de Gaspar, a Director in the United Nations Centre on Transnational Corporations. In the meantime, a fifth D-2 post - the post of Director of the Division for Programme Support Services, where the Applicant was serving - had become vacant on 30 April 1985 but was not advertised. This vacancy was filled on 1 May 1986 by the transfer with subsequent promotion of Mr. Patrizio Civili, a Principal Officer (D-1) in the Department of International Economic and Social Affairs of the United Nations.

On 4 September 1985 the Applicant initiated an internal recourse procedure in a letter to the Secretary-General of the United Nations. He claimed that by not appointing him to one of the four vacant D-2 posts which had recently been filled by outside candidates, an action had been taken against him which he considered discriminatory and motivated by prejudice and/or by extraneous factors. He stated that the administrative decisions which would form the basis of his appeal to the Joint Appeals Board were the announcements on 26 August 1985 of the appointment of a Director of the Shipping Division and that of a Director of the Manufactures Division of UNCTAD, pointing out that this was only to meet the statute of limitation for initiating a recourse and that he reserved the right to include in his eventual appeal to the Joint Appeals Board other appointments to D-2 posts in UNCTAD as and when these were announced formally. On 25 September 1985 the Applicant wrote to the Under-Secretary-General for Administration and Management, who had acknowledged his previous letter and announced a reply, to draw attention to the facts surrounding the matter of his appeal. On 25 November 1985, not having received a reply, he lodged an appeal with the Joint Appeals Board at Geneva. On 3 November 1986 the Applicant was reassigned as Special Adviser in the Office of the Deputy Secretaries-General of UNCTAD. The Joint Appeals Board adopted its report on 1 July 1987. The concluding paragraphs of the Board's report read as follows:

"23. While the Board understands the disappointment of Appellant

in not having been selected for appointment to a D-2 UNCTAD post after some twenty years of service with distinction, the Board unanimously agrees that the Secretary-General has considered the Appellant in accordance with staff regulation 4.4. The Board refers to Judgement No. 362 of the Administrative Tribunal, dated 14 May 1986, in which it is stated: 'If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave "the fullest regard" to it.' In the spirit of this ruling of the Administrative Tribunal the Board found that the Administration lived up to its obligation of making a 'minimal showing.' Therefore, the Board cannot sustain the appeal.

24. The Board recommends that future selection procedures of D-2 appointments include written records on the evaluation of candidates.
25. The Board has noted that Appellant's present assignment in the Office of the Deputy Secretaries-General of UNCTAD is of a limited duration and required only in the context of UNCTAD VII. The Board is aware that Appellant accepted this assignment although he felt that it was 'unfair treatment'. The Board, therefore, recommends to the Secretary-General of the United Nations to normalize the situation of Appellant on the earliest opportunity and, in so doing, to make full use of the qualifications and experience of Appellant who, ever since 1970, has been rated as a staff member of unusual merit."

On 2 September 1987 the Assistant Secretary-General for Human Resources Management informed the Applicant that:

"The Secretary-General [of the United Nations], having re-examined your case in the light of the Board's report, has decided, in conformity with the Board's recommendation in paragraph 23, to reject your appeal.

At the same time and bearing in mind the Board's recommendation in paragraph 25 of the report and the temporary nature of your current assignment, the Secretary-General, UNCTAD, is being requested to find a placement for you at the end of that assignment commensurate with your qualifications and experience."

On 26 October 1987 the Applicant filed with the Tribunal the

application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent was influenced by prejudice and extraneous circumstances in considering and rejecting the Applicant for the four D-2 vacancies announced on 24 January 1985.

2. Since the criteria for the filling of vacancies laid down in the Charter and the Staff Rules and Regulations form part of the Applicant's contract of employment, his contractual rights have been violated by the failure of the Respondent to fully comply with these criteria when the post of Director of the Division for Programme Support Services was filled without issuing a vacancy notice, a post in which the Applicant was interested in and for which he was fully qualified. The same applies to the post of the Director of the Transfer of Technology Division. By not issuing vacancy notices for the posts in question, the Applicant's candidature has not been taken into account in violation of staff regulation 4.4.

3. Only the widest publicity of a vacancy within and outside the Organization can ensure that the best candidates become known to the Organization and enable it, after careful examination of each application, to choose the best candidate for filling the vacancy.

4. The actions of the Secretary-General of UNCTAD in temporarily assigning the Applicant as a Special Adviser were a breach of contractual obligation and were detrimental to the Applicant's career prospects.

Whereas the Respondent's principal contentions are:

1. The Applicant's statutory right under the Staff Regulations to have the fullest regard given to his candidacy for five vacant D-2 posts was fully observed. The mere absence of a vacancy announcement is not determinative of the issue of whether

the Applicant's candidacy had been given the "fullest regard" as required by staff regulation 4.4, and the "minimal showing" required under Judgement No. 362 (Williamson) is present in this case.

2. The Applicant has produced no evidence to support his claim that the Respondent's failure to appoint him to a D-2 post was due to prejudice.

3. Staff members may be assigned by the Secretary-General to any activity or office of the United Nations. The Respondent's assignment of the Applicant as a Special Adviser in the Office of the Deputy Secretaries-General of UNCTAD did not harm him or violate any of his rights.

The Tribunal, having deliberated from 9 to 25 May 1989, now pronounces the following judgement:

I. The sum and substance of this case can be reproduced in the following words of the Applicant himself:

"Since the criteria for the filling of vacancies laid down in the Charter and the Staff Rules and Regulations form part of the Applicant's contract of employment, his contractual rights have been violated by the failure of the Respondent to fully comply with these criteria when the vacancy of the Director of Support Services Division was filled without issuing a vacancy notice, a post in which the Applicant was interested and for which he was fully qualified."

To this complaint, the Applicant added a few others: he maintained that the procedure followed by the Respondent in filling vacancies, especially at D-2 level, had not been properly observed, that the Applicant had been a victim of prejudice and discrimination and finally that the Respondent failed to treat him properly by not giving him a worthwhile job to do, even though his qualifications and performance fully entitled him to it.

II. On 24 January 1985, UNCTAD advertised four posts as vacant at

D-2 level. A fifth post, that of Director of Programme Support Services (later known as Management and Support Services), was also vacant, but for reasons not explained, the Acting Secretary-General of UNCTAD wrote on 10 May 1985 to the Secretary-General of the United Nations in New York that "you will also recall that the post of Director, Programme Support Services, is currently vacant and that it is my proposal for it to be left vacant for a further period". It had then been vacant for about 10 days, i.e. since 30 April 1985. This was the post the Applicant was primarily interested in, as that was the Division (Programme Support Services) to which he belonged and for which he considered himself fully qualified. When the Joint Appeals Board asked him why he did not apply for any of the other four D-2 posts advertised on 24 January 1985, he replied that these four posts were, in his view, meant for outside candidates and that as the most senior D-1 in the Programme Support Services he had felt "to stand a good chance" of being selected for the D-2 post of Director for Programme Support Services.

III. In view of this, the Tribunal does not find it necessary to examine in detail how the other four posts were filled. Admittedly, on a later date the Applicant asked the Respondent why he was not selected for one of these four posts and in one instance he pointed out that, when the person originally selected for one of these four posts - the post of Director for Transfer of Technology - failed to take it, the post should have been re-advertised before it was filled by the transfer of an officer from New York. Be that as it may, the fact is that the Applicant had not applied for these posts and their disposal is not before the Tribunal, even if the Applicant later gave the impression that he might have been interested. The Joint Appeals Board report suggests that even for these posts for which the Applicant had shown no interest, "a dossier on all persons to be considered had been transmitted to the United Nations Headquarters". But this dossier did not deal with the post of



Director for Programme Support Services. Besides, it is not clear when this dossier was considered at United Nations Headquarters and by whom.

IV. However, insofar as the post of Director for Programme Support Services is concerned, the Tribunal must take into account a memorandum of 21 May 1987 sent to the Joint Appeals Board by the new Secretary-General of UNCTAD (Mr. Dadzie) who had taken over on 1 February 1986. The memorandum reads in part:

"My selection for the post of Director of the Division for Management and Support Services was made after a thorough review of all eligible staff in UNCTAD and in close consultation with the concerned officials at Headquarters, including the USG [Under-Secretary-General] for Administration and Management, as is required for senior posts involving administrative and management responsibilities. Particular consideration was given to the Chiefs of the three services comprising the Division, including Mr. Abbas, Chief of the Technical Co-operation Service. I discussed the matter with these three officials and assured them that I had given the fullest consideration to each of them."

V. The memorandum quoted above does not indicate when this discussion with "these three officials" (all D-1 and in the same Division for Programme Support Services and therefore entitled to consideration) took place and when the assurance was given to them that "the fullest consideration to each of them" had been given. However, the Tribunal notes that within seven weeks of his taking over, the Secretary-General of UNCTAD asked the United Nations Headquarters, on the basis apparently of some agreement already arrived at, for the appointment of Mr. Patrizio Civili as Director of the Division for Programme Support Services with the understanding that for the first six months, he would, under instructions from the Secretary-General of the United Nations, receive the emoluments of a D-1 post (which he was already holding in New York) before he was formally promoted as D-2. This

arrangement was made because of the financial stringency the United Nations was facing. Mr. Civili joined UNCTAD in May 1986 as D-1 as Head of the Programme Support Services, and became D-2 in November 1986.

VI. The Applicant pleads that the post should have been advertised and that he should have been given proper consideration for occupying it. He further claims that he is senior to Mr. Civili, has an excellent record of performance and was experienced in the work of this Division. He asserts therefore that the post should have gone to him.

VII. In this context, the Tribunal was obliged once again to examine the vexed question of advertising vacancies as and when they occurred. No uniform policy seems to be practised in spite of numerous resolutions of the General Assembly and the sincere efforts of the Respondent to find a fair and practical solution. The Tribunal is of the opinion that all vacancies are to be advertised, but the Secretary-General will have the authority to indicate, as indeed he is doing generally even now, in each advertisement how he would eventually wish to fill the vacancy - by outside recruitment, by interior promotion or transfer or on a replacement basis of staff members working on secondment. In this case, the lack of advertisement would be irrelevant if it could be established that the Applicant was in fact given adequate consideration. There has been much argument both by the Applicant and the Respondent about the Tribunal's jurisprudence as given in paragraph VII of Judgement No. 362 (Williamson) which reads:

"If once called seriously into question, the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave the 'fullest regard' to it."

It follows that the burden of proof of having given consideration is on the Respondent whenever a staff member questions that such

consideration was given. Secondly, such consideration should to some measurable degree meet the criterion of "fullest regard" in a reasonable manner. And finally, there must be good faith and consciousness of all the circumstances surrounding any claim.

VIII. In this particular case, except for the assertion that the Applicant was considered for the post, there is no convincing evidence of any merit that the above criterion was met. Nothing is known about how the final selection was made, who were the candidates, how their worth was assessed and who assessed them and with what result. For appointment and promotion to D-2 level, the Secretary-General reserved to himself full discretion, but as the appropriate circular in this respect makes clear, his attempt is always to find the best candidate, howsoever defined. In the present instance, the Tribunal has not been given any indication how, where, when and by whom the Applicant's claim for this particular post (Director of the Division for Programme Support Services) was examined and with what consequence. In the circumstances doubts persist that the Applicant was accorded due process and that, in any event, the required degree of consideration was given to the Applicant; the Tribunal considers it self-evident that even if the Applicant had been given full consideration, he would not have automatically been selected for the post. The Tribunal notes that the Joint Appeals Board recommended in paragraph 24 of its report "that future selection procedures of D-2 appointments include written records on the evaluation of candidates." To the extent this recommendation was not already in effect, there is no indication what action, if any, the Respondent took on it; the Tribunal considers that the raison d'être behind it deserves careful consideration.

IX. As regards the allegation of prejudice and discrimination the Applicant makes about the Respondent, the Tribunal notes that the Joint Appeals Board did not feel itself empowered to deal with

"other subjects raised by Appellant, such as disciplinary actions, grievances like the leak of confidential information to a member State, inspections like auditing the use of funds or investigating UNCTAD managerial activities, or issues such as a comparison of the relative merits of the appointees with those of Appellant". There were also other complaints which the Joint Appeals Board did not examine, for example, allegations about a move of the Applicant's service (or a part of it) from the "E" Building of the Palais des Nations to the Villa Bocage.

X. As regards the leak of information to a foreign mission, the Applicant maintained that, although he was falsely accused, the accusation was apparently believed by those in a position to recommend or not recommend his promotion. The Applicant took this grievance up with the Panel on discrimination and other grievances and he received a reply dated 29 September 1987 which concluded with the sentence: "Since undertaking such an investigation is outside the competence of this Panel, we regret to inform you that we are unable to take up your case." In addition, when the Applicant had earlier discussed this incident on 19 May 1984 with the then Secretary-General of UNCTAD (Mr. Gamani Corea), he too refused to put before the Joint Disciplinary Committee the Applicant's allegation that someone in UNCTAD was spreading malicious rumours about him.

XI. The Tribunal finds that the Joint Appeals Board did no more than conclude that inasmuch as no one in the Division for Programme Support Services was selected for the post of Director, there was no discrimination. In the absence of any knowledge of who the other eligible candidates outside of UNCTAD might have been, it was clearly not feasible for the Joint Appeals Board to examine the Applicant's claim in relation to all other candidates and decide if there was in fact any discrimination.

XII. As regards the move to the Villa Bocage and the Applicant's allegation of hostility on the part of Mr. McIntyre (who was temporarily in charge of UNCTAD until Mr. Dadzie took over), the Joint Appeals Board simply asked Mr. McIntyre about his personal relationship with the Applicant and paragraph 14 of the Joint Appeals Board report reads:

"14. Concerning his personal relationship with Appellant, Mr. McIntyre said that some verbal and written statements of Appellant, made in connection with the move in May 1984 of the Technical Co-operation Service to Villa Bocage, had disappointed him. But he considered that his relationship with Appellant was 'friendly and correct'".

The Joint Appeals Board apparently did not question Mr. McIntyre about his alleged threat to the Applicant that if he did not co-operate, he could be denied promotion to D-2.

XIII. The Applicant further implies that when in November 1986 he was detached from his regular duties as Chief of the Technical Cooperation Service, and given an assignment as Special Adviser in the Office of the Deputy Secretaries-General of UNCTAD, he was in fact being moved away from any useful work and that he was, he says, essentially put out to pasture for a long period of time up until his retirement in July 1988. He states he did no work, hardly participated in UNCTAD Conference VII (principally for which he was given this new assignment) and that finally he was ordered to continue as Special Adviser, in spite of his vehement protests. He considers that all these steps were taken mala fide by the Respondent. The Joint Appeals Board recommended that the Applicant's situation be normalized; the Respondent accepted this recommendation but the Applicant alleges that nothing was ever done to change his state of, as he puts it, "gainful unemployment".

XIV. In the absence of suitable examination of and a Joint Appeals Board report on various allegations made by the Applicant about

discrimination and prejudice against him, the Tribunal cannot come to any firm decision on those matters; nor does it consider it necessary to reopen these issues at this stage. The Tribunal notes, however, that there were instances when the Applicant's conduct and the tone of his communication and correspondence with senior officers were such as to lead to some irritation. In these circumstances, the Tribunal concludes that there is evidence of tension in the relationship between the Applicant and at least some senior officials in UNCTAD who had a voice in the advancement of the Applicant, and as a result the Applicant was placed at a disadvantage.

XV. In the light of all the considerations set out above, the Tribunal holds that even if the Applicant's claims for the post of D-2 in the Division for Programme Support Services were examined, such examination was at the most cursory and could not meet the requirements of staff regulation 4.4 or the standard of consideration the Tribunal has laid down in Williamson. The Tribunal also holds that while it has not made any determination as to prejudice or discrimination against the Applicant, the procedure followed in insufficiently investigating his various complaints and the handling of his candidature were inappropriate. On these grounds, the Tribunal considers that the Applicant is entitled to compensation for the injury he suffered. The Tribunal assesses this at US\$ 5,000.

XVI. The Tribunal awards compensation to the Applicant in the amount of US\$ 5,000 and rejects all other pleas of the application.

(Signatures)

Roger PINTO  
First Vice-President, presiding

Jerome ACKERMAN  
Second Vice-President

Samar SEN  
Member

Geneva, 25 May 1989

Jean HARDY  
Acting Executive Secretary