

Judgement No. 230

*(Original: French)*Case No. 214:
Teixeira*Against: The Secretary-General
of the United Nations*

Request by a person who has concluded a series of special service agreements for recognition that he has the status of staff member.

Agreement of the Respondent that the dispute should be submitted to the Tribunal.—Since the Applicant claims certain rights under the Staff Regulations and Rules, the dispute may be heard by the Tribunal on the basis of an agreement between the parties.—Existence of such an agreement.—Previous Judgements Nos. 96, 106 and 150.—Competence of the Tribunal.

Request that the Tribunal should rule that the Applicant had in fact become a staff member.—The Tribunal notes that this request is interwoven with the merits of the case, on which the Applicant has asked to plead subsequently.—Request that the merits of the Applicant's case should be receivable by the Joint Appeals Board.—The Tribunal considers that the Board has acted within its competence in deciding not to entertain the appeal.—Request for the establishment of arbitration machinery.—The Tribunal notes that the Respondent has agreed to recognize its competence.—Request for the payment of compensation for the damage suffered by reason of the Respondent's delay in accepting an appeals procedure.—Lack of a provision for the settlement of disputes in the agreements signed by the Applicant.—Section 29 of the Convention on the Privileges and Immunities of the United Nations.—Judgement No. 150.—Insertion of a clause relating to arbitration in the revised wording of special service agreements.—Question whether the prolongation of the dispute is attributable to the Respondent.—Award to the Applicant of a sum of \$1,000 as compensation for the injury that he has sustained.

Setting of a three-months' time-limit within which the Applicant may file with the Tribunal an explanatory statement and pleas dealing with the merits of the case.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Madame Paul Bastid, Vice-President, presiding; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza;

Whereas on 3 September 1976, Ib Teixeira filed an application which did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after effecting the necessary corrections, again filed the application on 13 January 1977;

Whereas the pleas of the application are as follows:

“Considering articles 7, paragraph 1, and 9, paragraphs 1 and 2, of the Statute of the United Nations Administrative Tribunal and considering article 7, paragraph 3, of the Rules of the Tribunal, the Applicant requests the Tribunal:

“A. To rule that he had in fact become a staff member of ECLA and that as such his appeal on the merits of the case should be receivable either by the Joint Appeals Board or directly, but subsequently, by the Tribunal itself;

“B. Failing such ruling, to order the rescission of the decision of the Secretary-General of the United Nations to reject the recommendation of the Joint Appeals Board and accordingly to order the Respondent to establish arbitration machinery to hear the Applicant's complaint;

“C. In either case to order payment to the Applicant of an indemnity of one

thousand one hundred and twenty-five United States dollars (\$1,125), being the equivalent of three months' salary, as compensation for the damage suffered by reason of delay attributable to the Respondent's refusal to recognize the competence of the Board or his refusal to establish arbitration machinery, as the case may be."

Whereas the Respondent filed his answer on 11 February 1977 and amended it on 15 February 1977;

Whereas, in his answer, the Respondent recognized the competence of the Tribunal to hear and pass judgement upon the application;

Whereas the Applicant submitted written observations on 7 July 1977;

Whereas the facts in the case are as follows:

On 30 July 1964, the Applicant, a Brazilian journalist then resident in Santiago (Chile), concluded a special service agreement with ECLA to translate from Spanish into Portuguese and edit public information material for dissemination in Brazil and other Portuguese-speaking areas; the agreement commenced on 1 August 1964 and was to expire on the satisfactory completion of his services, but not later than 30 September 1964; the United Nations agreed to pay the Applicant, upon certification by the Chief of Information Services of ECLA that the services had been satisfactorily performed, two monthly instalments of \$300 each as full consideration for his work; paragraph 4 of the agreement provided that the Applicant would not be considered in any respect as being a staff member of the United Nations and paragraph 5 provided that his rights and obligations were strictly limited to the terms and conditions of the agreement. In four successive amendments this agreement was extended to 31 March 1965, the Applicant's remuneration remaining fixed at \$300 per month. On 13 January 1965, in a memorandum addressed to the Acting Director of the Division of Administration of ECLA and to the Acting Executive Secretary of ECLA, the Chief of Information Services explained that it had been decided to request the Assistant Secretary-General of the Office of Public Information in New York to appoint the Applicant to a permanent post with ECLA, against the budget of that Office, and in the meantime to continue paying the cost of the Applicant's salary. The Assistant Secretary-General, Office of Public Information, replied that the Office could not provide funding for the Applicant's employment; consequently, ECLA concluded a new special service agreement with the Applicant, on the same conditions, first for two months beginning 1 April 1965 and then for the seven remaining months of 1965. A comparable special service agreement was concluded between ECLA and the Applicant for 1966 but the Applicant's remuneration was increased to \$375 per month to meet the rise in the cost of living. A similar agreement was concluded for 1967. During the latter year, however, the Applicant also concluded two other special service agreements with ECLA. The first commenced on 30 May 1967, had an open expiration date and provided for the translation into Portuguese of three documents at the rate of \$2.50 per page, performance to be certified by the Director of the Industrial Development Division of ECLA. The second commenced on 5 September 1967, also had an open expiration date and provided for the translation into Portuguese of another document, at the same rate of remuneration, performance to be certified by the Chief of Editorial and Language Services of ECLA. In a memorandum dated 2 February 1968, the Applicant informed the Assistant Executive Secretary of ECLA that, although he had been transferred from the Press Section to the Industrial Development Division at the end of September 1967, he had continued to do work for the Press Section; noting that there was no possibility of his occupying a post in the Industrial Development Division due to difficulties which had arisen with the agreements between the Inter-American Development Bank and ECLA, he requested that his special service agreement be renewed on the same conditions as before. As a result, on 28 February 1968, the Applicant concluded a special

service agreement with ECLA for the first half of 1968 to translate ECLA information documents into Portuguese in return for a monthly remuneration of \$375, subject to certification of the quality of the work by the Chief of Information Services. On 24 June 1968, the Director of the Industrial Development Division sent a memorandum to the Assistant Executive Secretary of ECLA informing him that in addition to preparing press material the Applicant had prepared summaries of industrial studies, and proposing that his special service agreement be extended until the end of 1968 so that he could continue that work. In an annotation to that memorandum, the Assistant Executive Secretary approved the proposed extension but directed that the Applicant be advised that that extension would be the last. Accordingly, a special service agreement identical to the previous one was concluded for the second half of 1968. On 9 December 1968, the Applicant concluded a special service agreement with ECLA under which he was to prepare 11 summaries of reports for the Industrial Development Division for \$2,200. This agreement commenced on 1 October 1968 and was to expire not later than 31 January 1969. Similarly, on 20 January 1969, the Applicant concluded with ILPES (Latin American Institute for Economic and Social Planning) a special service agreement for the translation of a document, between 16 January 1969 and approximately 29 January 1969, at the rate of \$2.50 per page, satisfactory performance to be certified by the Editor of the Publications Programme of ILPES. On 13 March 1969, the Chief of Information Services informed the Assistant Executive Secretary of ECLA that the Applicant had again offered his assistance to the Information Services. A special service agreement providing once again for a monthly remuneration of \$375 was then concluded for the period 17 March to 16 July 1969, and then extended for three months. On 24 September 1969, the Executive Secretary of ECLA requested the Chief of the ECLA Office of Personnel to grant the Applicant a special service agreement until the end of December 1969 with a monthly remuneration of \$375, but to advise him that, for budgetary reasons, it would no longer be possible to employ him in 1970. The Applicant's special service agreement was thus extended until the end of 1969. On 19 December 1969, the Director of the Industrial Development Division requested the Assistant Executive Secretary of ECLA to approve an agreement with the Applicant for 1970 on the same conditions as before, providing for the preparation of summaries relating to the work of the Division, it being understood that the Applicant would devote the time remaining to him to similar tasks for other divisions of ECLA. Accordingly, a special service agreement was concluded for the year 1970. On 6 January 1971, the Director of the Economic Development and Research Division of ECLA requested that the Applicant's agreement be extended, on the same conditions, for 1971; he would prepare summaries of the work of that Division and do similar work, as required, for the Industrial Development Division and for other divisions of ECLA. Accordingly, the Applicant's agreement was renewed for the year 1971. In addition, on 16 December 1971, the Applicant concluded a special service agreement with ILPES, for the translation into Portuguese of various texts between 16 December 1971 and 29 February 1972, at the rate of \$6 per page, performance being certified by the Editor of the Publications Programme. The Applicant's agreement with the Economic Development and Research Division was renewed for the year 1972. When, at the end of that year, the Director of that Division requested a further extension of the Applicant's agreement for 1973, it was decided to extend it for three months only, while a regular budgetary solution in the form of a locally recruited or international post was explored. In fact, the Applicant's agreement was renewed until 30 April, then until 31 July 1973. By a memorandum dated 1 June and a telegram dated 4 June 1973 addressed to the Chief of Staff Services in the Office of Personnel Services, New York, the Chief of the ECLA Office of Personnel noted that the continued collaboration of the Applicant with ECLA under special service agreements had involved the payment of more than \$5,000 and requested authorization to extend the Applicant's agreement for three months. This

authorization was granted by telegrams dated 5 and 29 June 1973, subject to the proviso that if the Applicant's services were required beyond that period, the situation concerning his contractual status would be regularized in the meantime, and the Applicant's agreement was renewed until 31 October 1973. On 25 July 1974, the Applicant addressed to the Director of the Division of Administration of ECLA a memorandum entitled "Defence of acquired rights" in which he alleged that, on instructions from the Executive Secretary of ECLA, as stated in writing by the Director of the Office of the Executive Secretary, he had continued working for ECLA until that date, without receiving his monthly remuneration of \$375, and that he had received assurances that he would continue to be employed by ECLA at least until the end of 1975; he added that, acting on instructions from the Director of the Office of the Executive Secretary, he had arranged, at considerable expense, to move to Brazil, in order to work for the United Nations there, and requested the Director of the Division of Administration to clarify ECLA's real intentions towards him or else to grant him the compensation due to him for his 10 years of work with ECLA as well as reimbursement of the expenses incurred in transferring his personal effects to Brazil and a repatriation grant; he stressed, finally, that, although he had been compelled by necessity to continue signing special service agreements for 10 years, that type of agreement had constituted in his case a legal artifice which manifestly violated the rules of the United Nations and international, regional and Chilean labour law. In a reply dated 4 September 1974, the Acting Director of the Division of Administration rejected the Applicant's claims, invoking paragraphs 4 and 5 of the special service agreement. On 3 June 1975, the Applicant appealed to the Joint Appeals Board through the Chairman of the ECLA Staff Committee whom he had requested on 30 August 1974, before leaving for Brazil, to file an application with the Tribunal if a favourable answer to his petition was not received from the Division of Administration. On 19 March 1976, the Joint Appeals Board submitted its report, whose conclusions were as follows:

"24. Having carefully considered all the material put before it by the parties, the Board, while unable to determine the facts with certainty, considered that there was a reasonable degree of probability that the appellant had worked on a full-time basis and during normal office hours for ECLA from August 1964 to October 1973.

"25. Considering that the appellant had signed more than twenty-five special service agreements bearing the statement that 'The subscriber shall not be considered in any respect as being a staff member of the United Nations' and on one occasion, recognizing that no post was available for him, had even solicited the renewal of the special service agreement, the Board could not hold that the appellant was a staff member entitled to lodge an appeal under Staff Regulation 11.1. Accordingly, the Board, under the authority granted to it in Staff Rule 111.1 (c), *decides not to entertain this appeal.*

"26. The Board is very disturbed, however, by the irregularities in the Administration's treatment of the appellant and the injustice likely to arise in such circumstances. By using special service agreements to engage the appellant in full-time employment because no post was available for him in the manning table, the Administration denied him the status of a member of the staff and the benefits pertaining to that status, including the social security provided in chapter VI of the Staff Regulations and Rules and access to the appeals procedure established in chapter XI.

"27. In this connexion the Board regrets that the special service agreements signed by the appellant contain no provision for the settlement of disputes arising out of the contract. The following passage from Judgement No. 122 of the International Labour Organisation Administrative Tribunal, which was quoted with ap-

proval by the United Nations Administrative Tribunal in its Judgement No. 150, is, in the Board's view, of significant relevance:

“ ‘While the Staff Regulations of any organization are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognized so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organization, and consequently may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.’

Bearing in mind that principle and noting that the revised special service agreement form issued while this case was under consideration (now entitled ‘Contract—Individual Contractor’ and numbered P.106) contains provision for arbitration of any dispute arising out of or in connexion with the contract, the Board urges the Secretary-General to establish an arbitral or appeals procedure to consider and decide the appellant's claims.”

On 20 July 1976, the Officer-in-Charge of Personnel Services informed the Applicant that the Secretary-General had decided to take note of the decision of the Board not to entertain the appeal and to take no action on the Board's recommendation set out in paragraph 27 of its report. On 3 September 1976, the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The status of the Applicant vis-à-vis ECLA was that of an unofficial staff member; he had become such because of circumstances, the attitude of the Administration and the conditions of his work. The very nature of his work actually gave him the outward marks of a staff member, one who had for several years performed the duties normally performed by a public information officer and by an editor-translator, to such an extent that the Administration several times sought to regularize the situation by trying to incorporate the Applicant into the regular staff of ECLA. In the end, it did not do so, thereby keeping the Applicant in an extremely precarious situation which was unjust by virtue of the fact that, while doing work equal to that of an ECLA Professional, the Applicant received only one fifth of the income of a public information officer and an infinitesimal portion of the privileges and rights normally granted to that category. The Applicant was at the time a political refugee and the 25 special service agreements he signed were essentially a series of leonine contracts.

2. The Applicant should have been given a hearing by virtue of the general principle that everybody has, in the event of a dispute with his employer, the right of access to an appeals body. By adding a paragraph concerning arbitration to the wording of special service agreements, the Administration has itself recognized the extreme injustice of the Applicant's situation.

Whereas the Respondent's principal contentions are:

1. The legal relationship between the Applicant and ECLA was governed exclusively by the terms of the Applicant's contracts. Paragraphs 4 and 5 of the special service agreements signed by the Applicant are free of ambiguity. Whatever his personal or family situation, the Applicant entered into those agreements of his own free will, thus accepting that he would not be considered in any respect as being a staff member of the United Nations. Moreover, the agreements contain not a single reference, express or implicit, to any statutory element of the Staff Regulations and Rules.

2. The conduct and the acts which the Applicant imputes to ECLA did not

alter or have any reflection whatsoever upon the contracts signed by him. The Applicant, in particular, had on occasion simultaneous agreements with ECLA, and even if he sometimes observed normal working hours, he was always free to do his work whenever and wherever he chose. The evidence leaves no room for doubt that he performed his services on a free-lance basis and was not subject to the discipline or authority of ECLA, which had no say in his private professional activities. With respect to privileges and immunities, his name was not accredited in the Ministry of Foreign Affairs and was not included in the list of officials of the United Nations; he was not provided with a Laissez-Passer and did not enjoy the privileges attaching to staff members.

The Tribunal, having deliberated from 3 to 14 October 1977, now pronounces the following judgement:

I. The Applicant worked for ECLA for nearly 10 years—from 1 August 1964 to 31 October 1973—under a number of successive special service agreements. He claims to have continued working several months more without a contract and without remuneration. On 25 July 1974, the Applicant addressed to the Director of the Division of Administration of ECLA a memorandum entitled “Defence of acquired rights” requesting the latter to inform him of ECLA’s real intentions towards him or else to grant him the compensation due to him for his 10 years of work. In a reply dated 4 September 1974, the Acting Director of the Division of Administration rejected all the Applicant’s claims on the grounds that he was not considered a staff member of the United Nations and that the compensation and other sums which he claimed were not provided for in the special service agreements which he had signed.

II. The Tribunal notes that on 30 August 1974 the Applicant addressed to the Chairman of the ECLA Staff Committee a memorandum entitled “Application to the United Nations Administrative Tribunal”, transmitting the application to him and requesting him to forward it to the Tribunal “if a favourable answer to [his] previous petition is not received from the Division of Administration of ECLA”. It was only by a letter dated 3 June 1975 that the Chairman of the Staff Committee transmitted to the Secretary of the Joint Appeals Board an undated application of the Applicant, addressed to the President of the United Nations Administrative Tribunal. According to the Chairman of the Staff Committee, the Applicant had not received the Administration’s reply dated 4 September 1974 because he was no longer in Chile; believing that no reply had been addressed to him, he had sent a new application to the Staff Committee.

On 19 March 1976, the Joint Appeals Board decided not to entertain the appeal on the ground that the special service agreements signed by the Applicant specified that “the subscriber” would not be “considered in any respect as being a staff member of the United Nations”.

III. The Applicant is of the opinion that his status is that of a staff member and that he is entitled to have recourse to the appeals procedures available to staff members. This view is contested by the Respondent, who stresses that paragraphs 4 and 5 of the successive agreements between the two parties stipulated that the Applicant would not be considered in any respect as being a staff member of the United Nations and that his rights and obligations were strictly limited to the terms and conditions of the agreement. According to the Respondent, it follows that since the agreements contain no clause referring to the Staff Regulations and Rules, the Applicant did not have the right to submit a dispute concerning those agreements to the Joint Appeals Board or to the Tribunal.

The Tribunal nevertheless notes that the Respondent did in this case allow the dispute concerning the special service agreements to be submitted to it. In so doing, the Respondent has complied with a general principle of law whose importance for the settlement of disputes between the United Nations and its co-contractors has been frequently affirmed.

IV. The Tribunal notes that in this dispute the Applicant claims certain rights under the Staff Regulations and Rules. This is therefore a dispute which the Tribunal may hear on the basis of an agreement between the parties. The Respondent "finds that the Tribunal is an appropriate forum to be seized with the application" and the Applicant has likewise acknowledged that "the [arbitration] machinery could, incidentally, be a hearing by the Tribunal". The Tribunal notes, moreover, that, in accordance with the approach it has taken in earlier cases, it may properly hear an appeal concerning the application of the Staff Regulations and Rules without its affirmation of its competence leading to the conclusion that the Applicant is a staff member or former staff member of the United Nations (Judgements No. 96, *Camargo*; No. 106, *Vasseur*; and No. 150, *Irani*).

Consequently, the Tribunal declares itself competent to pass judgement on the application.

V. In the first plea of his application, the Applicant requests the Tribunal to "rule that he had in fact become a staff member of ECLA". The Tribunal shares the view of the Respondent that "Applicant's principal plea requesting the Tribunal to declare as a preliminary issue that the Applicant became in fact a staff member of ECLA is closely interwoven and cannot be legally disassociated from the merits of the case".

The Tribunal notes that, in his application and in his written observations, the Applicant has asked to plead subsequently on the merits of the case. Consequently, the Tribunal considers that it is not required to take a decision on this point at this stage.

VI. The Applicant also requests the Tribunal to rule that his appeal on the merits of the case should be receivable by the Joint Appeals Board. The Tribunal notes that Staff Rule 111.1 (c) provides that "Where its competence is in doubt, the Joint Appeals Board itself shall decide". On that basis and in this case, the Tribunal considers that the Joint Appeals Board acted within its competence in deciding not to entertain the appeal. The Tribunal would only be able to examine the question of the application of Staff Rule 111.1 (c) if it was decided, on the merits of the case, that the Applicant is entitled to invoke the Staff Regulations and Rules.

VII. There is no need for the Tribunal to rule on the Applicant's second plea since the Respondent, in his answer, has agreed to recognize the Tribunal's authority to "arbitrate the dispute", a position which accords with "Applicant's alternative plea B".

VIII. In his last plea, the Applicant requests payment of compensation for the damage suffered by reason of delay attributable to the Respondent's refusal to recognize the competence of the Joint Appeals Board or his refusal to establish arbitration machinery.

Having ruled on the competence of the Joint Appeals Board in paragraph VI above, the Tribunal must now decide whether the Respondent has incurred liability by reason of his delay in accepting an appeals procedure.

The Tribunal notes that none of the successive agreements binding the two parties

contained any provision for the settlement of disputes. It shares the regret of the Joint Appeals Board "that the special service agreements signed by the appellant contain no provision for the settlement of disputes arising out of the contract".

The Applicant invokes the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946 which, in section 29 in article VIII ("Settlement of Disputes"), provides as follows:

"The United Nations shall make provisions for appropriate modes of settlement of:

"(a) Disputes arising out of contracts . . ."

In its Judgement No. 150 (*Irani*), the Tribunal cited the statement of the Administrative Tribunal of the International Labour Organisation, in its Judgement No. 122 (*Chadsey*), to the effect that:

"While the Staff Regulations of any organisation are, as a whole, applicable only to those categories of persons expressly specified therein, some of their provisions are merely the translation into written form of general principles of international civil service law; these principles correspond at the present time to such evident needs and are recognized so generally that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation, and consequently *may not lawfully be ignored in individual contracts. This applies in particular to the principle that any employee is entitled in the event of a dispute with his employer to the safeguard of some appeals procedure.*" (Emphasis added.)

The Tribunal notes, moreover, that the United Nations has recognized this principle, giving the benefit thereof to subscribers of special service agreements by inserting in the revised wording of these agreements a clause relating to "arbitration". But it was only in 1976 that the Organization included in form P.106, entitled "Contract-Individual Contractor", a paragraph 8, providing that "any dispute arising out of or in connexion with this contract shall, if attempts at settlement by negotiation have failed, be submitted to arbitration . . .".

The Tribunal notes that the Applicant had already expressed his desire to submit an appeal in his memorandum dated 30 August 1974 addressed to the Chairman of the ECLA Staff Committee and that an appeal was transmitted to the Joint Appeals Board on 3 June 1975. The Board, in turn, requested the Secretary-General, on 19 March 1976, to establish an arbitral procedure for the Applicant. On 20 July 1976, the Applicant was informed that the Secretary-General had decided not to comply with that recommendation.

The Tribunal notes that it was only in his answer of 9 February 1977 that the Respondent accepted "the establishment of an arbitral procedure to hear the Applicant's claim".

IX. The Tribunal considers that the prolongation of the dispute is attributable to the Respondent by reason, firstly, of the absence of a guarantee of appeal in the various agreements concluded with the Applicant over a period of nearly 10 years, and, secondly, of the Respondent's subsequent refusal to make some means of appeal available to the Applicant. That omission and that unjustified refusal have caused injury to the Applicant by impeding for a long time the settlement of the dispute. The Tribunal fixes at \$1,000 the amount of compensation to be paid by the Respondent to the Applicant for the injury thus sustained.

X. The Applicant having expressed the wish that the merits of the case should be considered subsequently, the Tribunal decides that, unless the parties settle the matter, the Applicant may file with the Tribunal, within three months from the date of this Judgement, an explanatory memorandum and pleas dealing with the merits of the case. Thereupon the procedure prescribed by the Statute and Rules of the Tribunal relating to written and oral proceedings will follow.

(Signatures)

Suzanne BASTID

Vice-President, presiding

Francis T. P. PLIMPTON

Vice-President

New York, 14 October 1977

Francisco A. FORTEZA

Member

Jean HARDY

Executive Secretary
