INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

APPLICATION FOR REVIEW OF JUDGEMENT No. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

DEMANDE DE RÉFORMATION DU JUGEMENT N° 273 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

Abbreviated reference:

I.C.J. Pleadings, Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal

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Référence abrégée:

C.I.J. Mémoires, Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies

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N° de vente: **484**

APPLICATION FOR REVIEW OF JUDGEMENT No. 273
OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

DEMANDE DE RÉFORMATION DU JUGEMENT Nº 273
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APPLICATION FOR REVIEW OF JUDGEMENT No. 273 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

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DEMANDE DE RÉFORMATION DU JUGEMENT N° 273 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

The present volume reproduces the Request for opinion, the written statements and comments, and the correspondence in the case concerning the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal.* This case, entered on the Court's General List on 28 July 1981 under number 66, was the subject of an Advisory Opinion delivered on 20 July 1982 (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982*, p. 325).

The Hague, 1982.

Le présent volume reproduit la requête pour avis consultatif, les exposés écrits et observations écrites et la correspondance concernant l'affaire de la *Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies.* Cette affaire, inscrite au rôle général de la Cour sous le numéro 66 le 28 juillet 1982, a fait l'objet d'un avis consultatif rendu le 20 juillet 1982 (*Demande de réformation du jugement n° 273 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1982*, p. 325).

La Haye, 1982.

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REQUEST FOR ADVISORY OPINION

REQUÊTE POUR AVIS CONSULTATIF

THE SECRETARY-GENERAL OF THE UNITED NATIONS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

23 July 1981.

I have the honour to refer to Article 11 of the Statute of the United Nations Administrative Tribunal whereby a Committee on Applications for Review of Administrative Tribunal Judgements was established and was authorized, under paragraph 2 of Article 96 of the Charter, to request advisory opinions of the International Court of Justice.

The twentieth session of the Committee on Applications for Review of Administrative Tribunal Judgements was held at United Nations Headquarters from 9 to 13 July 1981 to consider an application presented to the Committee by the United States of America for a review of Judgement No. 273, delivered by the United Nations Administrative Tribunal on 15 May 1981, in the case of *Mortished* v. *the Secretary-General of the United Nations* (document AT/DEC/273). At its second meeting of the session, on 13 July 1981, the Committee decided to request an advisory opinion of the International Court of Justice regarding that Judgement. This decision is recorded in the report of the Committee on the work of its twentieth session (document A/AC.86/25).

The decision of the Committee as formally announced by its Chairman reads as follows:

> "The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application presented by the United States of America for review of Administrative Tribunal Judgement No. 273, delivered at Geneva on 15 May 1981. Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following question:
>
> > 'Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?'"

I am enclosing herewith one copy each of the English and French text of the report of the Committee in which that decision has been duly certified. Pursuant to a decision of the Committee, a transcript of the proceedings at its twentieth session is being prepared in English and French and copies thereof will be transmitted to the Court as soon as possible.

In accordance with Article 65 of the Statute of the Court, I shall transmit to the Court all documents likely to throw light upon the question. Furthermore, as required by paragraph 2 of Article 11 of the Statute of the Administrative Tribunal, I shall arrange to transmit any views that Mr. Mortished, the person in respect of whom the Tribunal rendered its Judgement No. 273, may wish to submit.

(Signed) Kurt WALDHEIM.

DOSSIER TRANSMITTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

DOSSIER TRANSMIS PAR LE SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES

INTRODUCTORY NOTE

On 23 July 1981 the Secretary-General informed the President of the International Court of Justice that, by a decision adopted on 13 July 1981 at its twentieth session, the Committee on Applications for Review of Administrative Tribunal Judgements, after having considered an application of the United States relating to Judgement No. 273 of the Tribunal, requested the Court to give an advisory opinion on the following question:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?"

The present dossier contains documents likely to throw light upon this question.

The dossier consists of two parts. Part I contains documents relating to the proceedings leading to the request by the Committee for Review for an advisory opinion of the International Court of Justice and Part II contains documents relating to the repatriation grant scheme.

The documents, which are part of the official records of the United Nations, have been certified to be so or to be true copies or translations thereof. Other documents have been certified as true copies of the originals or translations thereof. Each document is identified by title and official United Nations symbol, if any. Whenever possible, a citation is also given to the volume and page where the document may be found in the *Official Records* of the United Nations. In addition all documents have, for convenience of use, been numbered consecutively in the order in which they appear in the dossier, and references to documents in this introductory note are based on this system of numbering.

Part I of the Dossier. Documents Relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 273 of the Administrative Tribunal

A. Documents of the Twentieth Session of the Committee on Applications for Review of Administrative Tribunal Judgements

On 15 June 1981, the United States presented an application (doc. No. 1) for a review of Judgement No. 273 rendered on 15 May 1981 by the Administrative Tribunal in the case of *Mortished* against *the Secretary-General of the United Nations* (doc. No. 12). The twentieth session of the Committee on Applications for Review of Administrative Tribunal Judgements was thereupon convened to consider the application (docs. Nos. 2 and 3). By a memorandum dated 23 June 1981, the Secretary-General advised the Committee that he was not availing himself of his right under article IV of the provisional rules of procedure of the Committee to submit comments on the application presented by the United States (doc. No. 4). On 23 June 1981 counsel for Mr. Mortished submitted comments on the application presented by the United States (doc. No. 5).

The Committee met on 9 and 13 July 1981 and considered the application of

the United States and decided that there was a substantial ground for the application of the United States on the bases that the Administrative Tribunal may have erred on a question of law relating to the provisions of the Charter of the United Nations and that it may have exceeded its jurisdiction or competence (doc. No. 6, paras. 11 and 12). The Committee decided (doc. No. 6, para. 13) that it would request an advisory opinion of the International Court of Justice and that the question to the Court should be formulated in the way proposed by the United States in its application (doc. No. 1). The Committee also decided (doc. No. 6, para. 14) that a transcript (docs. Nos. 7 to 9) of the proceedings at its twentieth session should be made and communicated to the Court and to the parties to the proceeding before the Tribunal.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee on Applications for Review of Administrative Tribunal Judgements at its Twentieth Session

The rules of procedure that governed the twentieth session of the Committee for Review were the Provisional Rules adopted by the Committee at its first meeting on 16 October 1956 and amended at its meetings on 25 October 1956, 21 January 1957 and 11 December 1974 (doc. No. 10).

A verbatim record was made of the oral arguments of the parties before the Administrative Tribunal (doc. No. 11) and the Tribunal delivered its Judgement on 15 May 1981 (doc. No. 12). The Statute and Rules of the Administrative Tribunal were those in effect from 3 October 1972 (doc. No. 13). The Statute and Rules have not been changed from the version considered by the Court in the Application for Review of Judgement No. 158 (*I.C.J. Reports 1973*, p. 166).

The Staff Regulations[1] and Staff Rules in effect at the time of Mr. Mortished's separation from service complete this section of the dossier (docs. Nos. 14 to 16).

C. Documents[2] Submitted to the United Nations Administrative Tribunal: Case No. 257: Mortished against the Secretary-General of the United Nations

Mr. Mortished filed an Application to the Administrative Tribunal on 10 October 1980 (doc. No. 17 and Annexes 1 to 13, together with a list of Annexes). The Secretary-General filed an Answer on 4 March 1981 (doc. No. 18 and Annexes 14 to 52 together with a list of Annexes)[3]. Mr. Mortished filed Written Comments on the Secretary-General's Answer on 10 April 1981 (doc. No. 19). Additional documents and information were supplied to the Tribunal as a result of questions and discussions during the oral proceedings (docs. Nos. 20 to 25).

[1] The copy of the Staff Regulations in the dossier (doc. No. 14) is the version in force as of 1 January 1981 but the provisions relating to the repatriation grant and all others relevant to the application are unchanged from those in force at the time of Mr. Mortished's separation from service (30 April 1980).

[2] In these documents, which were submitted to the Administrative Tribunal, Mr. Mortished is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". These documents are noted in the opening paragraphs of Judgement No. 273 of the Tribunal (doc. No. 12) and constitute the written submission made to the Administrative Tribunal in the case. Oral submissions made to the Administrative Tribunal are set out in the Verbatim Record of the public meeting of the Tribunal (doc. No. 11).

[3] The Annexes to the Secretary-General's Answer concerning the repatriation grant (i.e., Annexes 18 to 48) are contained in Part II of the dossier. The Appendix to the table of Contents lists the number of each Annex and the corresponding document number in Part II of the dossier.

Part II of the Dossier. Documents Relating to the Repatriation Grant Scheme[4]

A. Documents of the Fourth Session of the General Assembly

On 31 October 1949 the Committee of Experts on Salary, Allowance and Leave Systems presented to the General Assembly its report reviewing the salary and allowance system of the United Nations, which report included recommendations on the replacement of the then existing system of expatriation allowances with a repatriation grant scheme (doc. No. 26, paras. 106 to 111). The Secretary-General commented on this report including the proposed repatriation grant scheme (doc. No. 27, paras. 17, 31 and Appendix II, paras. 1 to 9 and 32 to 35). Both reports (docs. Nos. 26 and 27) were considered by the Fifth Committee on 22 November 1949 (doc. No. 28, paras. 16, 44 to 46 and 79 and doc. No. 29, paras. 8, 14, 40 and 71). The Committee decided to refer the two reports to the Advisory Committee on Administrative and Budgetary Questions (ACABQ)[5] with a request that that Committee study the question and report to the fifth session of the General Assembly (doc. No. 29, para. 95).

B. Documents of the Fifth Session of the General Assembly

The Advisory Committee on Administrative and Budgetary Questions (ACABQ) duly presented its report (doc. No. 30) on the report of the Committee of Experts on Salary, Allowance and Leave Systems and recommended the adoption of the repatriation grant scheme proposed by that Committee with the proviso that the scale of repatriation benefits be reduced (doc. No. 30, paras. 65 to 71). The Secretary-General reported on the ACABQ report, favouring the initial scale of repatriation benefits proposed by the Committee of Experts (doc. No. 31, para. 12 and Annex A, part IX). The Secretary-General's report also contained a report (doc. No. 31, Annex B, para. 9 *(e)*) of the Consultative Committee on Administrative Questions (CCAQ)[6] on the report of the Committee of Experts which favoured the ACABQ recommendations on the proposed repatriation grant scheme.

The Fifth Committee established a Sub-Committee (No. 7) to consider, *inter alia*, the proposed repatriation grant scheme (doc. No. 32). The Sub-Committee proposed the adoption of the ACABQ recommendation (doc. No. 32, para. 28, and doc. No. 33). The Secretary-General maintained his proposal (doc. No. 34, para. 3) for the adoption of the scale of repatriation grant benefits recommended by the Committee of Experts.

The Fifth Committee considered the establishment of the repatriation grant scheme at its 242nd meeting on 5 October 1950 (doc. No. 35, paras. 24-42), its 265th meeting on 17 November (doc. No. 36, paras. 21, 23, 26 to 27, 37, 42, 50, 59 and 76), its 266th meeting on 20 November (doc. No. 37, paras. 35, 60 and 67), its 267th meeting on 20 November (doc. No. 38, paras. 1 to 3, 9, 24, 44, 46, 48 to 50, 53, 55, 66 and 72 to 74) and its 269th meeting on 24 November (doc.

[4] Documents relating to the establishment of the United Nations Administrative Tribunal were submitted to the Court in *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (*I.C.J. Reports 1954*, p. 4) and documents relating to the establishment of the procedure to request an advisory opinion of the Court were submitted in *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166).

[5] ACABQ is a standing advisory committee of experts established by the General Assembly.

[6] CCAQ is a committee of the Administrative Committee for Co-ordination, which consists of the Executive Heads of the United Nations and the specialized and related agencies. CCAQ itself consists of the heads of administration of those organizations that follow the United Nations "common system" of staff administration.

No. 39, paras. 23 and 49). The Committee recommended to the General Assembly that it adopt the repatriation grant scheme as recommended by the ACABQ and Sub-Committee 7 of the Fifth Committee (doc. No. 40, paras. 6 to 8, 12 to 13, 16 and 31).

On 15 December 1950 the General Assembly adopted the repatriation grant scheme proposed by the Fifth Committee, effective 1 January 1951 (doc. No. 41).

On 20 December 1950 the Assistant Secretary-General for Administrative and Financial Services issued an Information Circular describing, *inter alia*, the new repatriation grant scheme (doc. No. 42, para. 11 and Annex III).

C. Documents of the Sixth Session of the General Assembly

On 27 February 1952 the General Assembly adopted the Staff Regulations of the United Nations including provisions on the repatriation grant scheme (doc. No. 43, staff regulation 9.4 and Annex IV).

D. Documents of the Twelfth Session of the Consultative Committee on Administrative Questions (1952)

On 20 March 1952 the United Nations Secretariat prepared a working paper for CCAQ outlining proposed detailed conditions of eligibility for the repatriation grant (doc. No. 44). At its twelfth session the CCAQ agreed to a uniform set of conditions of eligibility for the repatriation grant, to be adopted by the United Nations and the specialized agencies, including the principle that the grant was payable to staff whom the organizations were "obligated to repatriate" (doc. No. 45, para. 4).

E. Documents of the Eleventh Session of the General Assembly

In 1956 the Salary Review Committee, established pursuant to General Assembly resolution 975 (X) of 13 December 1955, presented a report containing a comprehensive review of the United Nations salary allowance and benefit system, including the repatriation grant scheme (doc. No. 46, paras. 223 to 225 and Annex I). The Committee's principal relevant recommendation was that the grant should not be extended to non-expatriate staff nor should it be paid to staff on fixed-term appointments of less than five years (doc. No. 46, para. 225) which staff were instead to be paid a service or severance benefit (doc. No. 47, para. 107).

The Fifth Committee endorsed these recommendations of the Salary Review Committee (doc. No. 47, para. 107) and the Fifth Committee's recommendations were adopted by the General Assembly on 27 February 1957 (doc. No. 48).

F. Documents of the Eighteenth Session of the General Assembly

On 18 September 1963 the Secretary-General reported to the General Assembly on a number of personnel questions, including the repatriation grant (doc. No. 49, paras. 13 to 29). This report proposed that the repatriation grant scheme apply to expatriate officials whatever the length of their contracts (doc. No. 49, paras. 20 to 22). The ACABQ concurred in these proposals (doc. No. 50, paras. 11 to 19).

The Fifth Committee approved the recommendations of the ACABQ (doc. No. 51, paras. 32 to 49 and doc. No. 52, paras. 24 to 27).

On 11 December 1963 the General Assembly adopted the recommendations of the Fifth Committee that the repatriation grant scheme apply to expatriate officials whatever their length of service (doc. No. 53).

On 5 February 1964 an Information Circular was issued explaining to the staff the changes in the repatriation grant scheme made by the General Assembly (doc. No. 54, paras. 7 to 9 and Annex).

G. Documents of the Twenty-fifth Session of the Consultative Committee on Administrative Questions (1964)

The Twenty-fifth session of the CCAQ agreed upon principles to govern repatriation grant entitlements of expatriate officials assigned to their home country during part of their careers (doc. No. 55, paras. 32 to 33).

H. Documents of the Forty-first Session of the Consultative Committee on Administrative Questions (1974)

The Secretariat of the CCAQ on 6 May 1974 and 1 October 1974 prepared two studies on the repatriation grant (docs. Nos. 56 and 57), in particular, the practice of paying repatriation grant to staff who do not in fact repatriate on separation from international service (doc. No. 56, para. 14).

I. Documents of the Twenty-ninth Session of the General Assembly

On 18 December 1974 the General Assembly, in the course of amending the Staff Regulations to remove all differential treatment based on the sex of the staff member, made grammatical changes to the regulation governing the repatriation grant (doc. No. 58).

J. Documents of the Thirty-first Session of the General Assembly

The International Civil Service Commission (ICSC) established by General Assembly resolution 3357 (XXIX) of 18 October 1974 examined the repatriation grant scheme and, pending further study, recommended some changes to the scale of benefits (doc. No. 59, paras. 266 to 270). During the discussion on this report in the Fifth Committee some representatives questioned whether it was appropriate for the United Nations to pay the repatriation grant to staff members who did not repatriate (doc. No. 60, para. 46 and doc. No. 61, paras. 14 and 41). The General Assembly, upon the recommendation of the Fifth Committee (doc. No. 62, paras. 28 and 46), requested the ICSC to re-examine, in the light of the views expressed in the Fifth Committee, the conditions for the provision of repatriation grant payments (doc. No. 63, part II, para. 3).

K. Documents of the Forty-eighth Session of the Consultative Committee on Administrative Questions (1978)

The Forty-eighth session of the CCAQ considered the question of entitlements upon cessation of service, including the repatriation grant scheme (doc. No. 64, paras. 9 to 11) and prepared a detailed paper on the repatriation grant scheme for the ICSC (doc. No. 65, paras. 13 to 17).

L. Documents of the Thirty-third Session of the General Assembly

In 1978 the ICSC studied the conditions for payment of the repatriation grant (doc. No. 66, paras. 178 to 186) and recommended that payment of the repatriation grant be made conditional upon signature by the staff member of a declaration that the staff member does not intend to remain permanently in the country of his last duty station (doc. No. 66, para. 186).

The Fifth Committee considered the report of the ICSC during the 33rd

session of the General Assembly at the 32nd meeting on 13 November 1978 (doc. No. 67, para. 41), at the 37th meeting on 20 November (doc. No. 68, paras. 57 and 76), at the 38th meeting on 21 November (doc. No. 69, paras. 4, 21 and 22), at the 40th meeting on 22 November (doc. No. 70, para. 11), at the 41st meeting on 24 November (doc. No. 71, para. 38), at the 42nd meeting on 27 November (doc. No. 72, paras. 69 to 70) and at the 56th meeting on 9 December (doc. No. 73, paras. 29, 32, 37, 50 to 53, 57 to 66, 72 to 74 and 76). The Committee recommended to the General Assembly that payment of repatriation grant to otherwise entitled staff members be made conditional upon presentation by the staff member of evidence of actual relocation subject to the terms to be established by the ICSC (doc. No. 74, para. 13, Section IV, para. 4). The Assembly adopted this recommendation by resolution 33/119 on 19 December 1978 (doc. No. 75).

The staff was informed of the decision of the General Assembly on 22 January 1979 (doc. No. 76, para. 20) and was informed on 23 April 1979 of the subsequent decision of the ICSC with respect to the establishment of terms for payment of the grant (doc. No. 77). The Commission decided that, with effect from 1 July 1979, payment of the repatriation grant would be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station but that staff members already in service before 1 July 1979 would retain the entitlement to a repatriation grant proportional to the period of service qualifying for the grant that they had accrued by that date without the necessity of production of evidence of relocation (doc. No. 77, para. 2). The Secretary-General implemented this decision with respect to the United Nations, by an Administrative Instruction, effective 1 July 1979 (doc. No. 77, para. 3).

M. Documents of the Thirty-fourth Session of the General Assembly

The ICSC reported to the Fifth Committee the decision it had taken in connection with establishing the conditions of payment of the repatriation grant to staff who did not repatriate (doc. No. 78, paras. 20 to 25).

During the 34th session of the General Assembly the Fifth Committee considered the decision of the Commission, in particular that staff members already in service before 1 July 1979 would retain a portion of the entitlement to repatriation grant without the need for production of evidence of relocation, at the 38th meeting on 6 November 1979 (doc. No. 79, para. 80), at the 46th meeting on 13 November (doc. No. 80, paras. 65 to 67, 69 and 87), at the 47th meeting on 14 November (doc. No. 81, paras. 3 to 6, 15, 34 and 38), at the 55th meeting on 21 November (doc. No. 82, paras. 9 and 38 to 41), at the 60th meeting on 27 November (doc. No. 83, paras. 45, 59 to 62, 65 to 66, 68 to 69 and 71 to 85), at the 62nd meeting on 28 November (doc. No. 84, paras. 1 to 35, 39, 43 and 45) and the 79th meeting on 12 December (doc. No. 85, paras. 109 to 123). The Committee also considered a Note by the Secretariat concerning the conditions of entitlement to the repatriation grant (doc. No. 86), and recommended to the General Assembly that effective 1 January 1980 no staff member should be entitled to any part of the repatriation grant unless evidence of relocation away from the country of last duty station was provided (doc. No. 87, para. 15, Section II, para. 3). The General Assembly adopted the recommendation of the Fifth Committee on 17 December 1979 by resolution 34/165 (doc. No. 88).

On 14 December 1979 the staff was informed of the expected approval by the General Assembly of the recommendation of the Fifth Committee (doc. No. 89). On 21 December 1979 the Administrative Instruction governing conditions of entitlement to the repatriation grant since 1 July 1979 was amended to conform to the General Assembly decision (doc. No. 90) and subsequently a Personnel Directive was issued setting out what would constitute evidence of relocation (doc. No. 91).

N. Documents of the Thirty-fifth Session of the General Assembly

The ICSC, in its 1979 report, commented upon the effect of resolution 34/165 on the harmonization of personnel practices of the organizations within the United Nations "common system" (doc. No. 92, para. 14).

O. United Nations Staff Rules on Repatriation Grant Since Establishment of Repatriation Grant Scheme on 1 January 1951

Document No. 93 contains a compilation of United Nations Staff Rules governing the repatriation grant since its establishment on 1 January 1951 (these documents had originally been submitted to the Administrative Tribunal as part of the Secretary-General's Answer (doc. No. 18)).

CONTENTS OF THE DOSSIER

Part I of the Dossier. Documents relating to the Proceedings Leading to the Request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion of the International Court of Justice in Relation to Judgement No. 273 of the Administrative Tribunal

A. Documents of the Twentieth Session of the Committee on Applications for Review of Administrative Tribunal Judgements

A/AC.86/R.97
17 June 1981.

1. Application Dated 15 June 1981 Submitted by the United States of America in Accordance with Article 11, Paragraph 1, of the Statute of the Administrative Tribunal

The United States respectfully requests the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion of the International Court of Justice on the matter of Judgement No. 273 of the Administrative Tribunal.

Judgement No. 273 raises a question of law relating to the provisions of the Charter of a constitutional dimension within the ambit of article 11 of the statute of the Administrative Tribunal which is of sufficient seriousness and magnitude to merit seeking the advice of the International Court of Justice.

The General Assembly is expressly charged, pursuant to Article 101 of the United Nations Charter, with establishing regulations concerning the staff. Resolution 34/165 constitutes the making of such regulations. It states in relevant part:

> "Decides that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided."

It is thus abundantly clear from the face of the resolution as well as the legislative history that the General Assembly intended the resolution to terminate the administrative practice of payments of repatriation allowances to persons who do not relocate upon retirement. The Secretary-General acted in strict compliance with this resolution, as he was bound to do, when he issued administrative instruction ST/AI/269. In invalidating these actions of the Secretary-General as applied to Mr. Mortished, the Administrative Tribunal acted to deny the full effect of decisions of the General Assembly which were neither arbitrary nor capricious.

It is not the contention of the United States that there are no circumstances in which the Administrative Tribunal could reject the application of rules made by the General Assembly and no rights of employees that the Administrative Tribunal may seek to preserve. These issues are not raised by the instant case. The issue that is raised is whether, in light of all the circumstances of the case, the Administrative Tribunal gave due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not depart or express an intention to relocate away from the country of his last duty station.

In light of the constitutional dimensions of these issues, including the relevance of Article 101 of the Charter and the authority of the General Assembly thereunder, it is believed that the matter calls for an advisory opinion from the International Court of Justice. It is consequently our view that the Committee on Applications for Review of Administrative Tribunal Judgements should ask the Court the following question:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?"

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2. Information Circular on the Twentieth session of the Committee[1] — A/AC.86/INF.19*
3. Provisional Agenda for the Twentieth session[1] — A/AC.86/R.98

A/AC.86/R.99
25 June 1981.

4. Memorandum Dated 23 June 1981 from the Secretary-General Addressed to the Secretary of the Committee

With reference to your memorandum of 16 June 1981 transmitting the application for review of Administrative Tribunal Judgement No. 273 (*Mortished* v. *Secretary-General of the United Nations)* presented by the United States of America to the Committee on Applications for Review of Administrative Tribunal Judgements, I have the honour to advise that the Secretary-General is not availing himself of his right under article IV of the provisional rules of procedure to submit comments on the application of the United States.

A/AC.86/R.100
25 June 1981.

5. Letter Dated 23 June 1981 from Mr. Sylvanus A. Tiewul, Counsel for Mr. Mortished, Addressed to the Secretary of the Committee with Comments on the Application Presented by the United States of America (A/AC.86/R.97)

23 June 1981.

Dear Mr. Borg Olivier,

1. Mr. Mortished has asked me, as his counsel and representative in his claim for the payment of a repatriation grant, to acknowledge your letter to him of 16 June 1981 containing a copy of the communication of the US Government

[1] Document not reproduced. *[Note by the Registry.]*

concerning Judgement 273 of the Administrative Tribunal (*Mortished* v. *the Secretary-General of the United Nations*). He has asked me on his behalf to respond to your letter and transmit to you comments on the communication of the United States.

2. The copy of the communication which you transmitted to Mr. Mortished, pursuant to Article III of the Committee's Provisional Rules of Procedure, reached him in Geneva by extraordinary luck on 17 June 1981. His request to me to act as his counsel and representative reached me sometime thereafter. Since under Article IV of these Rules, we have only until 23 June 1981 to transmit our comments on the Application to you, we would like to reserve the right to transmit to you comments in addition to those attached hereto. We wish to emphasize that our sole object in this is the need to submit to the Committee appropriate comments with a view to facilitating its proceedings and assisting its discussion.

3. The communication of the United States in question was addressed to Mr. John Scott, Acting Legal Counsel. We raise in the present instance no objection to the treatment of this communication as a communication to the Secretary of the Committee as required by Article II of the Provisional Rules of Procedure of the Committee. This shall be without prejudice to the right of the Committee to reject the communication on the grounds of inadmissibility.

4. It appears from the actions taken by you following receipt of the communication that you consider the communication to be an application for a review of Judgement No. 273 within the meaning of Article 11 of the Statute of the United Nations Administrative Tribunal. Under this provision, such applications are receivable from a competent party *which objects to the judgement*. Although the communication of the US does not explicitly state that the United States objects to the judgement, but merely that the judgement raises constitutional issues, we note that you have construed the communication as both the objection and the application for a review of the judgement. Our comments in this regard are contained in section II of the document.

5. We have considered the communication in the light of paragraph 3 of Article II of the Committee's Provisional Rules of Procedure. Although somewhat troubled by the contrast, we merely wish to take note of the practice that you have followed; we do not raise in the present instance objections in that regard.

6. We have also considered the fact that the Application has been made by a State which is a member of the Committee itself, that the Secretary of the Committee is a person designated by the Secretary-General who was the losing party in the judgement being impeached, and further that he is a member of the Office of Legal Affairs which presented the case on behalf of the Secretary-General. In order to ensure due process of law we respectfully make the following requests: (i) that we be given the opportunity to participate in all proceedings of the Committee; (ii) to make statements in explanation of the claim of Mr. Mortished or in rebuttal of contrary positions; (iii) that the sessions of the Committee be open; (iv) that the proceedings of the Committee be duly recorded; and (v) that an official transcript of the record be made available to us within a reasonable time after the conclusion of the proceedings.

(Signed) Sylvanus A. TIEWUL,
Counsel for Mr. Mortished.

COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS

Application of the United States
Regarding Judgement No. 273
(Mortished v. *the Secretary-General of the United Nations)*

Comments on behalf of Mr. Mortished

Date due: 23 June 1981 Sylvanus A. Tiewul
Date submitted: 23 June 1981 Counsel for Mr. Mortished

Summary of Comments

1. Mr. Mortished, having received on 17 June 1981 a copy of the communication of the United States dated 15 June 1981 containing a request to the Committee to seek an advisory opinion on Judgement No. 273 of the United Nations Administrative Tribunal, wishes to avail himself of Article IV of the Committee's Provisional Rules of Procedure to make comments on the communication. In addition to his preliminary reactions which are contained in Annex I to this document, he wishes the following comments to be made on his behalf by his counsel and representative in this matter.

2. We respectfully request the Committee to find:

(i) that the United States has no direct interest in Judgement No. 273, and consequently that the sole object of the Application is to vex the relations between the Secretary-General and the staff;

(ii) that the Application does not fall within the terms of Article 11, paragraph 1, of the Statute of the United Nations Administrative Tribunal; and

(iii) that the Application of the United States is based upon a mistaken view of the scope and tenor of Judgement No. 273.

As a consequence of each and all of these findings, we request the Committee to reject the Application as lacking in substantial basis.

3. If, contrary to the foregoing request, the Committee finds that there is a substantial basis to the Application, we respectfully request the Committee to decide that the real question which should be transmitted to the International Court of Justice for an advisory opinion is the following:

> "In the light of all the circumstances of the case, did the Administrative Tribunal in Judgement No. 273 give due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not relocate away from the country of his last duty station?"

4. If the Committee should instead decide to transmit the question as formulated by the United States in addition to or in place of the one just indicated above, we respectfully request the Committee to excerpt from the formulation its incorrect insinuations and to transmit the question in the following form:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/65 of 17 December 1979 did not prejudice the acquired rights of Mr. Mortished?"

5. Considering that the Administrative Tribunal in Judgement No. 273 specifically based its ruling on Staff Regulation 12.1, itself a resolution of the General Assembly, Mr. Mortished in any event requests the Committee to include in the questions to be submitted to the International Court of Justice for an advisory opinion the following question:

"Is there or is there not a general principle of law within the meaning of Article 36 (1) *(c)* of the Statute of the International Court of Justice on the protection of the acquired rights of an international civil servant?"

6. These comments are without prejudice to any others which we may wish to submit to the Committee at a later stage. Likewise the issues raised herein are without prejudice to any others which we may wish to raise should the Committee agree to request an advisory opinion from the International Court of Justice.

Elaboration of Comments

I

The United States has no direct interest in Judgement No. 273, and consequently the sole object of its application is to vex the relations between the Secretary-General and the staff.

7. Judgement No. 273 was on a case *(Mortished* v. *the Secretary-General of the United Nations)* to which the United States was not a party. Mr. Mortished has at no time been a national of the United States; nor is he claiming to exercise his right to the payment of the repatriation grant without relocation to or from the United States. Moreover, the specific administrative decision against which Mr. Mortished appealed to the Administrative Tribunal was not a decision to which the United States was privy. The Secretary-General in taking that decision did not claim to be acting directly or indirectly on behalf of the United States. On the contrary, it is clear that the dispute now resolved by Judgement No. 273 was a dispute solely between Mr. Mortished and the Secretary-General, the Head of the Secretariat and Chief Administrative Officer of the Organization.

8. Although the United States could have applied to intervene in the proceedings under Chapter VII of the Rules of the Administrative Tribunal, as it has done in the past, it chose not to do so. Although the United States could have, if it had joined the proceedings before the Administrative Tribunal, filed an *amicus curiae* brief, which could perhaps have assisted the Tribunal in resolving the case, no such action was taken by it. It is therefore clear that the United States had no direct interest in the dispute resolved by Judgement No. 273.

9. Neither Mr. Mortished nor the Secretary-General, who was the losing party in the case, has expressed an objection to the judgement of the Tribunal. Neither of them intends to do so; on the contrary, both parties see merit in accepting in good faith judicial decisions—with the axe lying where it falls, from one session of the Tribunal to another. The United States, which was not a party to the case and which had refrained from taking constructive action that could have assisted the Tribunal in its resolution, now expresses an objection to the judgement and a desire to seek an advisory opinion from the International Court of Justice. This action on the part of the United States will have the effect of unnecessarily protracting an otherwise settled dispute.

10. Under Article 11 of the Statute of the Administrative Tribunal, a "member State" which objects to a judgement of the Administrative Tribunal may request the Committee to request an advisory opinion of the International Court of Justice. But we submit that it is not sufficient merely to be a member State in order to be able to request, through the Committee, an advisory opinion from the International Court of Justice. As Article VIII of the Rules of Procedure of the Committee requires, there must be a "substantial basis for the application". We submit that by no stretch of imagination can the United States be said to have a substantial basis for the present application. We submit that Article 11 of the Statute of the Tribunal was not intended as a legal shelter for any and every vexatious application such as the present one against judgements of the tribunal in which a member State has no direct interest whatsoever.

11. The fact that the United States is the country which sponsored the adoption of General Assembly resolution 34/165 might well reflect the motivations of the United States in making the application. But this fact in itself is insufficient to confer upon the United States for all time the right to foist a particular preconceived notion of the legal effects of the resolution upon the judicial tribunal of the United Nations.

12. It is true that as a member State the United States, like other countries, has a legitimate concern about resolutions that have financial implications for the Organization. Analogies might even exist in the domestic law and practice of the United States to situations where the right exists for taxpayers to legally espouse certain causes of action before the courts. We submit, however, that it is inadmissible to seek to foist domestic law notions prevalent in one or the other country upon the United Nations Organization.

II

The application does not fall within the terms of Article 11, paragraph 1, of the Statute of the Tribunal.

13. According to paragraph 1 of Article 11 of the Statute of the Administrative Tribunal, there are four grounds on which a judgement of the Tribunal may be objected to, namely, "that the tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice". It appears that only the third of these grounds is relevant here since, in paragraph 2 of the Application, the United States takes the position that:

"Judgement No. 273 raises a question of law relating to the provisions of the Charter of a constitutional dimension within the ambit of Article 11 of the Statute of the Administrative Tribunal which is of sufficient seriousness and magnitude to merit seeking the advice of the International Court of Justice."

14. We submit that the fact that a judgement "raises a question of law relating to the provisions of the Charter" is not sufficient to bring it within the ambit of Article 11 of the Statute. Many judgements of the Administrative Tribunal have raised questions of law relating to the provisions of the United Nations Charter. But to fall within the ambit of Article 11 of the Statute, the application must show that the Tribunal has committed an error on a question of law which relates to the interpretation of the Charter. No attempt to do this has been made by the United States.

15. Still less relevant to the express terms of Article 11 is the only issue, raised in the application, as to whether the Tribunal "gave due weight to the actions of the General Assembly". That the Tribunal gave or did not give what the United States considers to be "due weight" to the actions of the General Assembly is not one of the four grounds on which the Committee may request an advisory opinion.

16. Far from founding the application on one or more of the four grounds specified in Article 11, the United States invokes (para. 5) "constitutional dimensions" (which are not spelled out for any one to see), "the relevance of Article 101 of the Charter" (which the Tribunal took into account) and "the authority of the General Assembly" (which the Tribunal did not challenge), in order to propose a request for an advisory opinion.

17. The Committee is respectfully requested to reject the application on the grounds that it does not fall within the terms of Article 11 of the Statute of the Administrative Tribunal.

III

The application of the United States is based upon a mistaken view of the scope and tenor of the judgement.

18. The premise on which the United States bases its objection to the judgement of the Administrative Tribunal is that the General Assembly had adopted resolution 34/165; that this resolution intended to terminate the administrative practice of payments of repatriation allowances to persons who do not relocate upon retirement; that the Secretary-General acted in strict compliance with this resolution in issuing Administrative Instruction ST/AI/269; that the Administrative Tribunal had invalidated these actions of the Secretary-General as applied to Mr. Mortished; and that this denied the full effect of decisions of the General Assembly.

19. With due respect, a reading of the judgement of the Administrative Tribunal will reveal that this approach simplifies and misinterprets the judgement.

20. From the outset it must be clearly appreciated that the scope of Judgement No. 273 is very narrow and that, given the terms in which it was hedged, the evolution of time will eliminate its applicability.

21. As to the scope of the judgement: only an extremly limited number of eligible staff who separate from service and do not—for various reasons—relocate from their country of last duty station are involved. As the International Civil Service Commission observed when it looked closely at the matter in 1979:

> "Considering that the proportion of staff members who did not return to their home country on separation was in any case very small, the Commission was of the opinion that the setting up of cumbersome watertight controls would not be warranted." (Report of the ICSC, *GAOR, Thirty-third Session, Supp. No. 30* (A/33/30), 1978, p. 62.)

Thus since the issuance of Administrative Instruction ST/AI/269, only two other persons in addition to Mr. Mortished have made claims to the grant in circumstances in which Judgement No. 273 is relevant. Consequently, if financial considerations lie behind the present Application of the United States, there is a misconstrued sense of economy involved. As a matter of fact the expenses involved in seeking an advisory opinion would far exceed the total of such repatriation grant payments for the next ten years.

22. As to the tenor of the judgement: the application of the United States contains at least two erroneous insinuations. First, in paragraph 3, it is stated that the Administrative Tribunal "acted to deny the full effect of decisions of the General Assembly". It is true that in relation to Mr. Mortished the protection of his acquired rights required no less than his exemption from a subsequent new rule, this exemption being based on an already existing rule promulgated by the General Assembly itself. This cannot amount in law to a denial of the full effect of General Assembly resolution 34/65, since such "full effect" can only be assessed in the light of other rules in force. Judgement No. 273 recognized and gave the following immediate legal effect to the resolution:

> "Effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant for periods of service subsequent to that date unless evidence of relocation away from the country of the last duty station is provided."

The judgement thus accorded in this respect with the perfectly sensible solution that had been proposed by the International Civil Service Commission in 1979 and adopted by all the agencies within the common system. With the evolution of time, it is clear that the number of persons theoretically entitled to the repatriation grant for periods of service prior to 1 January 1980 without evidence of relocation would gradually diminish to zero.

23. The Application of the United States also exaggerates and blows the issues involved in the judgement out of proportion, in speaking of their "magnitude", "seriousness", "dimensions", and so on. The legal issue which the Tribunal had to decide was a simple one: Did Mr. Mortished have an "acquired right" within the meaning of Staff Regulation 12.1 to the payment of a repatriation grant without the need to produce evidence of relocation. Staff Regulation 12.1, which the General Assembly itself had promulgated, provides as follows:

> "These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

The Tribunal held that given the nature of the repatriation grant as set out in Annex IV to the Staff Regulations, Mr. Mortished had an "acquired right" to which General Assembly resolution 34/165 should be without prejudice.

24. In making this ruling, the Tribunal took a position similar to that which the International Civil Service Commission, the specialized body created by the General Assembly to deal with these types of matters, had taken in 1979 when it considered the matter. (It is significant that the position taken by the ICSC was subsequently adopted by all the agencies within the common system.) In making this ruling, the Tribunal took a position which also accorded with the views that had been expressed on the issue by the Legal Counsels of the various agencies within the common system, including the Legal Counsel to the Secretary-General of the United Nations.

25. To a clearly defined legal question the Tribunal, composed of Madame Bastide, Mr. Forteza and Mr. André Ustor, gave a judicial answer—with Mr. Reis of the United States dissenting. It is understandable that the United States which had sponsored the adoption of resolution 34/165 might have had a view as to its interpretation different from that taken by the Administration Tribunal, which had to consider that specific resolution in conjunction with other resolutions of the General Assembly as well as other applicable legal norms.

26. A reading of the judgement will show that the tribunal not only gave "due weight to the actions of the General Assembly"; the Tribunal in fact examined extensively the debates in the General Assembly as well as the entire history of the repatriation grant including the work done by the various specialized bodies that had handled the matter. After this lengthy consideration, the Tribunal took account of the modification by resolution 34/165 of the repatriation grant scheme as it had been known, and continued:

> "The question therefore arises whether the Applicant can rely on an acquired right, failure to recognize which would give rise to the obligation to compensate for the injury sustained.
>
> The Tribunal has been required to consider on a number of occasions whether a modification in the pertinent rules could affect an acquired right. It has held that respect for acquired rights carries with it the obligation to respect the rights of the staff member expressly stipulated in the contract. The Tribunal pointed out, in paragraph VI above, that entitlement to the repatriation grant had been explicitly recognized at the time of the Applicant's appointment, together with the relationship between the amount of the grant and the length of service. The Tribunal also pointed out in paragraph VII above that at the time of the Applicant's entry on duty, payment of the grant did not require evidence of relocation to a country other than that of the last duty station. Further, the Tribunal held that respect for acquired rights also means that all the benefits and advantages due to the staff member for services rendered before the coming into force of a new rule remain unaffected. The repatriation grant is calculated according to length of service. The amount of the grant is 'proportional to the length of service with the United Nations', as stated in

Annex IV to the Staff Regulations. This link was explicitly reaffirmed in Staff Rule 109.5 *(f)*, which refers to 'the years and months of service qualifying for the grant which [staff members] already had accrued' as of 1 July 1979. Consequently, the link established by the General Assembly and the Secretary-General between the amount of the grant and length of service entitles the Applicant to invoke an acquired right, notwithstanding the terms of Staff Rule 109.5 which came into force on 1 January 1980 with the deletion of subparagraph *(f)* concerning the transitional system."

27. We submit that the foregoing points suffice to establish that the view of the United States concerning the scope and tenor of the judgement is mistaken, and that the Committee should reject the application on this ground alone.

IV

The questions to be submitted to the International Court of Justice for an advisory opinion.

28. If, contrary to the preceding contentions, the Committee decides to request an advisory opinion from the International Court of Justice, we submit the following comments and proposals on the question(s) to be transmitted to the International Court of Justice.

29. In paragraph 4 of the application, the United States states:

> "The issue that is raised is whether, in light of all the circumstances of the case, the Administrative Tribunal gave due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not depart or express an intention to relocate away from the country of his last duty station."

However having thus defined the issue, the United States proposes in paragraph 5 of its Application to submit to the International Court of Justice a rather different question, namely:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/65 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?"

If the issue is, as stated by the United States whether the Tribunal gave due weight to the actions of the General Assembly, we submit that this is the question that the Committee should transmit to the International Court of Justice. It would read as follows:

> "In the light of all the circumstances of the case, did the Administrative Tribunal in Judgement 273 give due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not relocate away from the country of his last duty station?"

If the Committee should instead wish to transmit to the International Court of Justice the question as posed by the United States in paragraph 5 of the Application, in addition to or in place of the one just indicated above, we request that it amend the formulation of that question for it to read as follows:

> "Is the Judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 did not prejudice the acquired rights of Mr. Mortished?"

Considering that the Tribunal in Judgement No. 273 specifically based its ruling on Staff Regulation 12.1, itself a resolution of the General Assembly, we in any event respectfully request the Committee to include in the questions to be submitted to the International Court of Justice for an advisory opinion the following question:

> "Does there exist a general principle of law within the meaning of Article 36 (1) *(c)* of the Statute of the International Court of Justice on the protection of the acquired rights of an international civil servant?"

30. For convenience sake, our comments and proposals on the questions to be submitted to the International Court of Justice for an advisory opinion are contained in composite form in Annex 2, in three alternatives.

23 June 1981. *(Signed)* Sylvanus A. TIEWUL,
Counsel for Mr. Mortished.

19 June 1981.

Dear Mr. Borg Olivier,

I acknowledge receipt of your letter of 16 June 1981 submitting to me a copy of the application of the United States of America for review of Administrative Tribunal Judgement No. 273 and informing me that I, as a party to the proceedings before the tribunal "may, within seven days from the date on which the copy of the application is sent by the Secretary, submit in writing to the Secretary comments with respect to the application".

I would point out that, while this opportunity for me to submit comments is appreciated, the time-limit imposed by your Committee's rules is totally unrealistic where transatlantic correspondence is involved and places me at a major disadvantage.

By good fortune, your letter, sent by rapid means, reached me here in Switzerland on 17 June 1981. My written comments must in principle reach you, in sextuplicate, by 23 June 1981. I do not, as do the other party authorized to comment and the applicant for review, possess an office or permanent mission in New York with the facility of direct communication with your Committee. I am therefore endeavouring to have Mr. Tiewul, the Headquarters staff member who was my counsel in the proceedings before the Tribunal, submit to you in good time comments on my behalf. Meanwhile, I enclose with this letter the comments I myself have to make on the application. I would request you kindly to consider any comments submitted to you by Mr. Tiewul as supplementing or, if that is his wish, replacing those sent to you herewith.

(Signed) Ivor Peter MORTISHED.

Comments of Mr. Mortished

(party to the proceedings before the United Nations Administrative Tribunal which resulted in the Tribunal's Judgement No. 273)

On the Application by the United States of America for Review of that Judgement

It is asserted by the applicant for review that the General Assembly's decisions—those whose attempted implementation by the Secretary-General led

to Tribunal Judgement No. 273—were not "capricious". This negative form of defence of the General Assembly's action may be variously viewed. I, at least, regard it as significant.

The applicant for review also raises the question whether the Tribunal "gave due weight to the actions of the General Assembly", "in light of all the circumstances of the case". The suggestion that the tribunal may not have done so would seem to come ill from a Member of the General Assembly, the body which established the Tribunal and which, if the qualification just mentioned is not to be seen as applicable to it, has an interest in treating as valid the findings of the instrument it created for the resolution of administrative disputes.

It is worth noting in this connection that the "circumstances of the case" include the General Assembly's formal delegation to the International Civil Service Commission (another body of its creation) of authority to determine the detailed conditions of entitlement to the repatriation grant and, inconsistent with that action, its sudden decision at its thirty-fourth session to ignore and overrule the "phasing out" arrangements wisely and properly established by the Commission under that authority.

The dissenting opinion attached to Judgement No. 273 quotes in its paragraph 6 the view that the General Assembly can make its own law. This is an interesting observation. Where, however, that law purports to govern the conditions of employment of United Nations staff, it must—if the Organization is to continue to have any staff at all—have the attributes of consistency, reliability and fairness. In other words, it must have the integrity which the Charter unilaterally requires of the Organization's staff; but which the staff has an equal right to demand of the Organization. The Administrative Tribunal, the competent body, would seem, by its Judgement, to have found some lack of qualities such as these in the law or in its implementation in the present instance.

The applicant for review states that General Assembly resolution 34/165 constitutes the making of "regulations" concerning the staff, a function with which the General Assembly is charged under Article 101 of the Charter. This may much more properly be said of the adoption by the General Assembly of the provision contained in the official Staff Regulation 12.1. This provision, maintained, observed and applied over many decades, is designated a "General provision" and is therefore applicable to all other provisions of the Staff Regulations. It was designed to protect the acquired rights of staff members and precisely—to use the applicant's term—to protect them from potential legislative or other measures of a capricious nature.

The Tribunal's upholding of such rights and its insistence on the observance of this general provision of the General Assembly's Staff Regulations is not a ground for initiation of the procedure of consultation of the International Court of Justice.

Geneva. 19 June 1981.

ANNEX 2

Questions to be submitted to the International Court of Justice for an advisory opinion if the Committee decides to request one

Alternative 1[1]

"In the light of all the circumstances of the case, did the Administrative Tribunal in Judgement No. 273 give due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not relocate away from the country of his last duty station?"

"Does there exist or does there not exist a general principle of law within the meaning of Article 36 (1) *(c)* of the Statute of the International Court of Justice on the protection of the acquired rights of an international civil servant?"

[1] Issue as defined by the United States with proposed addition.

Alternative 2[1]

"In the light of all the circumstances of the case, did the Administrative Tribunal in Judgement No. 273 give due weight to the actions of the General Assembly concerning repatriation grants when it found that Mr. Mortished should be given a repatriation allowance even though he did not relocate away from the country of his last duty station?"

"Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 did not prejudice the acquired rights of Mr. Mortished?"

"Does there exist or does there not exist a general principle of law within the meaning of Article 36 (1) *(c)* of the Statute of the International Court of Justice on the protection of the acquired rights of an international civil servant?"

Alternative 3[2]

"Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 did not prejudice the acquired rights of Mr. Mortished?"

"Does there exist or does there not exist a general principle of law within the meaning of Article 36 (1) *(c)* of the Statute of the International Court of Justice on the protection of the acquired rights of an international civil servant?"

A/AC.86/25
17 July 1981.

6. Report of the Committee

Rapporteur: Mr. Michael F. H. STUART (United Kingdom of Great Britain and Northern Ireland).

INTRODUCTION

1. At its twentieth session, the Committee on Applications for Review of Administrative Tribunal Judgements, established under Article 11 of the Statute

[1] Issue as defined by the United States, question as formulated by the United States with necessary amendment and proposed addition.

[2] Question as formulated by the United States with necessary amendment and proposed addition.

of the United Nations Administrative Tribunal, considered an application presented by the United States of America (A/AC.86/R.97) for review of Administrative Tribunal Judgement No. 273. Meetings were held on 9 and 13 July 1981.

I. Composition of the Committee and Organization of the Session

2. The Committee, under paragraph 4 of Article 11 of the Statute of the Administrative Tribunal, is composed of the member States the representatives of which have served on the General Committee of the most recent regular session of the General Assembly. At its first meeting, on 9 July 1981, the Committee was informed by the Acting Chairman, Mr. Erik Suy, the Legal Counsel, that Ambassador Mr. Abdul G. Koroma (Sierra Leone), the Chairman of the Sixth Committee at the thirty-fifth regular session of the General Assembly, had informed him that he would be away from Headquarters on official business and that consequently he would not be able to participate in the work of the Committee at its twentieth session. In these circumstances, the Chairman of the Sixth Committee, acting under rule 39 of the rules of procedure of the General Assembly, designated Mr. Philippe Kirsch (Canada), Vice-Chairman of the Sixth Committee at the thirty-fifth regular session of the General Assembly, to act in his place. On the basis of the foregoing the Committee agreed without objection that Canada should serve as a member of the Committee at the twentieth session in place of Sierra Leone. As a consequence the Committee was composed of the following 29 members at its twentieth session: Bahrain, Bolivia, Bulgaria, Canada, China, Ecuador, France, Germany, Federal Republic of, Greece, Guyana, Honduras, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Niger, Oman, Pakistan, Portugal, Romania, Senegal, Thailand, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Zaire and Zimbabwe.

3. At its meeting on 9 July the Committee elected the following officers:

Chairman:	Mr. Philippe Kirsch (Canada)
Rapporteur:	Mr. Michael F. H. Stuart (United Kingdom)

4. At its second meeting, on 13 July 1981, the Committee elected Mr. A. W. Omardin (Malaysia) as Vice-Chairman.

II. The Application before the Committee and Its Consideration

1. Receipt of the application

5. On 15 June 1981 the Committee received, through its Secretary, an application presented by the United States requesting a review of Judgement No. 273 rendered in the case of *Mortished* v. *the Secretary-General* of the United Nations by the United Nations Administrative Tribunal on 15 May 1981.

6. Pursuant to Article III of the Committee's provisional rules of procedure, a copy of the application was sent to the parties to the proceedings before the Administrative Tribunal on 16 June 1981 and to the members of the Committee on 25 June 1981.

7. By a memorandum dated 23 June 1981, the Secretary-General advised the Committee that he was not availing himself of his right under Article IV of the provisional rules of procedure of the Committee to submit comments on the application presented by the United States (A/AC.86/R.99).

8. In a letter dated 23 June 1981 to the Secretary of the Committee, Mr. Sylvanus A. Tiewul, counsel for Mr. Mortished, communicated comments on the application presented by the United States (A/AC.86/R.100).

2. Consideration of the application

9. The Committee considered the application presented by the United States at two meetings held on 9 and 13 July 1981.

10. At its first meeting, on 9 July, the Committee was informed by the Chairman that in a letter dated 23 June 1981 addressed to the Secretary of the Committee, the counsel for Mr. Mortished had requested, *inter alia*, that he be given the opportunity to participate in all the proceedings of the Committee and that he be permitted to make statements to the Committee. In addition, the Chairman informed the Committee that the Secretary had received a letter dated 29 June 1981 from Mr. Lowell Flanders, President of the Staff Committee of the Staff Union at Headquarters, with a request that the United Nations Staff Union be admitted as an observer to the deliberations of the Committee. The Committee agreed that it might consider these requests at a later stage in its deliberations. At the second meeting of the Committee, on 13 July 1981, the representative of the United Kingdom formally proposed that the Committee invite Mr. Mortished's counsel to be present during the Committee's consideration of the application before it and that if necessary, he be permitted to make a statement. This proposal was rejected by a vote of 5 to 2, with 9 abstentions.

11. After members of the Committee had presented their views on the application presented by the United States, the Chairman requested the Committee to indicate whether there was a substantial basis for the application within the meaning of Article 11 of the Statute of the Administrative Tribunal on the ground that the Administrative Tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations. The Committee agreed, by a vote of 14 to 2, with 1 abstention, that there was a substantial basis for the application on that ground.

12. The Chairman then requested the Committee to indicate whether there was a substantial basis for the application within the meaning of Article 11 of the Statute of the Administrative Tribunal on the ground that the Administrative Tribunal had exceeded its jurisdiction or competence. The Committee agreed by a vote of 10 to 2, with 6 abstentions, that there was a substantial basis for the application on that ground.

13. Subsequently the Committee, in the light of the foregoing decisions, considered the formulation of the question on which it would request an advisory opinion of the International Court of Justice. The Committee agreed without objection that the question should be formulated in the way proposed by the United States in its application (A/AC.86/R.97).

14. In the light of its positive decision on the United States application, the Committee decided that a transcript of the proceedings at its twentieth session should be made and communicated to the International Court of Justice, to the members of the Committee and to the parties to the proceedings before the Administrative Tribunal.

3. Decision

15. The Chairman formally announced the following decision:

> "The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application presented by the United States of America for review of Administrative Tribunal Judgement No. 273 delivered at Geneva on 15 May 1981. Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following question:
>
> 'Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in

determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?'"

I certify that the text contained in paragraph 15 above is a true copy of the decision of the Committee.

(Signed) Erik SUY,
Under-Secretary-General,
The Legal Counsel.

23 July 1981.

A/AC.86(XX)/PV.1
21 July 1981.

7. Transcript of the Proceedings at the First Meeting (Closed)

Held at Headquarters, New York,
on Thursday, 9 July 1981 at 10.30 a.m.

Acting Chairman: Mr. Erik Suy (The Legal Counsel)
Chairman: Mr. Philippe Kirsch (Canada)

—Opening of the session
—Election of officers
—Consideration of the application for review of Administrative Tribunal Judgement No. 273 (*Mortished* v. *the Secretary-General of the United Nations*) submitted by the United States of America (A/AC.86/R.97)

Opening of the Session

Legal Counsel (Acting Chairman): On behalf of the Secretary-General, I wish to welcome the members of the Committee on Applications for Review of Administrative Tribunal Judgements to this twentieth session of the Committee. Although this Committee is composed of representatives of States Members of the General Assembly, the Committee has its own particular mandate, expressed in Article 11 of the Statute of the United Nations Administrative Tribunal.

At this its twentieth session the Committee is called upon to examine the application for review of Administrative Tribunal Judgement No. 273, *Mortished* v. *the Secretary-General of the United Nations*, submitted by the United States of America.

Under the terms of Article 11 of the Statute of the Administrative Tribunal the Committee must decide, within 30 days from the receipt of the application, whether or not there is a substantial basis for the application. According to Article 2.1 of the provisional rules of procedure of the Committee, the date of receipt of an application is the date when copies of that application are dispatched to the members of the Committee by the Secretary of the Committee.

As the United States application was received by the Secretary of the Committee on 15 June 1981 and copies of that application were dispatched to the members on 25 June 1981, the Committee must decide whether there is a substantial basis for the application no later than 25 July 1981.

The following documents have been distributed to the members of the Committee: A/AC.86/INF.19 an information circular concerning this session; A/AC.86/R.97, the application presented by the United States of America; A/AC.86/R.98, the provisional agenda for the twentieth session; A/AC.86/R.99, a memorandum of the Secretary-General concerning the application by the United States of America; A/AC.86/R.100, letter dated 23 June 1981, from Mr. Sylvanus Tiewul, counsel for Mr. Mortished, addressed to the Secretary of the Committee, with comments on the application presented by the United States of America; and, finally, AT/DEC/273, Judgement No. 273 of the Administrative Tribunal, in the Mortished case. I would also remind members of the Committee that the provisional rules of procedure are contained in document A/AC.86/2/Rev.2.

Election of Officers

The Acting Chairman: I now propose that the Committee proceed to the election of its Chairman, Vice-Chairman and Rapporteur. It is an established tradition for the Committee to elect as its Chairman the Chairman of the Sixth Committee at the most recent session of the General Assembly. The Chairman of the Sixth Committee at the thirty-fifth session of the General Assembly was Mr. Abdul Koroma, who, unfortunately, is away from Headquarters on official business at this time.

In these circumstances, the Chairman of the Sixth Committee, whom I contacted before his departure from New York, informed me that, acting under rule 39 of the rules of procedure of the General Assembly, which relates to the composition of the General Committee, he had designated the representative of Canada, a Vice-Chairman of the Sixth Committee at the thirty-fifth session of the General Assembly, to take his place.

I should like to submit this proposal for the Committee's consideration and to ask if members have any objection to following this procedure under rule 39 of the rules of procedure proposed by the Chairman of the Sixth Committee, Ambassador Koroma. Does any representative wish to express his view on this or any other point?

Mr. Mashaire (Zimbabwe): We had, in fact, spoken about the chairmanship of this Committee with friends and were going to propose that in the absence of Ambassador Koroma the representative of Canada, Mr. Kirsch, assume the chairmanship. So we fully agree with that proposal.

The Acting Chairman: Are there any other comments? If not, may I take it that the Committee agrees that Canada, rather than Sierra Leone, should serve as a member of the Committee at this session and that, the representative of Zimbabwe having nominated Mr. Philippe Kirsch as Chairman, the Committee agrees that Mr. Kirsch of Canada be elected to that post?

Mr. Philippe Kirsch (Canada) was elected Chairman of the Committee.

The Acting Chairman: I invite the representative of Canada, Mr. Kirsch, to take the Chair and to preside over this meeting.

The Chairman: I first wish to thank the Legal Counsel of the United Nations, Mr. Suy, for opening this meeting and also to express my personal thanks to members of the Committee for the confidence they have placed in me by electing me Chairman of the Committee, and in particular to the representative of Zimbabwe for nominating me for this position.

The Committee must now proceed to the election of a Vice-Chairman and a Rapporteur. Are there any nominations for Vice-Chairman?

I see none. We shall therefore leave this matter for the time being and take a decision on it at a later stage.

I believe that it is also an established tradition for the representative of the United Kingdom on this Committee to serve as Rapporteur. I propose that the Committee follow this tradition and elect the representative of the United Kingdom as Rapporteur.

Mr. Stuart (United Kingdom of Great Britain and Northern Ireland) was elected Rapporteur of the Committee.

Consideration of the Application for Review of Administrative Tribunal Judgement No. 273 (Mortished v. Secretary-General of the United Nations) Submitted by the United States of America (A/AC.86/R.97)

The Chairman: We have been informed that all the documentation with regard to the application submitted by the United States has been distributed. I therefore believe that the Committee can proceed immediately with its consideration of that application. However, we must first deal with a number of procedural matters that have been addressed to the Committee.

First, in a letter dated 23 June 1981 addressed to the Secretary of the Committee, Mr. Sylvanus Tiewul, counsel for Mr. Mortished, made the following requests to the Committee: first, that counsel for Mr. Mortished be given the opportunity to participate in all proceedings of the Committee; secondly, that he be given the opportunity to make statements in explanation of the claim of Mr. Mortished or in rebuttal of contrary positions; thirdly, that the sessions of the Committee be open; fourthly, that the proceedings of the Committee be duly recorded; and fifthly, that an official transcript be made available to Mr. Mortished, through his counsel, within a reasonable time after the conclusion of the proceedings.

In addition, the Secretary of the Committee has received a letter dated 29 June 1981 from Mr. Lowell Flanders, President of the Staff Committee, containing a request that the United Nations Staff Union be admitted as an observer to the deliberation of the Committee on the United States application. I should like to recall that it has always been the practice of the Committee to hold closed meetings and no observers have ever been invited to its meetings. However, this is the first time that an application for review of an Administrative Tribunal Judgement has been submitted by a member State on a matter of obvious interest to the staff as a whole, including, obviously, Mr. Mortished. In these circumstances the Committee might be prepared to depart from its usual practice.

I would propose that in regard to Mr. Tiewul's request the Committee proceed as follows.

In accordance with the established practice, the Committee would hold closed meetings. However, Mr. Tiewul, as counsel for Mr. Mortished, would be invited to be present at all meetings when the United States application was considered. The Committee could invite Mr. Tiewul to make a statement, if it found that necessary.

As far as the recording of the Committee's proceedings is concerned, it is the established practice of the Committee to have sound recordings of all its proceedings. At a later stage, if the Committee acts favourably on the United States application, it may decide that an official transcript of the proceedings should be made and distributed to members of the Committee, to the parties in the proceedings before the Administrative Tribunal in the Mortished case, and, of course, to the International Court of Justice.

As to the request from the President of the Staff Committee, I propose that the Committee invite a representative of the Staff Union to be present at the meetings of the Committee.

Does any representative wish to speak on this matter?

Mr. Lahlou (Morocco) (translated from French): The question which you have just asked, Mr. Chairman, creates a certain number of problems for me. This is because you asked a series of questions and you want our reactions. I would therefore ask you, Mr. Chairman, to be good enough to reformulate your questions one by one, so as to obtain separate replies to each question. I thank you and should like to congratulate you on your election as Chairman of our Committee.

The Chairman (translated from French): The suggestion which the Moroccan representative has just made seems a wise one, and I shall therefore repeat the questions which I asked the Committee.

First, Mr. Tiewul, representing Mr. Mortished, would be invited to attend all the Committee meetings at which the United States application was considered. This is the first question.

Secondly, if the Committee should consider it necessary in the course of its deliberations to invite Mr. Tiewul to make a statement, it could do so.

The third question concerns the manner in which the Committee's proceedings are recorded. As you know, the Committee's deliberations are recorded on tape. My proposal is that this practice should be followed but that at a later stage, if the Committee decides to accept the recommendation submitted by the United States, the Committee should also decide that the discussions recorded on tape would be transcribed and distributed to the members of the Committee, to the parties concerned in Mr. Mortished's case and, of course, to the International Court of Justice. This is the third proposal.

And my fourth question or recommendation concerns an invitation to the representative of the Staff Union to attend the meetings of the Committee. These are the four questions which I asked, and I invite the Committee to express its agreement to these four suggestions as a whole or, if necessary, to discuss them separately. I invite comments from delegations.

Mr. Lahlou (Morocco) (translated from French): Thank you, Mr. Chairman, for the clarifications which you have just provided. I could give you my preliminary reaction and reply in the affirmative to the first and second questions; but the third question concerns an interim measure and we cannot commit ourselves in this connection at this stage, since we are simply authorizing the sound recording, while the transcription of a decision by our Committee would take place later. As for the request by the Union representative, I believe that we have not yet received sufficient explanation of this question to take a decision, because the context of the question which we are deciding is not yet clearly defined. I believe that, if we invite the Staff Union representative to attend our meetings, we would already be giving the question overtones which perhaps we do not want. So far, therefore, I think that I can still reserve my position regarding the request by the Staff Union representative to attend our meetings as an observer.

Mr. Petrov (Union of Soviet Socialist Republics) (translated from Russian): Mr. Chairman, allow me to congratulate you on your election. I should like to make a brief comment on the working arrangements which you have suggested.

In view of the specific character of our Committee and, in particular, its limited mandate, it seems to us that, for example, on one of these items (I forget which number) there is no need to invite the counsel to attend our meetings here, at least at this stage.

The Chairman (translated from French): Are there any other comments on this question? If not, may I consider that the third proposal which I made, concerning transcription of the recordings if the United States application is accepted, is adopted by the Committee?

It was so decided.

The Chairman (translated from French): With regard to the fourth ques-

tion—whether or not the representative of the Staff Union should be allowed to attend the deliberations, the representative of Morocco has proposed that this decision should be deferred for the time being. Is this proposal acceptable?

It was so decided.

The Chairman (translated from French): With regard to the first two questions, which practically go together—the question whether Mr. Mortished's counsel will attend our meetings and, as a subsidiary matter, the question whether later the Committee could invite him to speak if it sees fit—I should like to ask one last time whether there are other comments on these specific questions.

Mr. Stuart (United Kingdom): In my delegation's view it is important, if this Committee decides to ask the International Court for an advisory opinion—and we support the request of the United States on that issue—that the International Court should see that justice has been done in this Committee. For that reason we think that it would indeed be desirable to allow Mr. Mortished's counsel to be present, and if the Committee so wishes, to allow him to make a statement.

Mr. Rosenstock (United States of America): The United States is not prepared to take a position one way or the other on the question of the presence of Mr. Tiewul, the counsel for Mr. Mortished, at these closed meetings, unprecedented as it would be.

I think two things are worth noting. First, it is important that justice be done and it is important that justice appear to be done. Secondly, it is important also to recall the issues before us and the decision we are obligated to make. We are not obligated to decide whether or not Mr. Mortished has or does not have entitlements. We merely have to decide whether or not there is a substantial basis for the application. We are not required to decide that the Administrative Tribunal has exceeded its jurisdiction. We are not required to decide that the Administrative Tribunal has erred on a question of law relating to the Charter. The issue of the Tribunal's having exceeded its jurisdiction and erred on the question of law relating to the Charter has been placed before this Committee in the application, to which reference has already been made. What this Committee is obligated to decide is not whether that application is right or wrong—much less other questions—but merely whether there is a substantial basis for the application. The issues therefore are primarily the authority of the Administrative Tribunal and questions of law relating to the Charter, and it seems to us that a case can be made that, once we have accepted the written material from the counsel for Mr. Mortished, there are not issues before us uniquely within the competence of Mr. Mortished's counsel on which he must be heard in order for justice in fact to be done.

I say this without any prejudice at all to the Committee's decision but merely to record the view that the decision should be made in light of the questions before us, which do not involve some of the issues on which Mr. Mortished or his counsel would be uniquely competent to articulate a view.

However, I also bear in mind the point to which I earlier referred—that there is merit in justice not only being done but being seen to have been done. For all these reasons as well as others, we express no opinion on whether it would be discreet and wise to allow counsel's attendance, but merely point out that that question need not necessarily involve the question of whether justice has been done.

Mr. Petrov (Union of Soviet Socialist Republics) (translated from Russian): I should like to state once again that, as has already been pointed out here, we are not now deciding the merits of the case. Our task in this Committee is to reach a certain decision—on whether or not there is any justification for requesting the opinion of the International Court. At this stage, my delegation does not see how Mr. Mortished's counsel could help us to decide this question, because—I repeat again—in view of our limited powers in this regard, it is hardly worth complicating the consideration of this case by hearing the parties.

Mr. Seydou (Niger) (translated from French): I should like first, Mr. Chairman, to congratulate you on your election to the post of Chairman of our Committee.

With regard to the four questions which you have asked, my delegation has no difficulty in accepting the third proposal, as Tunisia had suggested, and waiving an existing rule when the application has been granted. Similarly, my delegation accepts the consensus reached regarding the question of the Union representative participating in our work.

With regard to the two questions raised by the request from Mr. Mortished's counsel, I think that it would perhaps be necessary to analyse them in the light of the first proposal which we have accepted. If I have understood correctly, we had decided to waive the existing rules by authorizing the transcription of our discussions when the Committee has granted the United States application. This implies—or at least this is my understanding—that there are two stages in our work: a first stage which will be entirely procedural and a second stage, which may require us to go deeper into the substance of the question. And if this is so, I think that we could find an intermediate solution by granting the request from Mr. Mortished's counsel to attend our meetings during the first phase of the work and perhaps allowing him to make statements during the second phase.

If I am mistaken, please correct what I have just said; but it seems to me that we could find an intermediate solution by this means.

Mr. Kbaier (Tunisia) (translated from French): I believe that, for the time being, we are in the procedural part of our meeting and have not yet tackled the question of substance. Consequently, this question can easily be solved and, as regards the invitation to Mr. Mortished's counsel, my delegation would have no objection.

The Chairman (translated from French): In the light of the statements made so far, I would venture to make a suggestion. It is clear that there is no general agreement at this stage regarding participation by Mr. Mortished's representative in our work. I therefore suggest that we should proceed in this matter as in the matter concerning the representative of the Staff Union: in other words, we should not take a decision at this stage. If, in the course of our substantive discussions, it appears to the Committee that it would be desirable to invite Mr. Mortished to attend our meetings and perhaps at a later stage to make a statement, the Committee will be able to do so at that time. For the time being, I therefore suggest that the decision should be deferred.

Does the suggestion which I have just made meet with the approval of delegations?

I see no objection.

It was so decided.

The Chairman: We turn now to the substantive consideration of the application submitted to this Committee.

The application presented by the United States is contained in document A/AC.86/R.97. A memorandum from the Secretary-General concerning the application can be found in document A/AC.86/R.99. Document A/AC.86/R.100 contains the text of a letter addressed to the Secretary of the Committee by the counsel for Mr. Mortished, with comments on the application submitted by the United States. The judgement of the Administrative Tribunal to which the application refers is contained in document AT/DEC/273.

In accordance with Article 11 of the Statute of the Administrative Tribunal, an application for review of a judgement of the Tribunal must be based on one or more of the following grounds: first, the Tribunal has exceeded its jurisdiction or competence; secondly, the Tribunal has failed to exercise jurisdiction vested in it; thirdly, the Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations; and, fourthly, the Tribunal has committed a fundamental error in procedure which has occasioned a failure of justice.

It is for the Committee to decide whether the application presented by the

United States has a substantial basis with regard to one or more of the four grounds which I have just enumerated.

I now invite the members of the Committee to present their views on the application submitted by the United States.

Mr. Stuart (United Kingdom): Before I make a statement on behalf of my delegation, I should like to thank the Committee for showing its confidence in me by electing me Rapporteur.

At the thirty-fourth session of the General Assembly, in 1979, the United Kingdom was originally one of the sponsors in the Fifth Committee of the draft resolution which later became resolution 34/165. Operative paragraph 3 of part II of that resolution contains the ruling relating to the repatriation grant which Judgement No. 273 of the Administrative Tribunal has set aside.

Operative paragraph 3 of part II of the resolution was not originally part of the draft resolution, and when the Fifth Committee adopted an amendment to make it so the United Kingdom delegation in that Committee withdrew its sponsorship because of certain doubts which we entertained on the specific issue of the repatriation grant. Those doubts arose in part from our concern to preserve the integrity of the common system. Other organizations had already accepted a different interpretation of the rules relating to the repatriation grant, an interpretation which has now been supported by the Administrative Tribunal. We also had doubts about the arguably retrospective nature of the ruling embodied in operative paragraph 3 of part II of resolution 34/165.

In the end, however, after our initial hesitations, we supported the resolution on the grounds that the grant had always been clearly intended as a repatriation grant, not as a lump-sum pension or a resettlement grant. Having reached that conclusion, and having supported the relevant paragraph of the resolution in 1979, my delegation now supports the request made by the United States delegation for an advisory opinion from the International Court.

I have briefly recounted the United Kingdom's earlier hesitations on this question in order to draw attention to the obscurity and difficulty which have attended the fundamental issue which we are now considering. In our view, it is because of the nature of the issue that an advisory opinion from the International Court would be particularly valuable. Also in our view, the relevant paragraph of resolution 34/165 was an interpretation of the law as it had originally been intended, not an attempt to create new law, and it was on that basis that we supported the resolution.

My delegation supports the request for an advisory opinion and attaches importance to ensuring that conditions are created whereby the International Court of Justice can exercise its judicial functions properly and in such a way that justice can be seen to be done as between Mr. Mortished and the Secretary-General.

We therefore support your proposal, Mr. Chairman, that the secretariat should be authorized to transmit to the International Court the transcript of the tape-recording of our proceedings.

We should also like to make as clear as possible the grounds on which the request for an advisory opinion rests. In our view, there are two grounds of the four specified in Article 11 of the Statute of the Administrative Tribunal that justify the request. The first is that the Tribunal erred on a question of law relating to the Charter. Article 101 lays down that the staff regulations shall be established by the General Assembly, and the relevant paragraph of resolution 34/165 was an exercise of that function. The second is that the tribunal exceeded its jurisdiction or competence in giving more weight to the doctrine of acquired rights than to General Assembly resolution 34/165.

It is for consideration whether the Committee might wish to clarify the text in document A/AC.86/R.97 to bring out those two specific points.

Mr. Lahlou (Morocco) (translated from French): I wanted to speak later, but I

have been inspired somewhat by my friend Mr. Stuart of the United Kingdom; I think that he made some reference to the work of the Fifth Committee, and whenever the Fifth Committee is mentioned I always want to say something. I should therefore like to indicate my first reaction, my preliminary reaction, taking into account three or four elements, and firstly this resolution 34/165 which was adopted by the Fifth Committee but in an atmosphere that was, shall we say, somewhat lively. It is true that there was a general consensus on this resolution but, naturally, it must be pointed out that this was not easy to achieve. We had difficulties because changes occurred, unbeknown to the General Assembly and to the Fifth Committee, in the interpretation of the concept of repatriation; this is no longer repatriation or rather it is repatriation in name only, because it is now a concept of change of residence and no longer of repatriation which we are now considering and which was introduced by the Administrative Committee on Co-ordination. As a result of these changes, at a certain point in time we found that things had gone beyond the General Assembly and that the Secretary-General was awarding this repatriation grant as though it was an acquired right and a sum which a staff member who had worked in the United Nations for several years should receive upon leaving. Naturally, what we now want—what I should like to put forward as my first reaction—is not to agree, never to agree that the question should be regarded as a question of acquired right. In our opinion, acquired right has no place in personnel management in the secretariat, because there is always a right which was accepted by everyone—in other words, when the General Assembly takes decisions, these decisions are not always retroactive in effect but have only an effect concerning earlier cases; we cannot accept a situation in which a staff member has a particular right when he joins the United Nations but that right is withdrawn after he has been working in the United Nations for some years and applied only to those who join in the future. We have rejected this argument and so this judgement, or any other situation, must not be used to create a situation in which acquired right is one day invoked. Naturally, we are not going to lay down the law; we are simply going to decide whether the dispute is sufficiently important to be referred to the International Court of Justice. Thus, the decision which we are to take is very, very limited. This means that, if we consider that the situation is not quite clear and if it is the subject of dispute between the Secretary-General and the person concerned, Mr. Mortished, and if the judgement of the Administrative Tribunal does not seem convincing to us, as it was not convincing to the applicant, we may in this case appeal to the Court, so that this time the law may be laid down. I should therefore like to revert to resolution 34/165 and to reaffirm once again that this resolution was adopted precisely in order to avoid such cases. It was adopted because, at one time, things had gone too far. And the International Civil Service Commission, studying the question, found that the idea of "repatriation", which in our minds still means a return to the homeland—no more and no less—had been considerably broadened and that we are therefore in a situation in which something different is meant by the word "repatriation".

As you can see, my way of thinking is very like my way of speaking. I am extremely puzzled. I have read carefully the documents submitted to us. The documents are clear on one situation. Firstly, there has never been any question that what was submitted as being the opinion of the General Assembly—in the case of the repatriation grant, the three recommendations made by the International Civil Service Commission and reproduced in resolution 34/165—remain the three valid formulae. This means that there must be a change of residence, a change of address. Evidence of a change of residence must be produced and, naturally, even if we have been told that the person concerned may change residence, spend one month in his new residence and then return to where he was before. That is too bad; but we shall decide solely on the basis of the papers

and documents which we are to be given. This is my first point, which shows that this situation should normally not have been accepted, and the judgement of the Administrative Tribunal deciding solely on the wish of the General Assembly should state what it did state. But there is a special situation, and here I am not in a position to express an opinion or to say what is its value and what weight should be attached to it. There has been a special provision and I have seen this in document AT/DEC/273, in the last paragraph of page 10, concerning an explicit agreement between the Secretary-General and the staff member concerned. There is this element, which means that the Secretary-General, when he signed that agreement, was not thinking of this resolution; he signed the agreement long before the adoption of resolution 34/165. Can this agreement, this contract between two parties, be abolished? Not by a single party, because the Secretary-General acts only on the authority vested in him by the General Assembly; so there are two parties, the General Assembly and the staff member concerned. Thus, would the General Assembly be able in this case to withdraw what it had already given by adopting a later resolution? I admit that I am not competent to answer this legal question, and I should like to be enlightened by my legal friends and colleagues as to the weight to be attached to this question vis-à-vis General Assembly resolution 34/165.

Mr. Rosenstock (United States of America): At this stage, we should like to make a few preliminary comments.

While it is necessary for us to bear in mind various aspects of the complex of facts involved in this case, it is also necessary for us to bear in mind that we are not here to litigate or pass judgement upon all of the issues involved in the case: we are here to decide whether or not there is sufficient merit in the concern that the Administrative Tribunal has or may have exceeded its jurisdiction, or committed an error of law in relation to an interpretation of a provision of the Charter, to require the advice of the International Court of Justice.

I therefore am not sure that it is necessary at all for us to go into the question, interesting though it may be and relevant though it may be to different stages of the matter, as to whether or not Mr. Mortished has a right and what the content of that right was.

The exchange which involved a potential contractual relationship between Mr. Mortished and the United Nations can arguably be perceived as having amounted to the fact that such repatriation grant as he might be entitled to would be computed on a basis including his service for the previous organization within the United Nations system from which he moved. In other words, he had put in a certain number of years and he was shifting; he wished to be assured that such rights as he had were not adversely affected and that the adverse effect would not be involved in the number of years in the computation. That exchange does not imply—nor need it flow as a matter of law from that exchange—what the substantive nature of those rights might be, might have been or could be thought to have been; it merely amounted to this: that, whatever the nature of those rights, the years in question—and that is all that was involved—would be counted towards that right.

So, in recognizing that Mr. Mortished had 12 years of service, we recognize that we count the years in the other organization. That does not go to the question of the nature of the rights involved; it merely recognizes that he had that number of years. It does not go to the question whether he met the other criteria. Obviously, had Mr. Mortished for any other reason failed to qualify in regard to rights, the fact that the number of years he had worked in another United Nations agency had been counted would not in and of itself create a right he did not have, but merely would reflect the fact that he had met one of the requirements. That requirement is not in question and has not been put in question by anyone involved in the matter—neither the Secretary-General nor the Administrative Tribunal.

That having been said, it remains our view that that issue is not relevant to what is before us. What is before us, it seems to us, is Article 101 (1) of the Charter, which is quite clear and speaks expressly of the regulatory authority of the General Assembly; and resolution 34/165, which speaks with extraordinary clarity to the question of repatriation grants. In this area the General Assembly is not, as is the norm, making a recommendation; it is not expressing a preference: it is acting in one of the very limited and precise areas in which it may act decisively and create a legal result. In analysing the situation, the General Assembly came to a conclusion, and the conclusion was as follows:

> "Decides that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided."

In seeking to incapacitate the Secretary-General from following the clear and binding action of the General Assembly, the Administrative Tribunal purported to exercise judicial review over the decisions of the General Assembly. It did not do so expressly, but it did so nevertheless, because it was faced with a situation in which it could not be argued that the General Assembly had not spoken with almost singular clarity. The General Assembly had spoken in full knowledge that it was disagreeing with the view of the International Civil Service Commission. So its action was clearly fully conscious and fully intentional. It cannot be argued that the Secretary-General had any discretion whatsoever with regard to the requirement expressed in the "Decides" paragraph to which I have referred. So to incapacitate the Secretary-General from carrying out an instruction which he was bound to carry out is to strike at the instruction itself.

It consequently invalidated the action of the General Assembly—action which happens to have been taken by the plenary Assembly unanimously, but which, whether or not it was taken unanimously, remains a decision of the Assembly. This raises serious questions relating to actions of the General Assembly in the area of its express competence, where it is authorized to make decisions and where it has made decisions. It is our conclusion that in its conclusions the Administrative Tribunal has erred on a question of law relating to the Charter of the United Nations, in particular Article 101, and involving the very status of decisions of the General Assembly; and that in so doing it has exceeded its jurisdiction or competence.

I would merely wish to note again that, as we indicated earlier, it is not necessary for this body to reach any conclusions with regard to Mr. Mortished's entitlements; it is not necessary for this Committee to reach any conclusions with regard to whether or not the Administrative Tribunal has in fact committed an error of law with relation to the Charter, be it Article 101 or the entire Charter structure pursuant to which the decisions of the General Assembly are not subject to judicial review. Nor is it necessary to conclude that the Administrative Tribunal has erred or exceeded its jurisdiction or competence; rather we need merely indicate that there is a substantial basis in these issues which the United States delegation has presented and that they are sufficiently serious issues to merit the advice of the International Court of Justice.

I should now like to raise a further and separate concern: why this matter has been brought before this Committee by a member State. The Secretary-General did not decide, himself, to act to refuse to grant a repatriation allowance to Mr. Mortished; he was left no authority by the General Assembly to do anything else. It consequently seemed to us that it was appropriate in the circumstances, and in no way a diminution of the authority of the Secretary-General, for this Committee to recognize that it was the General Assembly which had requested the Secretary-General so to act and left him no alternative, and consequently it is this Committee, on the suggestion of a member State—which, like all member States, voted for the paragraph in question—that should seek to bring the issue to this Committee.

We had, before doing so, consulted with the secretariat to ensure that there was no concern that we were in some way acting to cut across the authority of the Secretary-General. We would not, of course, have wished in any way to limit the authority of the Secretary-General or to suggest in any way that the authority of the Secretary-General should be limited. The fact that Article 11 provides that a member State can submit an application is amply justified by a situation in which the member States of the United Nations unanimously require the Secretary-General to take action; and when he has done so and that action on behalf of the General Assembly is struck down, it seems to us only appropriate that we seek the advice of the International Court of Justice on the constitutional issues involved.

Mr. Omárdin (Malaysia): First of all, Sir, I should like to congratulate you on your election to the chairmanship of this Committee.

The case before us for consideration today arises from the United States application to the Committee to request an advisory opinion of the International Court of Justice in the matter of Judgement No. 273 of the Administrative Tribunal. It is for us to consider the merits—whether the United States, as a member State of the United Nations, as well as a Member of the General Assembly, has a substantive basis for requesting an advisory opinion in the matter of Judgement No. 273. My delegation's preliminary view on this is based on Article 101 of the Charter of the United Nations.

If I have interpreted it correctly, there are two basic principles involved in Article 101. First, United Nations staff are appointed by the Secretary-General. Secondly, the rules and regulations pertaining to appointments, including contracts of employment, are subject to the rules and regulations derived from and approved by the General Assembly. In other words, any standing instructions pertaining to the staff rules and regulations issued by the Secretary-General derive their power from resolutions and directives of the General Assembly. On the basis of those two fundamental principles that I have just enumerated, what we have to consider is the relevant paragraph of resolution 34/165, which reads:

> "The General Assembly,
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> . . . . . .
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> 3. Decides that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided" (Resolution 34/165, II, para. 3).

The question raised here is whether the particular paragraph and those instructions issued by the Secretary-General to forewarn of the impending regulation of the General Assembly had been made known to the staff. What is the date of departure as regards resolution 34/165 and those instructions issued by the Secretary-General?

The defendant, in this case Mr. Mortished, had conscientiously and continuously during this period made known his view that documentary evidence of repatriation or relocation away from the country of his last duty station was not necessarily required to obtain the repatriation grant, since before 1 January 1980 it appears that documentary evidence was not the main substantive criterion regarding that grant.

Now we have to seek an advisory opinion by the International Court of Justice on this matter as to whether paragraph 3 of resolution 34/165, part II, and the instructions issued in relation to those staff members employed before that particular date constitute a conflict in terms of meaning. Also, nowhere in Judgement No. 273 of the Administrative Tribunal or in the staff rules and regulations is there a clear definition of what the term "repatriation grant" means. That is the main issue in contention in Mortished *versus* the Secretary-General.

It was the main issue considered by the Administrative Tribunal. It is the issue on which we have to seek the advisory opinion of the International Court of Justice, since there is no clear definition of the subject.

Therefore, in the view of my delegation, these two substantive issues require an advisory opinion from the International Court of Justice because, as a State Member of the United Nations and as a Member of the General Assembly, we wish to see that the resolutions that we adopt are interpreted and carried out in strict conformity with the meaning of the words, and with legal semantics and the intentions of member States.

Mr. Lennuyeux-Comnène (France) (translated from French): Mr. Chairman, I should like first to congratulate you on your election to guide the work of this Committee. I note that, when you informed us of the case submitted to our Committee, you implied that we were not required to decide on the Mortished case so much as on the application submitted by the United States requesting that the International Court of Justice should be consulted about this Mortished case. Therefore I think that the basis for our work is document A/AC.86/R.97, containing this request, much more than the Administrative Tribunal's judgement itself.

As you yourself indicated, the Committee is not a court of law; it is not competent to judge the case at issue; it can only decide whether the United States application is well founded. By virtue of Article 11, paragraph 1, of the Statute of the Administrative Tribunal, a judgement of the Tribunal may be contested on only four grounds. You mentioned them just now; I would like to recall them: firstly, that the Tribunal exceeded its jurisdiction or competence; secondly, that the Tribunal failed to exercise jurisdiction vested in it; thirdly, that the Tribunal erred on a question of law relating to the provisions of the Charter of the United Nations; fourthly, that the Tribunal committed a fundamental error in procedure which occasioned a failure of justice; it is in the light of these four grounds that we must consider whether or not the United States application is justified.

I notice that in its application the United States does not explicitly invoke any of these grounds; in any case, it certainly makes no reference to an error in procedure or to a failure by the Tribunal to exercise jurisdiction vested in it. It does not claim that the Tribunal exceeded its jurisdiction or competence; on the other hand, it expresses the view that "Judgement No. 273 raises a question of law relating to the provisions of the Charter of a constitutional dimension within the ambit of Article 11 of the Statute of the Administrative Tribunal which is of sufficient seriousness and magnitude to merit seeking the advice of the International Court of Justice". The only question which the Committee is asked is therefore clearly the following: is there serious reason to believe that the Administrative Tribunal erred on a question of law relating to the Charter of the United Nations? I believe that this is the only question which the Committee is empowered to consider, the only one on which it is empowered to give an answer, if possible. In passing, I would stress that the fact that the question is of great seriousness and magnitude in no way justifies recourse to the International Court of Justice, for the Committee has but one obligation: to respect Article 11 of the Statute of the Tribunal, which makes no distinction between questions which are of great seriousness and magnitude and questions which are not. In addition, the United States points out that this is a question of law relating to the provisions of the Charter, but I note that it does not clearly state that it believes that the Tribunal has erred on a question of law relating to the provisions of the Charter. Yet this is precisely the point of Article 11, paragraph 1; we have to find that there has been an error on a question of law; in fact, the United States memorandum speaks of a question of law but not of an error.

If we examine the United States arguments, we find a reference to the fact that, pursuant to Article 101 of the Charter, the General Assembly "is expressly charged . . . with establishing regulations concerning the staff". In fact, in my

delegation's view, that Article explicitly empowers the General Assembly only—I repeat, only—to establish regulations concerning the appointment of staff by the Secretary-General, but not regulations on points of detail, administrative regulations governing personnel status as a whole.

According to the United States argument, the Assembly in the exercise of its prerogatives took a clear decision by its resolution 34/165: the decision to terminate the practice of paying the repatriation grant to persons who did not relocate upon retirement. It is a fact that the tribunal, by its judgement, prevented this decision from taking full effect with regard to an international civil servant. The United States memorandum stresses the fact that the question is of constitutional importance in order to justify the application for review. It admits, however, that the Tribunal could, in certain circumstances, reject the application of rules made by the General Assembly and expresses the view that the Tribunal could do so if the Assembly were to adopt an arbitrary or capricious decision or if it wished to preserve a right. Thus we may ask ourselves whether the Tribunal was not authorized and precisely empowered, in the present circumstances, to reject the application of rules made by the General Assembly.

This is why I believe that, for strictly legal reasons, the Committee should reject the United States application. I repeat that the United States does not explicitly invoke any of the grounds available to the Committee under Article 11, paragraph 1, of the Statute of the Tribunal and that the only one of these grounds to be invoked is actually invoked only by implication. It is not clearly spelled out, since the memorandum says that a question of law is involved but makes no reference at all to an error on a question of law in connection with the violation of the Charter. And even supposing that this ground were invoked, one cannot consider this to be justified under Article 11 of the Statute of the Administrative Tribunal. For the judgement of the Administrative Tribunal contains nothing which contradicts Article 101 of the Charter—the only article at issue—and the Tribunal's judgement in no way denies the competence of the General Assembly to decide the rules and conditions of employment of secretariat staff. The judgement of the Tribunal simply states that Mr. Mortished had an acquired right by virtue of a transitional system instituted by the Secretary-General and that in this instance the Secretary-General did not apply Staff Regulation 12.1 requiring respect for the acquired rights of staff members.

We therefore find that none of the grounds mentioned in Article 11 of the Statute of the Administrative Tribunal are explicitly invoked by the United States; we find that, even if the United States had implicitly invoked an error on a question of law concerning the provisions of the Charter, this ground should be rejected as lacking a valid basis; we find that the Tribunal committed no error of interpretation of Article 101 of the Charter since—on the contrary—it recognizes the competence of the General Assembly; and we find, moreover, that the United States itself recognizes that the Tribunal has some competence to give rulings on decisions of the General Assembly. These arguments should, in my view, lead the Committee to reject the United States application for the Administrative Tribunal's judgement to be referred to the International Court of Justice to obtain the Court's opinion.

In addition, if we are talking about money, I think that the proceedings to be instituted will be much more expensive than the procedure of simply accepting the judgement of the Administrative Tribunal concerning the particular case of Mr. Mortished.

Mr. Kbaier (Tunisia) (translated from French): I listened just now with great interest to the statement by my colleague and friend, the representative of Morocco, and I must say that he raised a point which seems important: the fact of the explicit agreement between the Secretary-General and the staff member himself. I think this is an important point, which deserves the full attention of our Committee.

This being said, I must admit that my delegation is discomforted by the divergencies of interpretation. I may say that it finds itself in a somewhat difficult situation: on the one hand, the argumentation advanced by the Administrative Tribunal seems to a large extent to be characterized by a seemingly irrefutable solidity, particularly as this is a special case, it must be pointed out; on the other hand, the arguments put forward by Mr. Herbert Reis, which are undoubtedly in line with General Assembly resolution 34/165, perhaps seem rather unconvincing to us. Especially since, as I have said, we are dealing here with a special situation.

In any case, and in view of these two divergent interpretations, my delegation has certain doubts.

In addition, there is an important element which must be mentioned. As far as we know, the Secretary-General has not contested the Tribunal's judgement; and this fact merely increases our doubts and is not likely to dispel them.

This being so, it is for these reasons that my delegation feels that it would perhaps be wiser not to take a hasty decision.

Mr. Rosenstock (United States of America): Among the many issues that are not before us is whether one thing costs more or less. The issue before us relates to the authority of a General Assembly decision and whether or not the questions involved in that should be commented upon by the International Court of Justice.

There is, of course, no requirement that the application seizing this Committee of the question of reference to the Court conform to any strict rules of pleading: there are no rules of pleading. It is for this Committee to determine whether or not one of the four grounds is involved or if there is sufficient substance to the question whether one of the four grounds is involved to make it prudent to ask the International Court of Justice.

It is not prudent to ask the International Court of Justice a trivial question and therefore it is relevant to note that a question involving the authority of General Assembly decisions is not a trivial question.

Were it a matter of some money, regardless of the sum, that in and of itself would probably justify a decision to request an opinion of the International Court.

But that is not what is involved here. What is clearly involved here is a fundamental issue of constitutional dimensions within the terms of Article 11, as has already been made clear, which warrants seeking from the Court advice as to whether the Administrative Tribunal has exceeded the jurisdiction or competence vested in it or has committed an error of law in respect of the Charter.

There are excesses of jurisdiction which may not involve errors of law in connection with the Charter. But an error of law in connection with the Charter which involves a limitation on the authority of the General Assembly is in and of itself an excess of jurisdiction or competence.

It has been said that the United States in some way agrees that there are cases in which it may be possible for the Administrative Tribunal to strike down a General Assembly decision. But that is precisely what the United States is not saying and what the application is not saying.

What we are saying is: "These issues are not raised by the instant case" (A/AC.86/R.97, p. 2). So it is quite wrong to presuppose that the United States, in the application or at any other stage, is making an assertion one way or the other on whether there may or may not in theory be circumstances in which, etc., because, to repeat, these issues are not raised by the instant case.

Mr. Kemal (Pakistan): First of all, Sir, let me offer you my delegation's congratulations on your election as Chairman of this Committee. We should like to make only a brief statement at this stage.

I have heard it said more than once here that it is the understanding of the members of the Committee that the Committee is not empowered to pass judgment on the merits of the decision of the Administrative Tribunal.

However, we feel that the Committee would in fact be doing precisely that if it were to decide that there is no substantial basis for the application submitted by the United States. Acting against the application of the United States would automatically place the Committee on the side of the Tribunal's majority decision in document AT/DEC/273, which would have far-reaching implications for the future interpretation and application of General Assembly resolutions by the Administrative Tribunal.

The second brief point which we should like to make is that the Administrative Tribunal's judgement is not unanimous. I think the Committee must keep constantly in view that a member of the Tribunal differed with the majority decision. And if we give weight to one side of the decision we must give equal weight to the other side of the decision, the minority judgement, although the majority of the members of the Tribunal endorsed the decision in the Judgement.

We should like to express our views further at a later stage, but those were the two points which we wanted to make at this stage.

Mr. Lennuyeux-Comnène (France) (translated from French): A misunderstanding seems to have arisen between me and the United States representative about the fact that the United States application concerning Judgement No. 273 indicates that "It is not the contention of the United States that there are no circumstances in which the Administrative Tribunal could reject the application of rules made by the General Assembly and no rights of employees that the Administrative Tribunal may seek to preserve".

The United States representative implicitly invited me to read further the argumentation submitted by his delegation—in other words to see how, in this case, the question at issue was whether, in the light of all the circumstances of the case, the Administrative Tribunal duly took into consideration the decisions of the General Assembly concerning the repatriation grant, etc. . . . I must now say that I am puzzled, because I have before me the judgement of the Administrative Tribunal and it is 20 pages long; out of these 20 pages, there are 18 pages taking into consideration the General Assembly decision. This is the basis of the judgement. It is clear that the Administrative Tribunal did indeed take into consideration the General Assembly decisions concerning the repatriation grant and the reasons adduced for the judgement are based exclusively on that decision of the General Assembly, on possible interpretations of it, etc. If the only claim was that the Tribunal did not take this decision into consideration, I think that we should all object, for this document provides proof that the Tribunal took these decisions into consideration.

The Chairman (translated from French): If no delegation wishes to speak at this stage, the question is now, in view of the lateness of the hour, when we should hold our next meeting. As you know, a meeting had been scheduled for this afternoon; however, before deciding whether that meeting should be held, I should like to know whether delegations would be ready to continue the discussion on this question this afternoon. I see that they would not.

This being so, I have been told that the Committee could meet either later this week—in other words, tomorrow—or next week; in the latter instance, I think that arrangements have been made for a meeting on Wednesday. I should therefore like to have the Committee's views regarding the date of our next meeting.

Mr. Kbaier (Tunisia) (translated from French): As far as I am concerned, if my colleagues agree, I think that a Wednesday meeting might perhaps be better, so as to leave us the intervening week-end.

Mr. Rosenstock (United States of America): If members of the Committee wish to defer matters until next week, we would interpose no objection. But it should be borne in mind that we shall at some point be facing a time deadline, that the papers before us are not excessively voluminous, and that perhaps meeting tomorrow afternoon would have a certain merit in enabling us to get on with our work.

If there is a strongly held view in the Committee that some more time is needed, we would hope it would be possible for the secretariat to obtain meeting time on Monday of next week—particularly Monday afternoon, but in any case some time on Monday, since deferral all the way to Wednesday would make rather episodic our consideration of the matter and would push us toward the ultimate deadline we face and perhaps constrict us in terms of the time available, if a third meeting were required.

Mr. Kbaier (Tunisia) (translated from French): I have no definite proposal to make, but I agree with the United States representative's proposal for a meeting on Monday.

This being said, I should like to know whether document No. 100 has been issued in French.

The Chairman (translated from French): The answer to the last question of the Tunisian representative is in the affirmative: document No. 100 exists in French.

The secretariat had not scheduled a meeting for Monday, because of other meetings being held, but I understand that there would be no problem, if the Committee so wishes, in meeting on Monday.

Mr. Lahlou (Morocco) (translated from French): I have before me Judgement No. 273 and I see that it has two parts: one part in French, and one part in English. Is the second part, which is in English, also available in French?

The Chairman (translated from French): The second part is indeed available in French.

As regards the date of our next meeting, may I consider that the Committee agrees to meet next Monday? It will be decided at a later stage whether the meeting will be in the morning or the afternoon.

While waiting for a final answer to this question, I should like to remind you that, as far as procedure is concerned, we still have to elect a Vice-Chairman of the Committee. I shall therefore invite delegations to consider this matter.

We are awaiting a reply from the secretariat concerning the confirmation of a Monday meeting. I shall therefore ask the members of the Committee to be patient for a few minutes.

(continued in English)

Since there seems to be a delay in getting the information we have requested, I would suggest that we agree at this point to have a meeting on Monday afternoon. If there is any change, the members of the Committee will be notified.

As I hear no objection, I take it that the Committee agrees to that suggestion.

The meeting rose at 12.55 p.m.

A/AC.86(XX)/PV.2
21 July 1981.

8. Transcript of the Proceedings at the Second Meeting (Closed Part)

Held at Headquarters, New York,
on Monday, 13 July 1981 at 3 p.m.

Chairman: Mr. Philippe KIRSCH (Canada).

—Election of officers *(continued)*.
—Consideration of the application for review of Administrative Tribunal Judgement No. 273 *(Mortished* v. *the Secretary-General of the United*

Nations) submitted by the United States of America (A/AC.86/R.97) *(continued)*.

Election of Officers (continued)

The Chairman: As members will recall, at our meeting last week we left open one matter—the election of a Vice-Chairman of the Committee. I should like to ask whether there are now any nominations for that post.

Mr. Andresen (Portugal): I should like to nominate Mr. A. W. Omardin of Malaysia for the post of Vice-Chairman of the Committee. His qualifications are well known to all of us.

The Chairman: Are there any other nominations?

There appear to be none. May I therefore take it that the Committee wishes to elect Mr. Omardin to the post of Vice-Chairman of the Committee for the current session?

Mr. A. W. Omardin (Malaysia) was elected Vice-Chairman of the Committee.

Consideration of the Application for Review of Administrative Tribunal Judgement No. 273 (Mortished v. *Secretary-General of the United Nations) Submitted by the United States of America (A/AC.86/R.97))* (continued)

Mr. Stuart (United Kingdom): At our meeting on 9 July, Mr. Chairman, you put to the Committee the procedural question whether Mr. Mortished's counsel should be allowed to attend our meetings and, if so, whether he might be allowed to make a statement on the question before us. On that occasion I made a brief statement on behalf of the British delegation indicating that I thought the Committee should agree to both proposals. I should now like to revert to this question, in order to make a formal proposal that the Committee should agree to both of the foregoing proposals, and to explain my delegation's ground for this.

In the past it has been the practice of the Committee to consider applications for review in closed session, without allowing to be present either the Representative of the Secretary-General, *qua* litigant in the case under consideration, or the counsel of the staff member involved. In the past, however, the applications for review have always been made by staff members, and the present case is the first in which a member State has made the application. Article 11 of the Statute of the Administrative Tribunal provides for this right of member States, but it has in the past been suggested that exercise of the right by a member State might put the staff member in a position of inequality before the Committee, since a member State is both judge and advocate in the case, whereas the staff member is not represented before the Committee.

The International Court, moreover, has said that it would have to give careful thought to this argument if a case ever arose.

I think that the number of cases where a member State applies for the review is unlikely to be great; history seems to bear that out. Be that as it may, the concession to Mr. Mortished's counsel which I think we should make in the present case would not be conceded as a right, nor would it be a precedent for cases where the application was made by a staff member. I hope that this point will help to reassure those members of the Committee who have been reluctant to make the concession.

The more important argument, however, is that unless we agree to the attendance of Mr. Mortished's counsel and to hearing a statement from him, there is a real danger that the International Court may decline to give an advisory opinion. It would, I suggest, be highly undesirable that we should agree to request an advisory opinion, only to have the Court refuse to give one.

As I have the floor, I should like to add briefly to my main statement, made at our first meeting, last week, on the principal issue before us.

The main issue, as has been very cogently argued by the representative of the United States, is not whether the Administrative Tribunal's Judgement No. 273 was right or wrong, but whether we should request an advisory opinion from the International Court. The situation confronting us is one in which the General Assembly has said one thing clearly and unambiguously and the Administrative Tribunal has taken a different view of the matter. If we were not to decide to request an advisory opinion, we would—as the representative of Pakistan has pointed out—be deciding in effect that the Administrative Tribunal was right and the General Assembly was wrong. I do not think it would be right for us in this Committee to take such a weighty decision. If we did so, it would mean that this Committee, as a subsidiary body of the General Assembly, was making a judgment on an issue on which the General Assembly itself had decided differently.

We should also bear in mind in this connection that Article 96 of the Charter gives the General Assembly the right to request the International Court to give an advisory opinion on any legal question. The General Assembly might therefore take up the fundamental legal issue underlying the question before us and refer it to the Court if we failed to do so. If, on the other hand, we decide to request an advisory opinion, we shall ensure that the arbitration between the General Assembly and the Administrative Tribunal is undertaken by the highest judicial authority. That seems to my delegation to be an uncontroversial and highly desirable objective on which it might be possible for the Committee to decide by consensus.

Mr. Rallis (Greece): My delegation's opinion is much in line with what has just been said by the representative of the United Kingdom. The case before us involves a contradiction between a decision of the General Assembly and a judgement of the Administrative Tribunal. I do not wish to go into the substance of the matter, because we shall not be deciding that here; but I think it would be useful to request an advisory opinion of the International Court of Justice. Not to do so could constitute a prejudgement of the matter.

The Chairman: Are there any other members who wish to speak on the issue raised by the United Kingdom representative with respect to the possible attendance of Mr. Mortished's counsel? I think that we should confine the discussion at this point to that issue, since the substantive question will be discussed subsequently, in the light of the decision taken on the United Kingdom proposal.

Mr. Lennuyeux-Comnène (France) (translated from French): Mr. Chairman, could you please give us a precise formulation of the question?

The Chairman (translated from French): I can repeat the formulation I used last week on the same subject, if that is acceptable to the rest of the Committee.

The formulation I used last week was as follows: Mr. Tiewul, as counsel for Mr. Mortished, would be invited to be present at all meetings of the Committee when the United States application was considered; the Committee could invite Mr. Tiewul to make a statement, in the course of its deliberations, if it found that necessary. Those were the terms of the question raised last week concerning the possible participation of Mr. Tiewul.

May I take it that the United Kingdom proposal, in fact, coincides with the terms of the proposal made last week, and which I have just repeated?

Mr. Petrov (Union of Soviet Socialist Republics) (translated from Russian): Mr. Chairman, you may remember that, at the last meeting, our delegation expressed the opposite opinion on this question. Unfortunately, therefore, we will have to say a few words on this same question once again. I wish to say once again, and it has to be repeated, but in our opinion, in the opinion of our delegation, our Committee has been given very narrow and, what is most

important, quite specific terms of reference. As was also emphasized in this Committee, we cannot enter into the substance of the matter. And if we start doing that, we will of course, only naturally, stray from the terms of reference of our Committee, as laid down by the General Assembly.

We believe that we have all we need in order to arrive at a definite opinion. On the basis of Article 11 of the Statute of the Administrative Tribunal we can decide this question, and it seems to us that we should be guided by this. We can decide—and I again repeat that we have all we need in order to take a decision—on which of the four grounds there is a basis for asking the International Court for an advisory opinion. Inviting a private person—in this case counsel—to make a statement would, we firmly believe, not further our deliberations in any way for, at a future date, the International Court could, if it ever came to consider this question, reach the conclusion that our Committee attempted to deal with the substance of this matter. And this is not only incompatible with the status of our Committee but could also, in a way, prove detrimental to the parties to this dispute. That is our opinion.

The Chairman: Before we proceed further, I should like to recall that it is not, of course, our function here to consider the question again from the perspective in which it was considered by the United Nations Administrative Tribunal. All that we are doing here is considering the application submitted by the United States. I think that it is clear in all our minds that our role is definitely limited to that.

That being said, I should like to put three questions. The first one, directed to the United Kingdom representative, is this: is the proposal I made last week the one on which the United Kingdom would wish a decision to be taken at this point? I have in mind the proposal whose terms I outlined a moment ago.

Mr. Stuart (United Kingdom): Yes, Mr. Chairman.

The Chairman: I shall now ask the second question. Up to now we have heard views concerning the desirability of inviting Mr. Tiewul to be present at our meetings and, if so requested by the Committee, to make a statement. Am I to take the statement by the United Kingdom representative as meaning that he is now submitting a formal proposal?

Mr. Stuart (United Kingdom): Yes, Mr. Chairman.

The Chairman: My third question is this: Is there any formal objection to the proposal made by the United Kingdom representative?

Mr. Petrov (Union of Soviet Socialist Republics) (translated from Russian): Mr. Chairman, I am explaining our delegation's position and I would like therefore to say once again that our delegation objects to inviting the counsel to a substantive discussion of the merits of the case in this forum.

The Chairman: Since the United Kingdom representative has now made a formal proposal and since the representative of the Soviet Union has, I take it, submitted a formal objection to that proposal, we shall have no choice but to vote on the proposal.

Mr. Dia (Senegal) (translated from French): I still feel that we should avoid taking a vote.

Could not we hear all the other delegations' views to see if we could agree on a compromise, on a consensus, before reaching that point, even if the question has to be postponed until a later date?

Mr. Diaconu (Romania) (translated from French): I think that we should make every effort to avoid a vote on this question and to try and settle it by means of a compromise solution. I think that the door is open to a compromise on the matter.

Mr. Rosenstock (United States of America): For reasons indicated earlier by my delegation, we take no position on this matter. We see no legally compelling ground to take a decision on it, and we see no legally compelling ground to hear the counsel for Mr. Mortished.

On the other hand, we are not insensitive to the feeling expressed by some members that justice must not only be done but be seen to be done. We would not wish it to be thought by anyone that in declining to hear counsel we had declined to respond to the sensitivities of those who feel it might be advisable to hear him. We doubt very much that any body such as the Court would come to that conclusion, but there are, after all, other concerns that must be borne in mind in this matter.

That having been said, the only reason my delegation is speaking at this time is to urge that, one way or another, we resolve the matter today. If there is a need for some consultation, informally, among the members of the Committee before we take a decision by division, perhaps it would be advisable to suspend the meeting for a short time and see whether or not the gap can be bridged.

If we are to hear the views of Mr. Mortished's counsel, we must do so quickly. We are, I would hope, nearing the end of the discussion and are approaching the time when a decision will be taken. Therefore, if we are to hear the views of counsel, we should do so today, or at the latest tomorrow.

I might add that I share the opinion expressed by the Soviet Union representative that counsel has no views which could be relevant to the decision that must be taken by this Committee, or to the responsibility that is this Committee's with regard to the nature of the questions before us.

I repeat, however, that we are not interposing an objection, but would merely suggest a short suspension of the meeting at this time.

Mr. Lennuyeux-Comnène (France) (translated from French): I would not object to holding private consultations on this question, but before we suspend the meeting, I should merely like to state my delegation's view, which is somewhat similar to that expressed by the representative of the Union of Soviet Socialist Republics, in that we hardly see what purpose would be served, in the case before us, by hearing counsel for Mr. Mortished. We are not here to hear or reopen the Mortished case. We are called upon to answer questions concerning the Administrative Tribunal and which actually have very little to do with the Mortished case as such.

My delegation therefore will not object, of course, to the presence of counsel for Mortished at our deliberations, but it really does not see any need for it.

Mr. Stuart (United Kingdom): I naturally shall not go over the reasons why my delegation thinks it would be prudent to make this concession; I have just made a statement on the subject, and that should be sufficient. But I should like to add that, as I see it, it is indeed important that we should take a decision now—albeit after a short recess, during which we can consult and see if it is possible to agree on a decision by consensus. It is important that the decision should be taken now. If we are intending to concede that counsel for Mr. Mortished should be present during our proceedings, let us take a decision while we are still proceeding and not when we have finished; otherwise, it would seem a little pointless.

The Chairman: There appears to be no objection, and the meeting will therefore be suspended for a short time.

The meeting was suspended at 4.05 p.m. and resumed at 4.25 p.m.

The Chairman: May I ask the delegations that participated in the informal consultations that have just taken place whether any result, satisfactory or otherwise, has been achieved?

I take the general silence to mean that there has been no result. We must then revert to the only choice which seemed to be left open before the suspension of the meeting—that is, to proceed to a vote on the proposal that Mr. Tiewul should be allowed to attend our proceedings, along the lines I outlined earlier.

The proposal was rejected by 5 votes to 2, with 9 abstentions.

The Chairman: I shall now call on any representatives who wish to explain their vote.

Mr. Rosenstock (United States of America): My delegation did not participate in the vote that has just been taken, because we did not think it would be relevant, either way, to any of the matters before us.

Mr. Seydou (Niger) (translated from French): At this stage, I should like to explain my position. Niger sees no reason why counsel for Mr. Mortished should not attend our proceedings as an observer, without participating in them, because we consider, first, that his presence could obviate any misunderstanding that might subsequently arise—perhaps not during our discussion but during the process upon which we have embarked in considering the application made by the United States—and, secondly, that Mr. Mortished's presence should not be accompanied by any statement from him, since we are not considering the merits of the case. As we are only considering the application made by the United States, we feel that Mr. Mortished has no reason to intervene and that any individual or delegate who digresses from the application that has been submitted, and enters into the merits of the Mortished case, could be called to order by the Chairman. Therefore Mr. Mortished should have no say in this discussion.

That is my delegation's position.

Mr. Andresen (Portugal): The decisions that we shall be taking here relate to the exercise by the Administrative Tribunal of its powers, as well as the Tribunal's relations with the General Assembly. They will have a direct effect on an individual.

We have listened with the utmost interest to the arguments of the United States and other delegations as to why this matter should be submitted to the International Court. I do not wish to go into any details, but I submit that perhaps Mr. Mortished's counsel would have presented arguments on why it should not be submitted to the Court.

The clear imbalance between a member State that is a member of this Committee and an individual would suggest to us that it would have been prudent for Mr. Mortished's counsel to be present here. That is why we voted in favour of the proposal to that effect.

Mr. Lahlou (Morocco) (translated from French): My delegation voted against the proposal for the following reason: we felt that we were considering an application submitted by the United States. The applicant is present here and is in the position to defend the case before the Committee.

Therefore what we are discussing is not the substance of the Mortished case because, if that were so, the presence of counsel for Mr. Mortished and of Mr. Mortished himself would have been necessary. What we are considering is simply the United States application, and I think that in submitting its application, the United States delegation knows how matters stand and is capable of defending its case.

The Chairman (translated from French): I do not see any other delegation wishing to speak on the vote just taken. We may therefore resume consideration of the substance of the application presented on this matter.

Are there any delegations wishing to speak, at this point, on the United States application?

Mr. Dia (Senegal) (translated from French): Mr. Chairman, allow me, first of all to convey, on behalf of the Senegalese delegation, our sincere congratulations on your election as Chairman of this Committee. We have had occasion to appreciate your outstanding qualities, first in the Sixth Committee of the General Assembly and subsequently at other meetings of a legal nature, at which we had the honour to work in close collaboration with you.

In response to the application made by the United States and contained in document A/AC.86/R.97, of 16 June 1981, the Committee is required to decide whether there is a definite basis for asking the International Court of Justice for an advisory opinion on Judgement No. 273 of the Administrative Tribunal.

It is this aspect of the question to which we must give particular attention. We have before us the Administrative Tribunal's Judgement, which is based on the principle of acquired rights, and we also have General Assembly resolution 34/165, in which it was decided that effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided.

It was on the basis of this General Assembly decision that the Secretary-General took the position which we know he took—and we all know that he had no alternative.

Consequently, and as the United States note emphasizes, the issue that is raised is whether, in the light of all the circumstances of the case, the Administrative Tribunal gave due weight to the actions of the General Assembly.

The States that are members of the Committee did not oppose the adoption of resolution 34/165 at the time. Without making a value judgment concerning the merits of this resolution, the Committee can hardly fail to give due weight to a decision in which members participated. My delegation therefore feels that it is only right to ask the International Court of Justice to give an advisory opinion on the Judgement, if only to ensure that the Secretary-General does not find himself in a similar situation again in the future.

Mr. Diaconu (Romania) (translated from French): Mr. Chairman, I, too, am happy to see you presiding over our Committee. I was not here last year to see you presiding over other bodies but I have heard of your reputation and am very pleased now to see your confirmation of the extremely favourable impressions reported to me.

With regard to the question before us, we proceed from the assumption that the General Assembly's resolutions in this field are binding and that they must be complied with by all United Nations bodies. In this instance it is clear that the Secretary-General and the secretariat properly followed up the General Assembly's resolution by first incorporating it in the Staff Rules and subsequently ensuring its implementation. It is our belief that clear-cut resolutions of the United Nations General Assembly cannot be countered by the use, as in this case, of interpretations, conceptions or legal constructions which could nullify the content of these resolutions and render them to all intents and purposes inapplicable, even if the concept of acquired rights is used as an argument against them.

In taking this position, we do not wish to infringe on anyone's rights; we are not referring to the substance of the question, to the Tribunal's decision. We are not acting in this instance as a court of appeal. We are acting as a United Nations organ that is required to take a decision on a very simple question.

As far as we are concerned—as our delegation anyway is concerned—the General Assembly's resolution on this point has force of law. Its provisions must be complied with. Otherwise we are going to find ourselves in impossible situations. On the basis of successive resolutions we will have different rules depending on categories of acquired rights which differ for staff members recruited to the United Nations at different times, and this would not make for uniformity in the status of or régime governing international civil servants.

Having said this, we are in favour of any measure deemed necessary to ensure the full implementation of the General Assembly resolution.

Mr. Seydou (Niger) (translated from French): Mr. Chairman, having congratulated you at the first meeting, I should like to congratulate the representatives of Malaysia and the United Kingdom on their unanimous election as officers of our Committee.

In this statement I shall attempt, as far as possible, to confine my remarks to the question before us, namely the request for an advisory opinion presented on 15 June 1981 by the United States. In doing so I shall be guided solely by the first paragraph of Article 11 of the Statute of the Administrative Tribunal.

In the application presented by the United States we read that the judgement rendered by the Administrative Tribunal raises a question of law relating to the provisions of the Charter of the United Nations. In this connection the applicant referred to Article 101 of the Charter, and it is our understanding, from the statements made by that applicant in this very room, at our first meeting, that this reference relates specifically to the first paragraph of Article 101 of the Charter.

Without entering into an analysis of this short sentence, I do feel I should point out that the appointment referred to in the first paragraph of Article 101 is to be understood as involving a contract concluded between the Secretary-General, acting as the highest official of the Organization, and another party. The contents of this contract cannot conflict, needless to say, with the rules laid down by the General Assembly, which the Secretary-General is required to apply to all staff members of the Organization, and particularly in the case under consideration.

The concise wording of Article 101 suggests, on the other hand, that the rules governing this contract can change under the indirect impact of the resolutions adopted by the General Assembly, thereby affecting the rights and obligations of the contracting partners.

This is a somewhat fluid situation, but justified by the specific nature of one of the parties, namely the Secretary-General, whose will is subordinate to that of another organ, the United Nations General Assembly.

One of the consequences of this situation is to make one of the parties to the contract, and above all the provisions of the contract, subject to conditions—a circumstance which the parties in general to the contract are aware of when concluding this contract and which the Tribunal itself has recognized in its Judgements No. 95 *(Sikand)* and No. 142 *(Bhattacharyya)* and, more specifically, in the letter of appointment states that the appointment is offered to staff members subject to the relevant provisions of the Staff Rules and Regulations and to any subsequent changes in those documents.

These changes, of course, generally result from resolutions adopted by the General Assembly, in accordance with Article 101 of the Charter. But these provisions are not unqualified since Staff Regulation 12.1, which was laid down by the General Assembly itself, reads as follows:

> "These Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members."

I would not wish to comment on the question as to what exactly is meant by an acquired right or what is not meant by that term, particularly in the present circumstances, where we are only required to consider the application presented by the United States.

As I understand it, the question which concerns us is mainly to determine whether there are good grounds for acceptance of this request by our Committee. In my delegation's opinion the Administrative Tribunal, in its Judgement, applied Staff Regulation 12.0 without taking account of a provision of resolution 34/165 of 17 December 1979 which was to be incorporated in the Staff Rules, in accordance with the provision contained in Article 101 of the Charter. The United States, as a Member of the United Nations and co-sponsor and initiator of resolution 34/165, is entitled to submit an application to our Committee if such application relates to the implementation of one of the provisions of the resolution in a judgement of the Administrative Tribunal. In taking the view, in its reasons for the judgement, that the intention of the States Members of the United Nations, in voting for resolution 34/165, was not to make any change in the way in which the repatriation grant was paid, the Tribunal adopted an interpretation which, in my delegation's opinion, goes beyond the interpretation which the member States had in mind for resolution

34/165 and for the actual purpose for which this resolution was intended. This, in our view, raises a question of law which involves an error of law in the Tribunal's Judgement; and in view of this circumstance and of other points made by other delegations, particularly the delegation of the United States, we feel that the request for an advisory opinion of the International Court of Justice should be accepted by our Committee.

Mr. Borchard (Federal Republic of Germany): My delegation supports the request by the United States that the International Court of Justice be asked for an advisory opinion on Judgement No. 273 of the Administrative Tribunal. In this respect, we share the views expressed earlier by the United Kingdom representative. In the light of the constitutional dimensions of the issue involved, we believe that the matter calls for an advisory opinion from the International Court of Justice.

Mr. Lennuyeux-Comnène (France) (translated from French): Our discussions seem to be leading us to what is known as a conflict of laws. In other words, is the Administrative Tribunal entitled to interpret a recommendation of the General Assembly and, in so doing, in interpreting a decision of the General Assembly, has it erred on a question of law relating to the provisions of the Charter of the United Nations? As I understand it this is a question of principle which extends far beyond the Mortished case as such, and I therefore wonder if there are any precedents already in existence. At all events I believe that, at the level of the Secretary-General, if not of the Administrative Tribunal—there have already been interpretations of General Assembly decisions. There is no doubt that the Secretary-General has not always—and I am not speaking of any particular Secretary-General—carried out the General Assembly's decisions to the letter. Some examples come to mind: but there were no complaints that he had thereby violated the Charter of the United Nations or committed an error relating to the provisions of the United Nations Charter. There is the realm of the possible and of the impossible, and even decisions of the General Assembly are subject to interpretation by the highest official of the United Nations.

I think that to some considerable extent the role of the Administrative Tribunal is precisely to interpret the decisions of the General Assembly. We know that legislative bodies sometimes produce texts whose full implications and consequences are not envisaged at the time of their adoption. And it is the Administrative Tribunal's role to interpret these texts in the light of jurisprudence, in terms of acquired rights, etc.

I wonder if there was any case in the past where the Administrative Tribunal, without violating the provisions of the United Nations Charter, interpreted texts of the General Assembly. I should like to know if the Legal Counsel is able to enlighten us on that point.

Mr. Rosenstock (United States of America): My delegation would certainly not wish to nip in the bud a historical or legal analysis from the Legal Counsel. We are, however, somewhat hard pressed to determine what this has to do with anything. It goes without saying that there are a number of organs which must interpret General Assembly resolutions. But the fact that, to be applied, a General Assembly resolution must be interpreted does not move us very far along on the question whether or not the Administrative Tribunal has erred in the Judgement in question, and whether or not it has erred in one of two particular ways.

It might be suggested that one of the errors the Administrative Tribunal committed was to show a lofty disregard for the General Assembly, rather than to attempt to interpret the General Assembly resolution. Be that as it may, it is not evident to my delegation why we need to know whether or not the secretariat interprets General Assembly resolutions. Of course it does. Everybody interprets General Assembly resolutions constantly. From time to time people have the wrong idea about General Assembly resolutions; from time to time people have

the right idea about General Assembly resolutions. Every time something is done, it is by way of an interpretation. Very often the language of a General Assembly resolution is unclear, and therefore whenever one attempts to follow it, one is making an interpretation. Rarely is there a case such as the present one where we are dealing with a resolution that is absolutely crystal clear and that does not at all involve a question of interpretation, but merely of application—or in this case perhaps, unfortunately, of non-application.

The Chairman: I now call on Mr. Szasz of the United Nations Legal Department, who wishes to make a statement in response to the question by the representative of France.

Mr. Szasz (Office of the Legal Counsel): In response to the question posed by the representative of France, one can of course say what the representative of the United States has just said—that in a number of decisions the Tribunal has had occasion to interpret General Assembly resolutions. Most recently, it did so in the Smith case, which dealt with the decision of the General Assembly that no payment be made to persons who were engaged in a job action or who, in effect, were striking. In that case, there had first been a decision of the General Assembly, which later was incorporated by the Assembly in the Staff Regulations. The Tribunal examined that decision and the Staff Regulation very closely, for the purpose of determining their applicability to the particular job action in which Smith was engaged.

I think that more pertinent to the matter of interpretations by the Administrative Tribunal of General Assembly actions are cases in which the Tribunal may have been thought to have rejected a decision of the General Assembly. Only one such case in fact comes to mind; I do not have the exact name, but it is known as the proofreaders case. In that matter, proofreaders in New York, at Headquarters, had been given Professional status, whereas in Geneva they had been given General Service status. The Secretary-General had proposed that this inequality be corrected by promoting the Geneva proofreaders to Professional status. He had made the appropriate provision in the budget submitted to the General Assembly. The General Assembly had rejected that budgetary provision, thereby maintaining the Geneva proofreaders at the General Service level, and not providing for Professional posts.

The Tribunal held that the provision for equality between staff members required that persons doing the same work be assigned the same grade, and it thereby affirmed the appeal of the Geneva proofreaders for Professional status. In a sense, that was a rejection of a budgetary action by the General Assembly. On the other hand, the Tribunal in that case relied on what it considered to be an overriding principle, established by the General Assembly in the Staff Regulations: the equality of staff members.

So there are situations in which the Tribunal has examined a General Assembly action—and sometimes two or three different General Assembly actions—in order to decide what law was properly applicable to a particular case.

Mr. Lennuyeux-Comnène (France) (translated from French): I should like, through you, Mr. Chairman, to thank the secretariat for the helpful clarification provided and which seems to me to indicate that the fact that the Administrative Tribunal did not base its decision in the Mortished case precisely on a literal interpretation of General Assembly resolution 34/165 does not mean, in view of the precedents drawn on, that it erred on a question of law relating to the provisions of the Charter of the United Nations.

This is simply the point I wanted to make to our Committee, namely that, in the light of Article 11 of the Statute of the Tribunal, we cannot complain that the Tribunal committed such an error of law relating to the provisions of the United Nations Charter because, if it really did in this particular case commit such an error of law, we would have to review many other judgements of the Administrative Tribunal.

The Chairman: If no one else wishes to speak, I shall take it that our substantive consideration of the application submitted by the United States in this case has been concluded.

It was so decided.

The Chairman: It appears that the time has come for the Committee to take a decision on this matter.

Unless there is any other suggestion concerning the procedure to be followed, I should now like to put four questions, one after the other, to the Committee. They are, of course, related to the four grounds listed in Article 11, paragraph 1, of the Statute of the United Nations Administrative Tribunal. Is that procedure acceptable to the Committee?

Mr. Rosenstock (United States of America): We should like to have some explanation of what you intend to do, Mr. Chairman, before you do it, in order to avoid the wrong question getting the wrong answer, or the wrong question getting the right answer—either of which could cause some measure of difficulty.

As has been suggested earlier, what is involved here is not a decision by this body that the Administrative Tribunal has committed one of the four errors listed in Article 11 of the Statute.

The Chairman: Am I to take it that the United States representative is saying that the Committee should decide rather whether or not there is a substantial basis for the application? Is that his point?

Mr. Rosenstock (United States of America): That is correct; those are the words in paragraph 2 of Article 11.

I am somewhat concerned that the Committee is about to be asked these questions: did the Tribunal commit error No. 1, error No. 2, error No. 3 and error No. 4; and that those questions, once asked, would place us in a difficult position. I therefore wish some clarification as to the nature of the questions about to be submitted to the Committee. Although we for our part would have no difficulty in answering those four questions, we do not think it is essential for the Committee to answer them.

The Chairman: It is my understanding that the way in which I have suggested we should proceed is the way in which the Committee has traditionally proceeded when the time to take a decision has come.

In order to make it absolutely clear how we intend to proceed, I shall read out paragraphs 1 and 2 of Article 11 of the Statute of the Administrative Tribunal. After that, if the Committee agrees, I shall formulate the four questions in such a way as to remove any doubt that might exist about the purpose of putting these questions.

Paragraph 1 of Article 11 reads as follows:

> "If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter."

Paragraph 2 of Article 11 reads:

> "Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a

substantial basis for the application. If the Committee decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

If the purpose of asking the four questions is now clear to everyone, I shall formulate the first question and ask if there is any objection to that formulation, before an answer is given.

Mr. Diaconu (Romania) (translated from French): I have some doubts about the procedure which you are proposing. If I understand the text of Article 11 correctly, the questions that are to be considered here—as to whether the Tribunal has exceeded its jurisdiction or competence, has failed to exercise jurisdiction vested in it or has erred, and so forth—are questions that were raised by the United States Government and the Permanent Mission of the United States before this application was submitted to us. Now that the application has been submitted, that stage is already past unless, of course, we wish to contend at this point that the United States Government was completely mistaken on all these points and that there is no basis for even presenting an application. But I understand that the application is already before us, and that these questions should not be raised in this body. These were questions raised by the United States Government, which has answered them.

Now we are concerned with the question raised in paragraph 2, namely whether there is a substantial basis for requesting an opinion of the Court. This is the question the Committee must answer. The article is clear on this point. It states that within 30 days from the receipt of an application under paragraph 1, the Committee shall decide whether or not there is a substantial basis for the application. That is all. We, the Committee, are not required to state whether or not there has been an error or whether the Tribunal has exceeded its competence or not. We are not required to pronounce on any of those points. That, at least, is my interpretation, and I truly believe that we should not become involved in this complication of questions and evaluations, which are very delicate, and which would lead us into the substance of the question. We need pronounce only on the question as to whether there is a substantial basis, a basis in fact, for referring the request to the Court for an advisory opinion. That is our task.

As to the other questions, it will be for the Court to look into them because otherwise we ourselves would be deciding the matter. If we all say that the Tribunal has committed an error, then what is the International Court to say? If we, here, all say that the Tribunal has, for example, exceeded its competence, we would be saying what the Court is supposed to say. I may be wrong, but I think that we would have difficulty in pronouncing on these very specific questions and that it would be far more in keeping with the competence, structure and very nature of our Committee if we were to pronounce on the question dealt with in paragraph 2 of Article 11.

The Chairman (translated from French): After hearing the statement just made by the representative of Romania, I think two comments are called for. The first comment is that it is, quite obviously, impossible to dissociate paragraph 2 completely from paragraph 1 of this article, since the "substantial basis" mentioned in paragraph 2 must naturally tie in with the provisions of paragraph 1.

The second comment is that, after hearing the representative of Romania, it occurred to me that we might be able to simplify the question by referring simply to the general terms of Article 11, or to paragraph 1 of Article 11, but I have just been advised by the secretariat that the procedure to follow, from the point of view of the International Court of Justice, would be to answer the four questions one by one.

I imagine that if the Committee needs any further explanations, the representatives of the secretariat will be able to provide them.

Mr. Rosenstock (United States of America): It seems to my delegation that we have made it clear that we believe that, within the meaning of Article 11, paragraph 1, of the Statute of the Administrative Tribunal, the Tribunal has erred on a question of law relating to the provisions of the Charter and that it is likely that the nature of the error has involved an exceeding of the Tribunal's jurisdiction or competence.

That having been said, if the Committee is merely asked whether or not there is a substantial basis for the application and if it answers the question affirmatively, it will then clearly have indicated that it believes there is a substantial basis for the application, which is based on two grounds contained in Article 11, paragraph 1.

Moreover, we are somewhat surprised that this matter is being dealt with in these rather tiny procedural steps, since they suggest requirements for action that are to be found nowhere. We should have thought that this simple question could be asked: Does the Committee believe that this matter ought to be sent to the International Court of Justice? Then the separate issue could be put: How should the question be formulated? Nowhere is there anything making it incumbent upon us to do more than that.

Nevertheless, if it is necessary to take this matter in two stages, then the question should be whether or not there is substantial basis for the application, which, as we have made clear, is based on two grounds. I think that this will provide the court with sufficient grist and leave no doubt that we have acted precisely within our terms of reference.

If there is some reason that we have not divined for proceeding in some other way, we should certainly be glad to hear it.

Mr. Lennuyeux-Comnène (France) (translated from French): When listening to the representative of the United States, I wondered whether we really had the same texts before us, relating to the application dated 15 June and presented by the United States, in accordance with Article 11, paragraph 1, of the Statute of the Administrative Tribunal. For the representative of the United States tells us that this text indicates that the Tribunal made a mistake or committed an error. This is not in the application issued as document A/AC.86/R.97. There are a number of observations, but the conclusion drawn by the representative of the United States is not so categorical. The text does not say that the Tribunal erred. It merely says: "In invalidating these actions of the Secretary-General . . . the Administrative Tribunal acted to deny the full effect of decisions of the General Assembly which were neither arbitrary nor capricious." That is an observation. It also states that: "The issue that is raised is whether, in the light of all the circumstances of the case, the Administrative Tribunal gave due weight to the actions of the General Assembly, etc". But I am not quite sure if the French text corresponds to the English text, because I see nothing to indicate that the Tribunal made a mistake or committed an error.

Mr. Rosenstock (United States of America): If it is preferred, we should have no difficulty ourselves in participating in a decision that the Administrative Tribunal has both exceeded its jurisdiction and erred. If that is the desire, by all means let us say so. That goes beyond "substantial basis" and it subsumes "substantial basis".

It goes without saying that if what is desired here is a determination on the Committee's part that the Tribunal has erred in a question of law relating to the Charter, we are fully prepared to make that determination, and we presume others are as well. That would more than meet the requirement of "substantial basis". If it is desired to put the question whether or not the Tribunal has exceeded its jurisdiction or competence, we would have no trouble in answering that question in the affirmative. Indeed, that subsumes the matter of "substantial basis".

We would have no problem in proceeding in that way. We had thought it might cause some difficulty to others, and we really do not think it is necessary; but if it is desired, by all means let the question be put to us in that way.

Mr. Stuart (United Kingdom): My delegation takes the view that, in the light of evidence from past proceedings of the International Court, the Court would prefer this Committee to state explicitly and clearly the precise grounds—taken from the four grounds mentioned in Article 11 of the Statute of the Administrative Tribunal—on which the reference is made to the Court. So my delegation would indeed prefer that this Committee should decide that the two grounds on which the request for an advisory opinion is based are those which have been very clearly stated by the United States representative.

The Chairman: I would venture to make a suggestion that we proceed in the following way: first, the statement would be made that the United States application invokes the ground that the Tribunal has erred on a question of law relating to the provisions of the United Nations Charter, and then this question would be asked: Is it the view of the Committee that there is a substantial basis for the application presented by the United States on the ground that has been invoked?

Would that be a satisfactory way of proceeding? That appears to be the case, and I shall therefore now formally repeat what I have just said.

The United States application invokes the ground that the Administrative Tribunal has erred on a question of law relating to the provisions of the Charter of the United Nations. Is the Committee of the view that there is a substantial basis for the application presented by the United States on the ground that has been invoked?

If there is no objection, I shall take it that the Committee's response to that question is in the affirmative.

Mr. Lennuyeux-Comnène (France) (translated from French): Mr. Chairman, you will decide as you wish but as far as the French delegation is concerned, it cannot answer these questions in the affirmative.

The Chairman (translated from French): In the circumstances, I think that we have no choice but to ask for another vote on the question phrased in the terms which, I hope, I will not have to formulate again, since I have just read it out twice.

(continued in English)

I therefore now put to the vote the question that I have just formulated.

By 14 votes to 2, with 1 abstention, the Committee answered the question in the affirmative.

The Chairman: Thus, the Committee has expressed its view that there is a substantial basis for the application submitted by the United States.

I shall now call on any representatives who wish to explain their vote.

Mr. Mashaire (Zimbabwe): My delegation had doubts whether it was necessary for us to base the United States application on the wording of paragraph 1 of Article 11 of the Statute of the Administrative Tribunal. We wondered whether the question could not have been worded differently. Nevertheless, in view of the complexity of the situation, we wished our vote to be recorded as being in the affirmative.

Mr. Rosenstock (United States of America): I wish merely to explain that we voted in favour of the question that had been put to the Committee on the basis that it did not by any means exclude, but rather subsumed, the other ground of exceeding jurisdiction or competence.

Mr. Lahlou (Morocco) (translated from French): I should like to explain my position after the vote by saying that the affirmative vote I cast was due to the fact that my delegation has difficulty in identifying this particular situation from the file on this international civil servant. Because of this difficulty we feel that the question should be considered further for the purpose of taking a final judicial decision. But it should be clearly understood that my delegation did not wish to uphold or substantiate the claims of one side or the other; it merely wishes to say that it will be able to accept a particular solution for a particular situation, namely for the case which we have just considered.

The Chairman: Now that the Committee has decided that there is a substantial basis for the application of the United States under Article 11 of the Statute of the Administrative Tribunal and that, consequently, the International Court of Justice should be requested to give an advisory opinion, we must now determine how the question to be put to the Court should be formulated. The Committee is aware that one formulation is proposed in the application submitted by the United States, in document A/AC.86/R.97.

Does anyone wish to speak on whether the formulation included in the United States application should be the one used in putting the question to the International Court of Justice?

Mr. Rosenstock (United States of America): I should like briefly to explain why we believe that the question contained in our application is the correct one.

The question in our application subsumes the two issues which the Court must examine and the grounds which we have been discussing—that is, did the Administrative Tribunal commit an error of the type described, and did it exceed its jurisdiction or competence? In our view, those issues are correctly and fairly raised in the question as we have drafted it.

We do not suggest that there is no other way in which the question could be drafted, but we believe that our formulation would give the Court an opportunity to examine those two critical grounds from Article 11 and to reach an important conclusion.

Moreover, we believe that the question as formulated in our application would give the Court an opportunity to decide, should it so desire, that in the instant case the Administrative Tribunal had erred, without at the same time necessarily making a determination that there were no situations in which the Tribunal could find grounds for not applying a General Assembly decision.

We are not saying—and I repeat this to make it absolutely clear—that there are cases in which the Administrative Tribunal could so act, but are merely making the point that, should the Court so wish, it could give advice that the Tribunal had in the instant case exceeded its jurisdiction or competence or had erred on a question of law relating to the Charter, while not passing judgment on the theoretical question—not necessarily raised in this case—to which we refer in the penultimate paragraph of the descriptive portion of our application.

Those are the reasons that led us to the particular formulation contained in our application. That is why we for our part regard it as an appropriate formulation, although, if other members have in mind any other form of words that would accomplish the aim of bringing both these grounds from Article 11 before the Court, that would be perfectly acceptable to my delegation.

The Chairman: I wish to recall that, after deliberating on the matter for some time, the Committee decided to request an advisory opinion from the Court on the basis of one of the grounds included in Article 11.

Mr. Rosenstock (United States of America): In that case, Mr. Chairman, I request that you put to the Committee the other ground as well—that is, whether there is a substantial basis for believing that the tribunal has exceeded its jurisdiction or competence.

As we indicated in our explanation of vote earlier in the meeting, we believe that the decision the Committee took did not rule out that other ground. If, however, it is now thought that the decision did rule out the other ground, then we formally request that the additional question be put to the Committee.

Mr. Lennuyeux-Comnène (France) (translated from French): There are two points I wish to make, the first of which is in reply to the United States representative who, going beyond the scope of the questions put to him or put to this Committee, is now asking us to base the majority decision just adopted by the Committee on the four grounds given in paragraph 1 of Article 11. Since the

Committee has only been asked about one of these grounds—the fourth—I find it a little strange that our hand is now being forced and we are being told that that would cover the four grounds available to the Committee. If that is the case, I think we should take another vote on each of the grounds: the first, the second, the third and the fourth.

Secondly, my delegation did not join in the decision taken just now. That is why it is somewhat hesitant to ask that the proposed decision should be amended. But I should nevertheless like to say that in my view it would be more fair, and possibly clearer, to replace the wording "could not be given immediate effect" by the words "could not take effect retroactively". Because that is what is at issue. It is an issue of challenging acquired rights, I think. Therefore it would be more fair to say "could not take effect retroactively".

The Chairman (translated from French): You will recall that, a good half hour ago, I suggested the possibility of putting the four questions to the Committee. After a discussion, the point of which I no longer see, we voted with what I believe to be general agreement in the Committee on one of the grounds, and we took a positive decision. Before coming to the question we must at this point, to use the words of the representative of France, take a retroactive measure. In other words before taking up the question of the formulation of the question, we have to know if the Committee wishes to invoke any other basis than that on which the decision was taken. I therefore see no other alternative to retracing our steps. If a representative wants us to raise another of the four questions, we will do so. If no one insists that we raise one of the other three questions, then we can proceed to the formulation. At all events we must avoid confusing the question of the ground for the decision with the question of formulation of the question to be put to the Court.

Mr. Rosenstock (United States of America): As we indicated, we would wish to have the question posed whether or not the Committee thinks that there is a substantial basis for an application grounded on the notion of the Tribunal's having exceeded its jurisdiction or competence. We believe that, in view of the way in which it has been chosen to interpret what the Committee has already done, this additional question should be placed before the Committee.

No one has raised either of the other two grounds, and there can therefore be no question of going through the four grounds.

The Chairman: Very well; we shall now ask the other question to which reference has been made:

The United States application also invokes the ground that the Tribunal has exceeded its jurisdiction or competence. Is the Committee of the view that there is a substantial basis for requesting an advisory opinion from the International Court of Justice on that ground?

Mr. Lahlou (Morocco) (translated from French): My attention may have strayed at some point but I have not fully understood the first question put to us. After the statement by the representative of Romania and the complications which emerged here, in this room, you, Mr. Chairman, made an admirable effort in exercising imagination and you made, I feel, a proposal which most members of the Committee have approved. I should now like an explanation from the Chair. Mr. Chairman, when you were seeking a middle course, which you proposed to us, did you have the four questions in mind and, by the indirect way in which you put the question to us were you trying to circumvent the difficulties? If that is so, I think that we have taken a decision on this middle-course solution, which falls between the United States proposal and the statement made by the representative of Romania. Otherwise I do not see what need there would be for the first question, on which we have already taken a decision.

The Chairman (translated from French): When the time came for the Committee to consider the decision it was to take, I announced that I was going

to put four questions in accordance with the normal practice of this Committee. At that time, there were objections from those who felt that the Committee should not be forced to take a decision on each of those four questions. I then put the question as to which ground or grounds in Article 11 were being invoked. As I understood it, after some discussion, the ground at issue was error on a question of law. But the decision that the Committee should put only one question to the Court, regarding the ground of error on a question of law, was obviously associated in the mind of the United States delegation with an "understanding" in the Committee which proved to be unfounded. Consequently, to eliminate any confusion, I felt obliged to retrace my steps and I put a second question—the question whether the Committee considered that there were serious grounds for the allegation that the Tribunal had exceeded its jurisdiction or competence.

Mr. Seydou (Niger) (translated from French): I am sorry to have to take the floor at this late stage of our proceedings, but I have the feeling that there are some small problems which have arisen since we voted on the question of the admissibility of the United States application. And, with reference to the problem that you raised, Mr. Chairman, a moment ago, I should be remiss if I failed to refer to document A/AC.86/Rev.2 which, unfortunately, is only issued in English, because we could not have a French text. But, with my rudimentary knowledge of English, I have formed the impression that Article 8 of this document clearly indicates the procedure that we should follow. It says—and I quote in English: "If the Committee decides that there is a substantial basis for the application under Article 11 of the Statute of the Administrative Tribunal, it should request an advisory opinion from the International Court of Justice." This means that, having taken a decision on the application presented by the United States, the only question we now have to decide is how to formulate the question to be referred to that Court and, in this connection, the United States, in its note A/AC.86/R.97, has formulated a question which I think is acceptable but, as far as I am concerned, I see no necessity for adding another question to this one. And my arguments concerning the admissibility of the American application were based on one of the grounds referred to in paragraph 1 of Article 11. I do not propose to go beyond that ground because, in so far as I have been able to analyse the Judgement rendered by the Tribunal, I have personally been unable to find any other ground on which we could accept the United States application.

The Chairman: I shall try to put the problem in the simplest possible terms. In my view—and perhaps in the view of the Committee as a whole—there has been a misunderstanding about the effect of having limited the basis of the application to one ground. It now appears that a second ground is needed. Unless there is a strong objection to this, I would suggest that we now take a decision on the second ground.

As there appears to be no objection, I shall now read out the question as I put it a moment ago:

The United States invokes as a second ground for its application the fact that the Tribunal exceeded its jurisdiction or competence. Is the Committee of the view that there is a substantial basis for requesting an advisory opinion from the International Court of Justice on that ground?

By 10 votes to 2, with 6 abstentions, the Committee answered the question in the affirmative.

The Chairman: We shall now revert to the matter of the formulation of the question to the International Court of Justice. The formulation suggested by the United States is contained in document A/AC.86/R.97. In this connection, the representative of France has made a suggestion, which I would now ask him to repeat.

Mr. Lennuyeux-Comnène (France) (translated from French): I do not know if I am in a position to formulate an amendment to a decision from which I have

dissociated myself, not once but twice. I merely said that I would prefer it if, at the end of the draft decision proposed by the United States delegation, instead of the words "could not be given immediate effect", the words "could not take effect retroactively", were used. For I believe that, in the present instance, the question of retroactivity is at issue.

Mr. Diaconu (Romania) (translated from French): I think that we have taken a decision on two of the grounds on which we are basing our request for an advisory opinion of the Court. In my opinion—although something may have escaped my attention—the United States application does not reproduce, does not elaborate these two grounds as we have reproduced them from Article 11 and on which we have taken a decision, on the basis of Article 11. Now that we have taken a decision as a Committee, we are no longer bound to follow the United States application. Now we are the Committee, and it is the Committee that is requesting an opinion of the Court. Therefore the Committee must formulate its request for an advisory opinion as it sees fit and above all, I would say, in accordance with its decision. In my view, all we need to say is that the Committee has found that there were grounds for requesting an advisory opinion of the Court on the basis of two requests, on which we have voted, and that the Committee is asking the Court to pronounce on these two questions. And we could then mention the questions. In fact in the letter from the United States there is a description, a text which we have not all, I think, been able to study, and which we cannot reproduce in the context of the request. What we can clearly spell out is what we have decided here, and what we have voted on.

Mr. Stuart (United Kingdom): My delegation would agree with the representative of Romania that this Committee is, indeed, free to reformulate the question if it so wishes. But the United States has formulated a question in its paper which is before us, and it really does seem to me that the most convenient thing for the Committee to do would be to consider whether or not that formulation is satisfactory. That will save us a certain amount of labour, if we find that it is satisfactory.

My delegation certainly thinks that the United States text is a reasonable formulation of the question to be put to the International Court of Justice, having regard to the two grounds—taken from the four grounds set out in Article 11 of the Statute of the Administrative Tribunal—which we have agreed are the grounds for seeking an advisory opinion from the International Court. I do not think that the fact that we have decided that there are those two grounds for seeking an advisory opinion means that we do not have to put a question to the Court. I think that we do. And, as I have said, I think that the way in which the United States has worded the question is satisfactory.

I should like to comment in particular on the amendment that the representative of France has proposed; that is, that in the phrase "immediate effect" in the United States formulation, the word "immediate" should be replaced by the word "retroactive". As I see it, the United States wording is neutral; it does not attempt to pre-empt the judgment of the International Court; it does not in any way prejudice the issue. It puts an entirely neutral question: is Judgement No. 273 of the Administrative Tribunal warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect? That leaves it to the Court to decide whether or not, if the resolution were given immediate effect, it would be retroactive. If we now use the word "retroactive", we might as well not go to the Court; we shall have decided already that the resolution has retroactive effect and that would be contrary to the provision of Staff Regulation 12.1 that the General Assembly may alter regulations when it chooses but without prejudice to the acquired rights of the staff.

So I would maintain that the amendment proposed by the representative of France would be prejudicial and would pre-empt the judgment we are asking the International Court to exercise. I am therefore completely opposed to the proposed amendment, and I support the formulation in document A/AC.86/R.97, which is before us.

Mr. Lennuyeux-Comnène (France) (translated from French): I do not insist on the amendment I proposed because, to all intents and purposes, I did not join in the decision. On the other hand I entirely share the views of the representative of Romania. The Committee has taken a decision based on two arguments and the International Court must be acquainted, through an official document, with these two arguments, if only for its edification.

The Chairman (translated from French): As I understand it, the International Court will see the two arguments in any case, in the form of decisions taken by the Committee earlier. I do not think that this is necessarily a decisive factor.

(continued in English)

The representative of France has withdrawn his proposal. We are now left with the proposal submitted by the United States.

The two questions that have been answered by the Committee will appear in its report, and therefore they will be transmitted to the International Court of Justice, as will the question that we decide to submit to it. In those circumstances, would the Committee agree to the formulation of the question proposed by the United States delegation being submitted to the International Court of Justice?

If there is no objection, that procedure will be followed.

It was so decided.

The Chairman: I have been asked by the secretariat of the Committee to put a technical matter before the Committee.

It will be recalled that last week it was decided that if the Committee took favourable action on the United States application, it would take a decision that an official transcript of the proceedings would be drawn up and distributed to the members of the Committee, to the parties in the proceedings before the Administrative Tribunal, and to the International Court of Justice. The proposal is that these transcripts should be prepared in the two official languages of the International Court of Justice—English and French. If there is no objection, I shall take it that the Committee agrees.

It was so decided.

The Chairman: The Committee has thus concluded its examination of the application presented by the United States.

At its first meeting, the Committee decided that meetings at which applications were discussed should be private and that decisions would be announced in public meetings. Before declaring open the public meeting at which I shall announce officially the decision of the Committee with regard to the United States application, I should like to consult members about the Committee's report. Obviously, there has been no time for the Rapporteur, the United Kingdom representative, to present a draft report to the Committee, and we must therefore decide how to proceed in this regard. Since the report is completely formal, does not contain a summary of the views expressed in the Committee, and follows a well-established model, I would propose that, in accordance with previous practice, the Committee entrust the drafting of the report to the Rapporteur, without meeting again to review the draft. The secretariat will distribute the report as soon as it is ready.

If there are no objections, I shall take it that the Committee agrees to that procedure.

It was so decided.

The meeting rose at 6 p.m.

A/AC.86(XX)/PV.2/Add.1
21 July 1981.

9. Transcript of the Proceedings at the Second Meeting (Open Part)

Held at Headquarters, New York,
on Monday, 13 July 1981, at 3.00 p.m.

Chairman: Mr. Philippe KIRSCH (Canada).

—Consideration of the application for review of Administrative Tribunal Judgement No. 273 *(Mortished* v. *the Secretary-General of the United Nations)* submitted by the United States of America (A/AC.86/R.97) *(continued)*.

Application for Review of Administrative Tribunal Judgement No. 273 (Mortished v. *Secretary-General of the United Nations) submitted by the United States of America (A/AC.86/R.97)*

The Chairman: The Committee on Applications for Review of Administrative Tribunal Judgements has decided that there is a substantial basis within the meaning of Article 11 of the Statute of the Administrative Tribunal for the application presented by the United States of America for review of Administrative Tribunal Judgement No. 273 delivered at Geneva on 15 May 1981. Accordingly, the Committee requests an advisory opinion of the International Court of Justice on the following question:

> "Is the judgement of the United Nations Administrative Tribunal in Judgement No. 273, *Mortished* v. *the Secretary-General*, warranted in determining that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect in requiring, for the payment of repatriation grants, evidence of relocation to a country other than the country of the staff member's last duty station?"

Mr. Lennuyeux-Comnène (France) (translated from French): You say that the Committee has taken a decision, which you read out. I wonder whether you could add, in that decision, "has decided by a majority", in order not to imply that it was a unanimous decision.

The Chairman: As I understand it, the report of the Committee will contain the conclusions we reached in the discussions in the closed meetings. It will state that the Committee voted on the two questions put to it, and took a decision by consensus on the formulation of the question to be put to the Court.

Mr. Andresen (Portugal): I should like to have some clarification, Mr. Chairman. It is my understanding that the Committee took two separate votes, indicating that there was a substantial basis for the United States application, on two separate grounds; and that it approved unanimously the formulation of the question to be put to the Court. Is that understanding correct?

The Chairman: That is my understanding.

Mr. Lahlou (Morocco) (translated from French): I would simply like to say that the context of what has just now been decided, in a plenary meeting, was quite different from that of the first decision. We were then at a closed meeting. What we decided on was decided on by a vote, but the only purpose of that vote was to produce a decision. It is traditional, I believe, never to reveal at open meetings how a decision was taken at a private or closed meeting. We took a decision, full stop. Was it taken by majority or by consensus? No one will know because our meeting was closed, and what we did will, in theory, remain secret.

Mr. Lennuyeux-Comnène (France) (translated from French): Mr. Chairman, I made no objection to the procedure you established at the beginning of our deliberations. Nevertheless, I believe that the Committee's report should at least state that decisions were taken and that they had to be taken by majority vote, because to have decisions of principle of such importance recorded as consensus decisions would be extraordinary. In fact, whether we so intended or not, we have politely overturned the United Nations Charter this afternoon, and that is certainly a proceeding with which the French delegation does not want to be associated.

The Chairman: I call on the Secretary of the Committee to explain to us the practice normally followed by this Committee.

Mr. Borg Olivier (Secretary of the Committee): As far as the practice of this Committee is concerned, I do not recall at this time whether there has ever been a vote on applications that have been before it. It is, however, the practice of all other Committees to indicate in their reports the manner in which they reached their decisions. I therefore think that it would be in accordance with the usual practice of the United Nations to indicate clearly in the report the results of the Committee's votes on the two grounds for deciding that there was a substantial basis for the application, and to indicate also that the Committee decided without a vote on the formulation of the question to the Court.

Mr. Rosenstock (United States of America): I think that we are becoming somewhat unrealistic. I see great merit in the position expressed by the representative of Morocco. After all, a decision is a decision is a decision. After a closed meeting, there is no need to include in the report—indeed, there is some question about the propriety of including—anything more than the decision.

But it does not seem to my delegation to make any difference, because we have already decided to make the transcript of these meetings available. So what we are really discussing is not whether or not it will be a matter of record that we took a vote, and not whether or not it will be a matter of record that the representative of France expressed certain views; that has already been decided by the decision we took to make the transcript available. What we are now discussing is a question of form; and it seems to me that, at least at the level of form, the representative of Morocco is correct: the meetings were closed meetings, and the most appropriate course—not necessarily the only one, but the most appropriate one—is to reflect in the report that there was a decision to do "X", and that there was a decision to do "Y", and that the question that is to be sent to the Court is "Z". One really has said quite enough when one has said that. Otherwise, one would have to go into various questions, and that does not seem to me to be necessary. I do not think it would be terrible if it were done, but it seems to me that it would blur the lines between the open and closed meetings—and to no particular purpose, since a transcript is being made available.

Mr. Lennuyeux-Comnène (France) (translated from French): It is perfectly proper for the United States representative to defend procedures that are the general rule in countries in which the system of democratic centralism is applied. But I find that the suggestion made by the Secretariat meets the concerns of the French delegation, and if it were possible to record in our report, that is to say, in the official document of our open meeting, majority decisions taken at a certain stage, my delegation, for its part, would be happy with that arrangement.

The Chairman (translated from French): Are there any other comments at this stage? Can I take it that the qualified formulation suggested by the representative of France is accepted?

Mr. Rosenstock (United States of America): No, it is not acceptable to qualify the decision, Mr. Chairman. If members of the Committee think it preferable to indicate in the report the exact result of the votes that were taken, we would have no objection. But we do object to qualifying the decision.

The Chairman (translated from French): Would the representative of France be prepared to submit a formulation reflecting his delegation's position on this question?

Mr. Lennuyeux-Comnène (France) (translated from French): If it is a matter of formulating a decision to be reported in an official document, the representative of France is quite prepared to state that during the deliberations he felt bound to dissociate himself from decisions that were taken at a closed meeting. You may have that recorded in the report, I don't mind.

The Chairman: It would seem to me that, possibly with some slight amendment, this is a statement of fact and would not engage the Committee as a whole in reopening the matter of the secrecy of its previous meetings.

Mr. Rosenstock (United States of America): Is the representative of France suggesting at this rather late stage that there was something wrong in having decided this matter in a closed meeting? That would be astonishing, since the point was not raised earlier and the delegation of France was among those that voted against hearing the counsel for Mr. Mortished.

We therefore find it somewhat surprising at this stage to hear any suggestion from the French delegation that there was anything improper, procedurally or otherwise, in following a course on which there had been a unanimous decision by the Committee—that is, to carry out our discussions on this matter in closed meetings.

That having been said, we have no objection to an appropriate reference being made in the report to the effect that the delegation of France did not vote in favour of the conclusions with regard to the issues in Article 11 of the Statute of the Administrative Tribunal—or words to that effect.

Mr. Diaconu (Romania) (translated from French): I don't understand what it is we are discussing now. The closed meeting is over. Accordingly, the Committee has decided what it was required to decide; it even decided on its report. It therefore seems to me, Mr. Chairman, that in open meeting you should simply announce, for the benefit of all concerned, the decision we took in closed session and stop at that. I just do not see that there is anything else for us to discuss now. I really think you ought simply to ask whether we can adjourn this meeting.

The Chairman (translated from French): There's nothing I want more, believe me.

Mr. Carias (Honduras) (translated from Spanish): My delegation too is finding it rather difficult to follow the discussion of the last few minutes and does not believe that the proper course for us is to have each delegation's position indicated concerning the decisions that were adopted.

My delegation is gratified by the way in which the secretariat of the Committee explained what United Nations practice was in reporting decisions adopted in a committee, namely, to indicate in the report that certain decisions were adopted, together with the votes, and then to state that the decision proper embodying the formulation of the request to the International Court would be taken without objection. The difficulty may have arisen because the word "unanimity" was used, which has a diferent shade of meaning from "without objection", although it boils down to the same thing. If we could revert to that type of formulation we might be able here to achieve a procedural consensus on the method of conveying the decisions of this Committee.

The Chairman (translated from French): I'm afraid that we have long since passed the stage at which a generally acceptable formulation by which all the Committee would be bound could be adopted.

I therefore wish first to ask whether other delegations wish to take the floor, after which I shall revert to the question I asked a few minutes ago, to wit, whether the delegation of France could put its own proposal on record in wording that could be discussed by it with the United States delegation and, of course, the Rapporteur. Would such a formulation be acceptable to the rest of the Committee?

Mr. Lahlou (Morocco) (translated from French): I should find it very difficult to accept the addition of any material to the records without the knowledge of the rest of the Committee. I would not agree to having direct contacts between France and the United States, even if that were to resolve our problems. For me this is the period of Ramadan; I am very tired but I will stay until 8.30 p.m. if necessary—that is the time when the fast ends—and I will never agree to having two delegations getting together to decide something without our knowledge.

The Chairman (translated from French): I hope I have not been misunderstood. I never suggested that the delegations of France and the United States should review the report on behalf of the Committee. All that I had in mind—and it is a practice that is followed from time to time elsewhere in the United Nations—is that in this case the report should record the position of the French delegation on this specific question as being the position of the French delegation.

Mr. Rosenstock (United States of America): It seems to my delegation that we could include a simple sentence such as this: the delegation of France wished it to be recorded that it voted against the two questions put to the Committee with regard to Article 11 of the Statute of the Administrative Tribunal.

If that is not acceptable, then we would ask the representative of France whether it is really necessary to record again what has been made so abundantly clear—especially since we are submitting a transcript of our proceedings to the Court, to the parties and to the members of the Committee.

If neither of those solutions is acceptable, we must decide whether or not in this case we should include in the report the actual results of the two votes taken by the Committee on the two grounds in Article 11, as well as a statement that the Committee decided without objection on the question to be put to the Court. That, however, seems to me to be the least preferable of the three solutions, and I wonder if the representative of France would be prepared to accept either of the other two.

Mr. Lennuyeux-Comnène (France) (translated from French): I am much more accommodating than what is being proposed by the United States representative. All that I was asking for was that the report should mention that at a certain stage, even a private stage, of our deliberations, decisions were taken by majority vote. Should the United States representative not wish that event to be reported "factually", I am quite prepared to accept his most recent suggestion. I have nothing at all against it.

The Chairman (translated from French): Is the most recent suggestion of the representative of the United States acceptable? I see no objections.

It was so decided.

The meeting rose at 6.20 p.m.

B. Other Documents Cited in or Relevant to Documents Considered by the Committee on Applications for Review of Administrative Tribunal Judgements at its Twentieth Session

10.	Provisional Rules of Procedure of the Committee[1]	A/AC.86/2/Rev.2
11.	Administrative Tribunal, Fifty-second Panel session, Verbatim Record of the first public meeting—Case No. 257: Mortished against the Secretary-General of the United Nations[1]	AT/PV.133

[1] Document not reproduced. *[Note by the Registry.]*

AT/DEC/273
30 juin 1981.

12. Tribunal administratif

Jugement n° 273

Affaire n° 257: MORTISHED Contre: LE SECRÉTAIRE GÉNÉRAL DE L'ORGANISATION DES NATIONS UNIES

LE TRIBUNAL ADMINISTRATIF DES NATIONS UNIES,

Composé comme suit: Madame Paul Bastid, présidente; M. Endre Ustor, vice-président; M. Francisco A. Forteza, vice-président; M. Herbert Reis, membre suppléant;

Attendu qu'à la demande de Ivor Peter Mortished, ancien fonctionnaire de l'Organisation des Nations Unies, le président du Tribunal a, avec l'assentiment du défendeur, prorogé successivement jusqu'au 30 septembre 1980 puis jusqu'au 10 octobre 1980 le délai prescrit pour l'introduction d'une requête devant le Tribunal;

Attendu que, le 10 octobre 1980, le requérant a introduit une requête dans laquelle il priait le Tribunal:

«A. De *dire et juger* qu'en vertu des modalités et des conditions et définitions fixées de façon détaillée par le Secrétaire général en application de l'article 9.4 du statut du personnel et de l'annexe IV audit statut en ce qui concerne le paiement de primes de repatriement, le requérant avait droit à une telle prime sans avoir à produire de pièces attestant son changement de résidence;

B. De *dire et juger* que le droit du requérant à une prime de rapatriement était un droit acquis;

C. De *dire et juger* que ce droit ne pouvait être aboli rétroactivement du fait de modifications apportées ultérieurement au statut et au règlement du personnel; et

D. Compte tenu de ce qui précède, d'*ordonner* au Secrétaire général de lui verser la somme à laquelle il a droit au titre de la prime de rapatriement conformément à l'annexe IV au statut du personnel»;

Attendu que le requérant a demandé une procédure orale le 25 février 1981;

Attendu que le défendeur a produit sa réplique le 5 mars 1981;

Attendu que le requérant a produit des observations écrites le 10 avril 1981;

Attendu que le Tribunal a entendu les parties lors d'une séance publique tenue le 28 avril 1981;

Attendu que des pièces supplémentaires ont été déposées par le requérant et par le défendeur le 28 avril 1981;

Attendu que des renseignements supplémentaires ont été présentés par le défendeur les 28 et 29 avril 1981 et par le requérant le 29 avril 1981;

Attendu que les renseignements supplémentaires présentés par le requérant contenaient une demande tendant au versement de 1206,45 dollars à titre d'intérêts pendant un an sur la prime de rapatriement évaluée à 24 129 dollars;

Attendu que des renseignements et pièces supplémentaires ont été présentés par le défendeur le 1er mai 1981;

Attendu que les faits de la cause sont les suivants:

Le requérant, de nationalité irlandaise, est entré au service de l'Organisation de l'aviation civile internationale (OACI) le 14 février 1949. En 1958, il a été muté à l'Organisation des Nations Unies où il a reçu un engagement permanent en qualité de traducteur-rédacteur de comptes rendus analytiques. Le 1er avril 1967, il a été muté du Siège à l'Office des Nations Unies à Genève.

Dans un mémorandum du 6 décembre 1979, le requérant, qui était devenu chef adjoint de la section anglaise de traduction et devait prendre sa retraite le 30 avril 1980, a informé le chef de la division du personnel de l'Office des Nations Unies à Genève que vu ce qu'il avait récemment entendu dire au sujet des mesures qui étaient recommandées à l'Assemblée générale en vue de la modification des conditions d'octroi de la prime de rapatriement énoncées dans l'instruction administrative ST/AI/262 du 23 avril 1979, et en particulier à l'alinéa *d)* de son paragraphe 2, il prévoyait qu'un très sérieux problème se poserait lors de son départ à la retraite. Le texte de cette instruction administrative était le suivant:

«1. Comme l'a annoncé la circulaire ST/IC/79/5 du 22 janvier 1979, l'Assemblée générale a décidé, dans sa résolution 33/119 du 19 décembre 1978, que le paiement de la prime de rapatriement aux fonctionnaires qui peuvent y prétendre serait subordonné à la présentation, par les intéressés, de pièces attestant leur changement effectif de résidence, selon les modalités qui seraient établies par la Commission de la fonction publique internationale.

2. Comme suite à cette décision, la Commission a arrêté les modifications suivantes des conditions d'octroi de la prime de rapatriement:

«*a)* A compter du 1er juillet 1979, le paiement de la prime de rapatriement sera subordonné à la présentation, par l'ancien fonctionnaire, de pièces attestant qu'il change de résidence en s'installant dans un pays autre que celui de son dernier lieu d'affectation;

b) Sera acceptée comme preuve du changement de résidence toute pièce attestant que l'ancien fonctionnaire a établi sa résidence dans un pays autre que celui de son dernier lieu d'affectation, telle qu'une déclaration émanant de certaines autorités du pays (immigration, police, administration fiscale ou autre), du plus haut fonctionnaire de l'ONU dans le pays ou du nouvel employeur de l'ancien fonctionnaire;

c) Tout ancien fonctionnaire pourra faire valoir son droit à la prime dans un délai de deux ans à compter de la date de cessation de service;

d) Nonobstant l'alinéa *a)* ci-dessus, les fonctionnaires ayant pris leurs fonctions avant le 1er juillet 1979 conserveront le droit au montant de la prime qui correspond aux années et aux mois de service ouvrant droit à ladite prime déjà accomplis à cette date, sans avoir à produire de pièce attestant leur changement de résidence; ils ne pourront toutefois prétendre à un montant supplémentaire au titre de périodes de services accomplies après cette date que s'ils satisfont aux conditions énoncées aux alinéas *a)* à *c)*»;

3. A compter du 1er juillet 1979, les dispositions ci-dessus régiront les modalités de paiement aux fonctionnaires de l'Organisation de la prime de rapatriement prévue par l'annexe IV au statut du personnel. Les modifications voulues seront apportées en temps utile au règlement du personnel.»

Dans un autre mémorandum en date du 19 décembre 1979, adressé au chef de la division du personnel, le requérant a déclaré plus précisément:

«3. A l'alinéa *d)* du paragraphe 2 de l'instruction administrative, les fonctionnaires ont été informés de ce que l'on avait l'intention de supprimer progressivement le droit à une prestation due au moment du départ à la retraite, qui existe depuis plusieurs décennies et sur laquelle un grand

nombre de fonctionnaires ont compté tout au long de leur carrière pour atténuer les difficultés rencontrées lors de la mise à la retraite, compte tenu en particulier de l'insuffisance et de l'érosion du pouvoir d'achat des pensions versées par les Nations Unies. Aucun motif justifiant la suppression de ce droit n'a été donné au personnel, mais, si une telle mesure devait être prise, il semblerait au moins normal et raisonnable que ce soit progressivement.

4. Mon engagement arrivant à expiration dans quelques mois, j'ai, au cours des derniers jours, reçu oralement et par écrit de la division du personnel de l'Office des Nations Unies à Genève un certain nombre de pronostics, d'avis et de suggestions au sujet des mesures que l'Assemblée générale pourrait prendre et qui pourraient avoir pour effet de supprimer brusquement, à partir du 1er janvier 1980, le droit visé au paragraphe 3 ci-dessus. Cependant, à ce jour (c'est-à-dire cinq jours ouvrables avant le 1er janvier 1980), je n'ai été informé ni d'aucune décision officielle ayant une incidence sur le droit susmentionné ni de l'annulation ou de la modification de l'instruction administrative ST/AI/262. En conséquence, pour ce qui est des droits auxquels je peux prétendre à la fin de mon engagement, je considère et continuerai de considérer que l'Organisation des Nations Unies, en sa qualité d'employeur, est liée par les clauses de ma lettre de nomination signée au nom du Secrétaire général de l'Organisation des Nations Unies le 5 août 1958.»

Le 21 décembre 1979, l'instruction administrative ST/AI/269 portant modification de l'instruction administrative ST/AI/262, avec effet au 1er janvier 1980, a été publiée; elle était ainsi conçue:

«1. Par la circulaire ST/IC/79/84 du 14 décembre 1979, les fonctionnaires ont été informés de la décision que prendrait vraisemblablement l'Assemblée générale sur la question de la prime de rapatriement. A sa 106e séance plénière, tenue le 17 décembre 1979, l'Assemblée a pris cette décision en adoptant sa résolution 34/165.

2. En conséquence, les conditions d'octroi de la prime de rapatriement énoncées dans l'instruction administrative ST/AI/262 du 23 avril 1979 sont modifiées, avec effet au 1er janvier 1980, par la substitution d'un nouvel alinéa *d)*; sous leur forme modifiée, elles se lisent comme suit:

«*a)* Le paiement de la prime de rapatriement sera subordonné à la présentation, par l'ancien fonctionnaire, de pièces attestant qu'il change de résidence en s'installant dans un pays autre que celui de son dernier lieu d'affectation;

b) Sera acceptée comme preuve du changement de résidence toute pièce attestant que l'ancien fonctionnaire a établi sa résidence dans un pays autre que celui de son dernier lieu d'affectation, telle qu'une déclaration émanant de certaines autorités du pays (immigration, police, administration fiscale ou autre), du plus haut fonctionnaire de l'ONU dans le pays ou du nouvel employeur de l'ancien fonctionnaire;

c) Tout ancien fonctionnaire pourra faire valoir son droit à la prime dans un délai de deux ans à compter de la date de cessation de service;

d) Les fonctionnaires n'auront droit à aucun montant au titre de la prime de rapatriement à moins qu'ils ne présentent des pièces attestant qu'ils se réinstallent dans un pays autre que celui de leur dernier lieu d'affectation.»

3. Les modifications voulues seront apportées en temps utile au règlement du personnel.»

Le même jour, le requérant a été informé en conséquence et a été avisé que la division du personnel était autorisée à lever la règle du préavis de trois mois et à accepter jusqu'au 31 décembre 1979 des démissions prenant effet immédiatement. Le 18 février 1980, il a adressé une requête à la commission paritaire de recours et demandé au Secrétaire général d'accepter qu'il soumette directement l'affaire au Tribunal. Le 11 avril 1980, le requérant a reçu, dans le cadre des formalités de mise à la retraite, une notification administrative de décharge dans laquelle il était indiqué qu'il avait droit à une prime de rapatriement pour la période comprise entre le 14 février 1949 et le 30 avril 1980 «sous réserve [de la production] d'une pièce attestant le changement de résidence». Après un échange de mémorandums entre le requérant et la division du personnel d'où il ressort que le défendeur a refusé de verser la prime de rapatriement au requérant en l'absence d'une pièce attestant le changement de résidence et que ce dernier a refusé de fournir une telle pièce, le requérant a été avisé le 1er mai 1980 que le Secrétaire général acceptait qu'il soumette directement son affaire au Tribunal. Le 10 octobre 1980, il a introduit la requête mentionnée plus haut.

Attendu que les principaux arguments du requérant sont les suivants:

1. En vertu tant de l'article 9.4 du statut du personnel et de l'annexe IV audit statut que de sa lettre de nomination, le requérant avait en principe droit à une prime de rapatriement bien que le versement de cette prime ait été expressément subordonné à des modalités devant être fixées par le Secrétaire général ainsi qu'à des conditions et définitions détaillées. Selon les modalités fixées par le Secrétaire général qui étaient en vigueur avant le 1er juillet 1979, le requérant avait droit à ce qu'une prime de rapatriement lui soit versée sans avoir à produire de pièces attestant son changement de résidence. Les modalités établies par le Secrétaire général qui sont entrées en vigueur le 1er juillet 1979 confirmaient que le requérant avait droit au versement d'une prime de rapatriement au titre des années et des mois de service ouvrant droit à ladite prime accomplis avant le 1er juillet 1979 sans avoir à produire de pièces attestant son changement de résidence.

2. Le droit du requérant à une prime de rapatriement était un «droit acquis»:

a) La prime de rapatriement a un caractère personnel. Son montant dépend en effet de la situation de famille de chaque fonctionnaire, de la catégorie à laquelle il appartient et — ce qui est le plus important — du temps passé par l'intéressé au service de l'Organisation. Son montant étant proportionnel au nombre d'années de service, il y a une analogie entre la prime et les prestations de retraite;

b) La prime de rapatriement est une prestation «gagnée» au cours de la période de service: à n'importe quel moment pendant la carrière du fonctionnaire, le caractère progressif de la prime permet d'en déterminer le montant précis, et l'importance de ce montant est fonction de la durée de la période de service. Ainsi, le fait que la prime est effectivement versée à la cessation de service n'est pas plus pertinent que dans le cas des droits à pension.

3. Le droit du requérant à la prime de rapatriement ne pouvait pas être aboli rétroactivement du fait de modifications apportées ultérieurement au statut et au règlement du personnel. La modification au statut et au règlement du personnel qui a pris effet le 1er janvier 1980 n'est pas applicable au requérant en ce qui concerne ses droits acquis.

Attendu que les principaux arguments du défendeur sont les suivants:

1. En adoptant la résolution 34/165, qui mettait fin à partir du 1er janvier 1980 à la pratique suivie antérieurement consistant à verser aux fonctionnaires, à leur

cessation de service, une prime de rapatriement sans exiger d'eux la présentation de pièces attestant leur changement de résidence, l'Assemblée générale a régulièrement exercé les pouvoirs qui lui sont conférés par le paragraphe 1 de l'article 101 de la Charte. A compter du 1er janvier 1980, les fonctionnaires et le Secrétaire général sont liés par les dispositions de la résolution 34/165:

a) Les résolutions de l'Assemblée générale ayant une incidence sur les conditions d'emploi font partie intégrante du contrat des fonctionnaires;

b) La pratique administrative antérieure qui consistait à verser la prime de rapatriement sans exiger de pièces attestant un changement de résidence ne créait des droits à la cessation de service que tant que les règles autorisant cette pratique étaient en vigueur, c'est-à-dire jusqu'au 31 décembre 1979.

2. La modification apportée par l'Assemblée générale aux conditions d'octroi de la prime de rapatriement et son application au requérant ne portent pas atteinte aux droits de ce dernier et sont compatibles avec l'article 12.1 du statut du personnel:

a) Le droit aux conditions d'octroi de la prime de rapatriement n'est pas un droit «acquis» lors de l'entrée en fonctions;

b) Le droit à la prime de rapatriement n'est pas «gagné» pendant la période de service;

c) Les conditions d'octroi des indemnités n'entrent pas dans le cadre de l'exception prévue à l'article 12.1 du statut du personnel en ce qui concerne les effets sur les fonctionnaires des amendements apportés audit statut.

Le Tribunal, ayant délibéré du 28 avril au 15 mai 1981, rend le jugement suivant:

I. Le requérant soutient qu'à l'époque de sa mise à la retraite, le 30 avril 1980, il était en droit de recevoir la prime de rapatriement sans avoir à produire de pièces attestant son intention de s'installer dans un autre pays que celui de son dernier lieu d'affectation, le droit acquis à la prime rendant inapplicable à son égard l'instruction administrative ST/AI/269.

Le défendeur reconnaît que si le requérant avait donné sa démission avant le 1er janvier 1980, la prime de rapatriement aurait pu lui être versée sans qu'il ait à établir son intention de changer de résidence. Mais par sa résolution 34/165 du 17 décembre 1979, l'Assemblée générale a décidé «que, avec effet au 1er janvier 1980, les fonctionnaires n'ont droit à aucun montant au titre de la prime de rapatriement à moins qu'ils ne présentent des pièces attestant qu'ils se réinstallent dans un pays autre que celui de leur dernier lieu d'affectation».

Le refus de payer la prime de rapatriement au requérant a donc été fondé sur l'instruction administrative ST/AI/269 établie en conséquence de la résolution 34/165.

Avant d'examiner la portée juridique de la requête, le Tribunal doit rappeler sur quelles bases sont établies les obligations juridiques de l'Organisation à l'égard du requérant en tant que fonctionnaire au service de l'Organisation depuis 1958.

II. La situation juridique des fonctionnaires de l'Organisation des Nations Unies est déterminée par un contrat passé par l'intéressé avec l'autorité compétente pour agir au nom de l'Organisation. Les dispositions de ce contrat lient les parties et ne peuvent être modifiées que d'accord entre elles. Intitulé «lettre de nomination», le contrat est signé par les deux parties. Le Tribunal a reconnu que des obligations complémentaires concernant un fonctionnaire peuvent être assumées par l'Organisation en vertu d'engagements pris à l'occasion ou après la conclusion de ce contrat (jugements nos 95, *Sikand*, et 142, *Bhattacharyya*).

Les dispositions sommaires contenues dans la lettre de nomination sont

complétées par des textes de portée générale beaucoup plus détaillés. La lettre de nomination s'y réfère en stipulant que l'engagement est offert «sous réserve des dispositions applicables du statut et du règlement du personnel, ainsi que de toutes modifications ultérieures de ces textes». Ainsi, par cette disposition, des documents de portée générale sont incorporés dans le contrat et le fonctionnaire accepte à l'avance les modifications qui pourront leur être apportées. Lors de l'engagement, les textes du statut et du règlement du personnel sont remis à l'intéressé et mention de cette remise est faite dans la lettre de nomination. Par ailleurs, les modifications apportées ultérieurement à ces textes sont portées à la connaissance de chaque membre du personnel par la publication de circulaires administratives contenant le texte des nouvelles dispositions applicables et la date de leur entrée en vigueur (jugement n° 249, *Smith*). A cette date, les dispositions nouvelles se trouvent incorporées dans le contrat.

III. La détermination des autorités compétentes pour élaborer le statut et le règlement du personnel a été faite par la Charte. L'article 101.1 de la Charte dispose que:

> «Le personnel est nommé par le Secrétaire général conformément aux règles fixées par l'Assemblée générale».

L'article 7 déclare que le Secrétariat est un «organe principal» de l'Organisation et l'article 97 qualifie le Secrétaire général comme «le plus haut fonctionnaire de l'Organisation».

Le statut du personnel adopté par l'Assemblée générale dispose sous le titre «Portée et objet»:

> «Le statut du personnel énonce les conditions fondamentales d'emploi, ainsi que les droits, obligations et devoirs essentiels du Secrétariat de l'Organisation des Nations Unies. Il pose les principes généraux à suivre pour le recrutement et l'administration du Secrétariat. Le Secrétaire général, en sa qualité de chef de l'administration, édicte et applique dans un règlement du personnel les dispositions, compatibles avec ces principes, qu'il juge nécessaires.»

Dans le chapitre «Dispositions générales», l'article 12.2 du statut est ainsi rédigé:

> «Le Secrétaire général fait rapport chaque année à l'Assemblée générale sur toute disposition du règlement du personnel ou toute modification à ce règlement qu'il a pu prescrire en application du présent statut.»

Ces textes donnent compétence au Secrétaire général pour établir et modifier le règlement du personnel dans le cadre défini par le statut du personnel. Le Secrétaire général a l'obligation d'informer l'Assemblée générale de l'exercice de sa compétence réglementaire découlant de la Charte et du statut mais la mise en vigueur des textes établis, qui a lieu à la date fixée par le Secrétaire général, n'est pas subordonnée à une approbation de l'Assemblée générale.

Autrement dit, la situation juridique d'un fonctionnaire est régie par les dispositions du règlement du personnel dès qu'elles sont entrées en vigueur.

IV. S'agissant de l'exercice de sa propre compétence réglementaire, l'Assemblée générale a, dans l'article 12.1 du statut du personnel, affirmé le principe fondamental du respect des droits acquis dans les termes suivants:

> «Les dispositions du présent statut peuvent être complétées ou amendées par l'Assemblée générale, sans préjudice des droits acquis des fonctionnaires.»

Suivant la disposition 112.2 *a)* du règlement du personnel, «le Secrétaire général peut apporter au présent règlement les amendements compatibles avec le statut du personnel».

Ainsi, le Secrétaire général est tenu de respecter les droits acquis des fonctionnaires comme l'Assemblée générale elle-même.

V. Le Tribunal doit enfin relever que, suivant l'article premier de son statut, la Commission de la fonction publique internationale (CFPI) a été créée «pour assurer la réglementation et la coordination des conditions d'emploi dans les organisations qui appliquent le régime commun des Nations Unies». Suivant l'article 10, la CFPI fait à l'Assemblée générale des recommandations touchant les indemnités et prestations auxquelles les fonctionnaires ont droit et qui sont fixées par l'Assemblée générale; une note à l'article 10 mentionne parmi celles-ci la prime de rapatriement. Suivant l'article 9, la CFPI est guidée dans l'exercice de ses fonctions par le principe «qui vise à établir une fonction publique internationale unifiée par l'application de normes, de méthodes et de dispositions communes en matière de personnel».

Le Tribunal a reconnu que ces dispositions relatives à la CFPI font partie du régime applicable au personnel des Nations Unies (jugement n° 236, *Belchamber*). Mais, sauf dans des cas exceptionnels, la CFPI n'a pas compétence pour prendre des décisions directement applicables aux membres du personnel.

VI. Le Tribunal doit maintenant considérer si le requérant peut se prévaloir de droits en ce qui concerne la prime de rapatriement.

Le Tribunal relève que, lors de son engagement à l'Organisation des Nations Unies le 30 juillet 1958, le requérant, qui était entré au service de l'OACI le 14 février 1949, a reçu du service du personnel une formule de mouvement de personnel *(Personnel Action Form)* mentionnant expressément: *«Service recognized as continuous from 14 February 1949»* et *«Credit towards repatriation grant commences on 14 February 1949»*.

Ces dispositions, bien que ne se trouvant pas dans la lettre d'engagement elle-même, constituent incontestablement de la part de l'Organisation la reconnaissance expresse du droit à la prime de rapatriement comme de la validation à cet effet de plus de neuf ans de services déjà accomplis à l'OACI.

Ainsi, dans le cas du requérant, une référence formelle a été faite, lors de son engagement, à la prime de rapatriement et au principe du lien entre le montant de cette prime et la durée des services. Le requérant se trouve de ce fait dans la situation relevée par le Tribunal dans les jugements n^{os} 95 et 142 précités, c'est-à-dire que des obligations spéciales ont été assumées par l'Organisation à cet égard.

VII. Lors de l'entrée du requérant à l'Organisation des Nations Unies, la prime de rapatriement existait depuis plusieurs années. Elle avait été établie par l'Assemblée générale par la résolution 470 (V) du 15 décembre 1950 après suppression d'une indemnité d'expatriation payée annuellement. La prime de rapatriement a été conçue à l'origine comme devant compenser pour le fonctionnaire les frais liés à sa réinstallation dans son pays d'origine. Le texte revisé du statut du personnel adopté dans la résolution 590 (VI) et mis en vigueur le 1er mars 1952 a incorporé les textes adoptés par l'Assemblée générale en 1950 (art. 9.4 et annexe IV, par. 4). Le règlement du personnel entré en vigueur le 1er janvier 1953 a défini dans sa disposition 109.5 *a)* l'expression «obligation de rapatrier» comme signifiant l'obligation d'assurer le retour en un lieu situé en dehors du pays d'affectation. D'autre part, il était prévu que la perte du droit au paiement du voyage de retour, perte qui intervenait si le voyage n'était pas effectué dans les six mois, était sans effet sur le droit à la prime de rapatriement (disposition 109.5 *i)*). Ainsi, dès 1953, le lien entre la prime de rapatriement et le retour «dans la patrie» était rompu dans le règlement du personnel. Le droit de percevoir la prime était admis en cas d'installation hors du pays d'origine. Le sens littéral du terme «rapatriement» était abandonné. Ces dispositions portées à la connaissance de l'Assemblée générale n'ont pas été contestées à l'époque.

VIII. Le Comité consultatif pour les questions administratives (CCQA), organe relevant du Comité administratif de coordination qui assure les consultations entre l'Organisation des Nations Unies et les institutions spécialisées prévues par les accords entre elles suivant les articles 57 et 63 de la Charte, a présenté le 14 mai 1952 un rapport dans lequel il a fait des recommandations concernant les primes de rapatriement (CO-ORDINATION/R.124, p. 6). Au nombre de celles-ci, il a indiqué que la prime devait être versée que le fonctionnaire soit effectivement rapatrié ou non; toutefois, l'Organisation n'a pas d'obligation lorsque le fonctionnaire adopte la nationalité du lieu d'affectation.

Vingt-deux ans plus tard, le Comité consultatif a chargé son secrétariat d'étudier le régime de la prime de rapatriement aux fins d'une enquête auprès des organisations en vue de considérer s'il y avait lieu de modifier le système établi. Le document en date du 6 mai 1974 (CCAQ/SEC/325(PER)) pose la question de savoir si la prime ne devrait être payée que s'il y a en fait rapatriement. Il indique que le but est d'aider le fonctionnaire et sa famille retournant dans leur pays d'origine et qu'il n'y a pas de justification logique de payer la prime à un fonctionnaire qui reste dans le pays de sa dernière affectation. Mais il ajoute qu'appliquer ce qui est logique soulève de grandes difficultés. Il note que les organisations n'ont pas le moyen de savoir où réside un fonctionnaire qui a quitté le service et il arrive en fait que le fonctionnaire ait plusieurs résidences. Même s'il a reçu le paiement du voyage de retour, il peut revenir à ses frais dans le pays de sa dernière affectation où il désire résider. Enfin, le fonctionnaire peut hésiter sur le choix de sa résidence définitive et demander que la question du paiement reste en suspens. Le document concluait: «Pour toutes ces raisons, le secrétariat du CCQA doute qu'il soit pratiquement possible d'essayer de subordonner le paiement de la prime à la preuve du rapatriement.»

Le défendeur a constaté que le règlement de certaines institutions spécialisées avait expressément reflété la pratique de ne pas exiger la preuve d'un changement de résidence pour le versement de la prime de rapatriement mais que celui de l'Organisation des Nations Unies ne l'avait pas fait, gardant le silence sur la preuve d'un changement de résidence.

Le Tribunal constate toutefois que le document établi en 1974 prouve que le système proposé dès 1952 par le Comité consultatif pour les questions administratives a été effectivement suivi au bénéfice des fonctionnaires, même si aucun texte réglementaire de l'Organisation des Nations Unies ne le consacrait expressément. Les parties ont examiné la question de savoir si une pratique constamment suivie depuis près de trente ans pouvait faire naître un droit acquis au sens de l'article 12.1 du statut du personnel. Eu égard à la situation propre du requérant, le Tribunal estime qu'il n'a pas à se prononcer sur cette question *in abstracto*.

IX. L'existence de la prime de rapatriement et le rôle respectif de l'Assemblée générale et du Secrétaire général dans la détermination de son régime juridique reposent sur le statut du personnel.

Suivant l'article 9.4 du statut du personnel, «le Secrétaire général fixe un barème pour le versement des primes de rapatriement dans les limites des maximums indiqués à l'annexe IV du présent statut et aux conditions prévues dans cette annexe». L'annexe IV stipule que «les conditions et définitions concernant le droit à cette prime sont fixées de façon détaillée par le Secrétaire général».

Le Tribunal observe que dans l'annexe IV au statut du personnel l'Assemblée générale a fixé certains points de façon précise: le montant de la prime est «proportionnel au temps que l'intéressé a passé au service de l'Organisation des Nations Unies»; il est calculé d'après un barème contenu dans l'annexe tenant compte notamment du nombre d'années de service continu hors du pays d'origine jusqu'à un maximum de douze; et le texte exclut du bénéfice de la prime un fonctionnaire renvoyé sans préavis. Par ailleurs, la détermination du droit à la prime est énoncée dans des termes ouvrant une marge d'appréciation:

«Ont droit, *en principe*, à la prime de rapatriement les fonctionnaires que l'Organisation *est tenue de rapatrier.*» (Les italiques sont du Tribunal.) Le Tribunal note que le texte ne vise pas les fonctionnaires *effectivement* rapatriés mais ceux pour lesquels cette obligation existe à la charge de l'Organisation. En outre, l'expression «en principe» laisse au Secrétaire général autorité pour déterminer ce qu'il est opportun de faire en pratique.

Ces deux dispositions du statut du personnel qui reconnaissent expressément que le régime de la prime de rapatriement rentre dans la compétence réglementaire du Secrétaire général sont toujours en vigueur. Aucun texte nouveau concernant cette prime n'a été incorporé dans le statut du personnel par l'Assemblée générale lors de ses trente-troisième et trente-quatrième sessions.

La question se savoir si le requérant est en droit de se prévaloir de droits acquis ne se pose donc pas par rapport à des textes du statut du personnel relevant de la compétence de l'Assemblée générale, même si l'objet de la requête se rattache étroitement aux décisions prises par l'Assemblée générale concernant la prime de rapatriement.

X. Les décisions prises par l'Assemblée générale à ses trente-troisième et trente-quatrième sessions l'ont été à la suite de travaux effectués par la Commission de la fonction publique internationale (CFPI). Déjà, dans son rapport à la vingt-septième session de l'Assemblée générale (A/8728, vol. I, par. 376), le Comité spécial de 1971-1972 pour la revision du régime des traitements avait fait état d'opinions divergentes en son sein au sujet de la prime de rapatriement et avait suggéré que son régime soit examiné par la CFPI dont la création était alors envisagée.

Lors de la trente et unième session de l'Assemblée générale, durant le débat qui a eu lieu à la Cinquième Commission sur le rapport de la CFPI, quelques représentants ont, en raison de la situation financière, fait des suggestions touchant l'octroi de la prime de rapatriement notamment dans le cas où le fonctionnaire reste au lieu d'affectation après sa retraite (Autriche, A/C.5/31/SR.32, par. 46; Canada, SR.34, par. 14; Belgique, SR.34, par. 41). Dans sa résolution 31/141 B, l'Assemblée générale a prié la CFPI de réexaminer, compte tenu des vues exprimées à la Cinquième Commission pendant la trente et unième session:

> «*a)* Les conditions d'octroi des versements à la cessation de service (par exemple, prime de rapatriement...) ... et la possibilité de fixer un plafond pour le total des sommes auxquelles lesdits versements donnent droit.»

En 1978, la CFPI a concentré son attention sur deux questions et notamment sur «l'opportunité de verser cette prime à un fonctionnaire qui, après la cessation de service, ne retourne pas dans son pays d'origine». Dans son rapport (A/33/30, par. 182 et suiv.), la CFPI a admis les difficultés pratiques de connaître les déplacements d'un ancien fonctionnaire, mais elle a reconnu que la prime ne devrait pas être versée à un fonctionnaire qui, à la cessation de service, s'installait définitivement dans le pays de son dernier lieu d'affectation. Elle a recommandé de subordonner le paiement de la prime à une déclaration d'intention du fonctionnaire et a ajouté:

> «Cette procédure devrait entrer en vigueur au 1er janvier 1979 pour les nouveaux fonctionnaires. Si les organisations estiment qu'il conviendrait d'accorder un certain délai aux fonctionnaires en poste qui ont pu déjà décider de leur lieu de résidence à la cessation de service en présumant qu'ils recevraient la prime, le CCQA devrait convenir d'une mesure transitoire commune.» (Par. 186.)

XI. Au cours du débat à la Cinquième Commission, en 1978, la discussion a porté essentiellement sur le moyen suggéré par la CFPI pour contrôler le changement de résidence, sans considérer le problème d'une mesure transitoire

soulevé par la CFPI. Un projet de résolution présenté par le représentant du Japon (A/C.5/33/L.33/Rev.1) disposait notamment:

> «*[L'Assemblée générale décide]* que le paiement de la prime de rapatriement aux fonctionnaires qui peuvent y prétendre sera subordonné à la présentation, par les intéressés, de pièces justificatives attestant leur changement effectif de résidence, selon les modalités qui seront établies par la Commission [de la fonction publique internationale].»

Le représentant du Japon a déclaré: «C'est à la CFPI qu'il appartiendra d'établir les modalités d'application exactes de cette disposition» (A/C.5/33/SR.56, par. 29). Ce faisant, il paraît avoir visé la présentation de pièces par les intéressés. A ce moment du débat, le Secrétaire général adjoint à l'administration et à la gestion est intervenu pour faire connaître l'«inquiétude» que plusieurs dispositions du projet de résolution causaient au Secrétaire général et aux chefs de secrétariat des diverses autres organisations et institutions spécialisées:

> «Dans le cas de la prime de rapatriement, [le Secrétaire général adjoint] présume que la CFPI fera preuve d'une certaine souplesse pour appliquer la disposition qui est proposée... Comme il s'agit là d'un droit acquis, il sera peut-être nécessaire de porter la question devant le Tribunal administratif et cela pourrait créer des problèmes à moins que la CFPI ne trouve un moyen de résoudre la difficulté.» (A/C.5/33/SR.56, par. 32.)

Le Tribunal observe que ces propos n'ont pas été contestés et que rien dans la discussion ne précise quelles modalités pourront être établies par la CFPI.

La partie pertinente du projet de résolution a été adoptée par l'Assemblée générale dans sa résolution 33/119 du 19 décembre 1978.

XII. Ainsi l'Assemblée générale, ayant formulé un objectif essentiel qui correspondait aux vues exprimées dans le rapport de la CFPI, chargeait celle-ci d'établir des modalités de mise en œuvre. La CFPI devait évidemment agir conformément à sa compétence pour assurer la coordination dans le cadre du régime commun.

Dans son rapport à la trente-quatrième session de l'Assemblée générale (A/34/30), la CFPI a examiné l'ensemble du problème et notamment la question d'un droit acquis, et elle est arrivée à ce sujet aux conclusions suivantes:

> «24. Certains membres ont contesté qu'on puisse dire qu'un fonctionnaire avait un droit acquis à la prime de rapatriement s'il ne se faisait pas rapatrier et ne se réinstallait pas ailleurs. A leur avis, s'il existait des droits acquis, seules les personnes qui avaient pris leur retraite pouvaient s'en prévaloir, mais certes pas les fonctionnaires en activité, dont les droits devaient être fondés sur une interprétation juste du statut du personnel en vigueur et non pas sur une pratique administrative qui violait l'article pertinent du statut dans la mesure où cet article indiquait expressément que la prime de rapatriement était destinée aux fonctionnaires que les organisations étaient tenues de rapatrier. La Commission a demandé l'avis du Bureau des affaires juridiques du Secrétariat de l'Organisation des Nations Unies, lequel Bureau a déclaré qu'en ce qui concerne l'Organisation des Nations Unies aucune clause expresse ou implicite ne prévoyait que seuls les fonctionnaires qui faisaient effectivement valoir leur droit au paiement des frais de voyage devaient recevoir la prime de rapatriement; les dispositions pertinentes du règlement du personnel avaient été soumises à l'Assemblée générale, qui en avait pris note et devait donc avoir estimé que la disposition du règlement était conforme à l'esprit et à l'objet du statut du personnel qu'elle avait elle-même approuvé. Compte tenu de cet avis, la Commission a décidé que la condition du changement de résidence ne devrait s'appliquer qu'à la partie de la prime correspondant aux services

accomplis par l'intéressé hors de son pays d'origine après la date à laquelle le règlement avait été modifié.»

En conséquence, la CFPI a adopté le texte suivant, publié comme circulaire le 6 avril 1979 sous la cote CIRC/GEN/39:

«Les modifications aux modalités d'octroi de la prime de rapatriement qui sont indiquées ci-après sont apportées par la Commission de la fonction publique internationale en application du paragraphe 4 de la partie IV de la résolution 33/119 de l'Assemblée générale:

a) Avec effet du 1er juillet 1979, le paiement de la prime de rapatriement est subordonné à la présentation, par les anciens fonctionnaires, de pièces attestant qu'ils se réinstallaient dans un pays autre que celui de leur dernier lieu d'affectation;

b) La preuve dudit changement de résidence est constituée par toute pièce attestant que l'ancien fonctionnaire a établi sa résidence dans un pays autre que celui de son dernier lieu d'affectation, par exemple une déclaration émanant de certaines autorités du pays (immigration, police, administration fiscale ou autre), du plus haut fonctionnaire des Nations Unies dans le pays ou du nouvel employeur de l'ancien fonctionnaire;

c) Tout ancien fonctionnaire peut faire valoir son droit à la prime dans un délai de deux ans à compter de la date à laquelle sa cessation de service a pris effet;

d) Nonobstant les dispositions de l'alinéa *a)* ci-dessus, les fonctionnaires qui étaient déjà en poste avant le 1er juillet 1979 conservent le droit au montant de la prime qui correspond aux années et aux mois de service ouvrant droit à ladite prime qu'ils ont accomplis à cette date, sans avoir à produire de pièce attestant leur changement de résidence; tout montant supplémentaire auquel ils pourraient avoir droit après cette date ne leur sera versé que s'ils remplissent les conditions énoncées dans les alinéas *a)* à *c)* ci-dessus.»

C'est sur la base de ce texte que l'instruction administrative ST/AI/262 du 23 avril 1979 a annoncé qu'à dater du 1er juillet 1979 ces dispositions régiraient les modalités de paiement aux fonctionnaires de l'Organisation de la prime de rapatriement prévue par l'annexe IV au statut du personnel. Le Secrétaire général précisait qu'en temps utile les modifications voulues seraient apportées au règlement du personnel. Dans la circulaire ST/SGB/Staff Rules/1/Rev.5 du 22 août 1979, le Secrétaire général a fait connaître que «la disposition 109.5, «Prime de rapatriement», est modifiée de façon à subordonner le paiement de cette prime à la présentation de pièces attestant le changement de résidence, *en ce qui concerne les périodes de service ouvrant droit à cette prime après le 1er juillet 1979*». (Les italiques sont du Tribunal.)

En conséquence, dans l'exercice de la compétence que lui confèrent l'article 9.4 et l'annexe IV du statut du personnel, le Secrétaire général a introduit les alinéas *d)* et *f)* suivants dans la disposition 109.5 du règlement du personnel:

«*d)* Le paiement de la prime de rapatriement est subordonné à la présentation, par l'ancien fonctionnaire, de pièces attestant qu'il change de résidence en s'installant dans un pays autre que celui de son dernier lieu d'affectation. Est acceptée comme preuve du changement de résidence toute pièce attestant que l'ancien fonctionnaire a établi sa résidence dans un pays autre que celui de son dernier lieu d'affectation.»

«*f)* Nonobstant l'alinéa *d)* ci-dessus, les fonctionnaires ayant pris leurs fonctions avant le 1er juillet 1979 conservent le droit au montant de la prime qui correspond aux années et aux mois de service ouvrant droit à ladite prime déjà accomplis à cette date, sans avoir à produire, en ce qui concerne cette période de service, une pièce attestant leur changement de résidence.»

Ce faisant, le Secrétaire général a adopté la même position que les chefs de secrétariat des institutions spécialisées.

XIII. Le Tribunal constate que pour la première fois un texte du règlement du personnel reconnaissait que le droit à la prime de rapatriement pouvait exister sans que soit attesté le changement de résidence.

Le Tribunal constate également que le requérant rentre dans le cadre défini à l'alinéa *f)* précité puisqu'il a pris ses fonctions avant le 1er juillet 1979. Il note que la période de service accomplie par le requérant avant cette date à l'OACI et à l'Organisation des Nations Unies dépasse de beaucoup le maximum de douze années de service ouvrant droit à la prime suivant l'annexe IV au statut du personnel. En conséquence, conformément à la disposition 109.5 *f)* précitée, le requérant conserve le droit au montant de la prime sans avoir à produire, en ce qui concerne cette période de service, une pièce attestant son changement de résidence.

Le Tribunal note qu'en vertu de cette disposition, si les services accomplis avant le 1er juillet 1979 n'atteignaient pas douze ans, la non-production d'une pièce attestant le changement de résidence réduirait le montant de la prime auquel aurait droit l'intéressé.

XIV. La question se pose donc de savoir si le droit défini dans la disposition précitée en vigueur le 1er juillet 1979, adoptée par le Secrétaire général à la suite d'une procédure définie par l'Assemblée générale dans sa résolution 33/119, a pu être aboli rétroactivement du fait de la suppression de l'alinéa *f)* par le Secrétaire général en conséquence de la résolution 34/165. La partie pertinente de cette résolution est ainsi conçue:

«*[L'Assemblée générale] Décide* que, avec effet au 1er janvier 1980, les fonctionnaires n'ont droit à aucun montant au titre de la prime de rapatriement à moins qu'ils ne présentent des pièces attestant qu'ils se réinstallent dans un pays autre que celui de leur dernier lieu d'affectation.»

Au cours du débat qui a précédé l'adoption de ce texte, la Cinquième Commission a demandé un avis du service juridique. Celui-ci a communiqué l'avis qui avait été présenté à la CFPI suivant lequel le Secrétaire général avait établi les conditions de paiement de la prime de rapatriement «by promulgating Staff Rule 109.5 and also by establishing a practice in an agreement within the Consultative Committee on Administrative Questions». Le service juridique soulignait que le statut du personnel ne subordonnait ni expressément ni implicitement l'octroi de la prime à l'utilisation effective du droit au rapatriement (A/C.5/34/CRP.8, p. 1).

Plusieurs délégations ont estimé que cet avis était erroné et que «le fait que [la disposition relative à la prime de rapatriement] n'a pas été appliquée correctement par le passé n'implique pas l'existence de droits acquis» (Australie, A/C.5/34/SR.47, par. 6).

Le président de la CFPI, tout en notant que la question n'était mentionnée dans le rapport de cette commission que pour information et n'appelait aucune décision de l'Assemblée générale, a déclaré que la CFPI avait pris «une décision pragmatique, dans un souci d'économie, estimant qu'il ne serait pas raisonnable d'imposer aux organisations une mesure contre laquelle les fonctionnaires ne manqueraient pas de former un recours». Il a relevé que les organes directeurs de la majorité des autres organismes qui appliquaient le régime commun avaient approuvé depuis juillet 1979 l'inclusion dans leur règlement du personnel des mesures transitoires annoncées par la CFPI (A/C.5/34/SR.55, par. 41).

Le Secrétaire général adjoint à l'administration, aux finances et à la gestion a indiqué que les dispositions envisagées auraient pour effet de révoquer une décision dûment appliquée par les organisations appliquant le régime commun. Il a déclaré que si l'Assemblée générale devait annuler la décision de la CFPI pour ce qui est des fonctionnaires de l'Organisation des Nations Unies, une telle

mesure ne pourrait non plus manquer d'être considérée par ceux-ci comme discriminatoire. Il a souligné que l'Organisation avait toujours eu pour pratique d'appliquer des changements de politique de la manière susceptible de créer aussi peu de bouleversements que possible, qu'elle ait agi de la sorte pour respecter les droits acquis ou simplement pour assurer une transition sans heurts d'un ensemble de dispositions à un autre. C'était dans cet esprit que le Secrétaire général et ses collègues du Comité administratif de coordination estimaient que la Cinquième Commission devrait accepter les dispositions transitoires (A/C.5/34/SR.60, par. 59-61).

La délégation des Etats-Unis a proposé le texte qui devait être finalement adopté et qui constitue une décision de l'Assemblée générale.

Le Tribunal constate qu'à aucun moment l'Assemblée générale n'a envisagé de compléter ou de modifier les textes du statut du personnel relatifs à la prime de rapatriement. L'Assemblée n'a pas non plus considéré le texte du règlement du personnel en vigueur depuis le 1er juillet 1979 et elle n'a aucunement prétendu que les dispositions introduites à cette date étaient frappées d'un vice qui en affecterait la validité. L'Assemblée s'est bornée à énoncer un principe d'action dont le Secrétaire général a tenu compte en établissant un nouveau texte de la disposition 109.5, texte qui, à dater du 1er janvier 1980, a remplacé le texte antérieurement en vigueur sur la base duquel le requérant pouvait obtenir la prime de rapatriement.

XV. La question qui se pose est donc de savoir si le requérant peut invoquer un droit acquis dont la méconnaissance donne lieu à l'obligation de réparer le préjudice subi.

Le Tribunal a eu plusieurs fois à examiner si un changement dans la réglementation applicable portait atteinte à un droit acquis. Il a jugé que le respect des droits acquis oblige au respect des droits expressément stipulés au profit du fonctionnaire dans le contrat. Le Tribunal a relevé au paragraphe VI ci-dessus que le droit à la prime de rapatriement avait été stipulé lors de l'engagement du requérant et que le lien entre le montant de la prime et la durée des services accomplis avait été également stipulé. Le Tribunal a également relevé au paragraphe VII ci-dessus qu'à l'époque de l'entrée en fonctions du requérant la prime était versée sans exigence de preuve de changement de résidence dans un autre pays que celui du dernier lieu d'affectation. D'autre part, le Tribunal a jugé que le respect des droits acquis signifie aussi qu'il ne peut être porté aucune atteinte à l'ensemble des bénéfices et avantages revenant au fonctionnaire pour les services rendus avant l'entrée en vigueur d'une nouvelle disposition réglementaire. Or, la prime de rapatriement est déterminée en fonction de la durée des services accomplis. Son montant est «proportionnel au temps que l'intéressé a passé au service de l'Organisation des Nations Unies», suivant l'annexe IV du statut du personnel. Ce lien a été expressément réaffirmé dans le texte de la disposition 109.5 *f)* du règlement du personnel qui vise les années et les mois de service «ouvrant droit à ladite prime déjà accomplis» au 1er juillet 1979. Dans ces conditions, le lien établi par l'Assemblée générale et le Secrétaire général entre le montant de la prime et les services accomplis donne au requérant titre à se prévaloir d'un droit acquis nonobstant les termes de la disposition 109.5 du règlement entrée en vigueur le 1er janvier 1980 et supprimant l'alinéa *f)* relatif au régime transitoire. Il appartient au Tribunal, comme dans le jugement n° 266 *(Capio)*, de tirer les conséquences de toute méconnaissance d'un droit acquis.

XVI. En subordonnant le versement de la prime de rapatriement au requérant à la production d'une pièce attestant son changement de résidence, le défendeur a méconnu le droit acquis du requérant résultant pour lui du régime transitoire énoncé dans la disposition 109.5 *f)* en vigueur du 1er juillet au 31 décembre 1979.

La position adoptée par le défendeur a pour effet de priver le requérant du

versement de la prime de rapatriement. Ayant reconnu que le requérant était en droit de recevoir cette prime dans les conditions qui avaient été définies par la disposition 109.5 *f)*, bien que celle-ci ait cessé d'être en vigueur à la date à laquelle le requérant a terminé ses services à l'Organisation des Nations Unies, le Tribunal constate que le requérant a subi un préjudice du fait de la méconnaissance de l'article 12.1 du statut du personnel et de la disposition 112.2 *a)* du règlement du personnel. Le requérant est donc en droit d'obtenir réparation de ce préjudice. Le préjudice doit être évalué au montant même de la prime de rapatriement dont l'octroi lui a été refusé. En conséquence, le Tribunal décide que le défendeur est tenu de verser au requérant, à titre de réparation, une somme égale au montant de la prime de rapatriement déterminé conformément à l'annexe IV du statut de personnel.

XVII. Aucun retard excessif n'ayant été apporté au règlement de la contestation qui posait des problèmes juridiques complexes, le Tribunal décide de rejeter la demande tendant à l'octroi d'intérêts en plus de la somme due.

XVIII. Pour ces motifs, le défendeur doit verser au requérant la somme fixée au paragraphe XVI ci-dessus.

(Signatures)

Suzanne BASTID,
Présidente.

Endre USTOR,
Vice-Président.

Francisco A. FORTEZA,
Vice-Président.

N'étant pas d'accord avec le jugement, j'expose ci-après mon opinion dissidente.

Herbert REIS,
membre suppléant.

Jean HARDY,
secrétaire.

Genève, le 15 mai 1981.

DISSENTING OPINION OF MR. HERBERT REIS

[Original: English.]

1. Since, on 17 December 1979, the General Assembly adopted resolution 34/165, deciding that "effective 1 January 1980 no staff member shall be entitled to any part of the repatriation grant unless evidence of relocation away from the country of the last duty station is provided", the Applicant has been afforded two opportunities to receive the repatriation grant to which his otherwise creditable service of 12 years would apply. First, on 21 December 1980, he was informed in an interview by the Chief of the Personnel Administrative Section, Personnel Division, United Nations Office at Geneva, that, in view of the adoption of General Assembly resolution 34/165 and his approaching retirement, he could secure payment of the repatriation grant without evidence of relocation provided that he retired effective 31 December 1980, that is, within the cutoff date set by the General Assembly. Second, since under current regulations payment of the repatriation grant, assuming its conditions are met, can be sought in a timely manner by a former staff member within two years of the date of his retirement, the Applicant has the right—confirmed by counsel for Respondent during the oral hearing on 28 April 1981—to apply for and receive payment of the grant upon presentation of documentary evidence that he has in fact relocated his residence outside Switzerland, the place of his last duty station. In this second context, when the Tribunal heard this case, the Applicant still had approximately one year in which to relocate in order to qualify for the grant. Notwithstanding these options, the Tribunal has decided that the Applicant is entitled to receive the repatriation grant without presenting evidence of relocation. This case presents difficult issues for decision and it is with regret that I dissent from the Judgement of the Tribunal.

2. The repatriation grant payable to staff members of the United Nations went through different stages prior to the adoption of General Assembly resolution 34/165. In the earliest days of the Organization this benefit was payable as a continuing expatriation allowance; then as a one-time grant payable upon repatriation or expatriation to any country other than that of the last duty station; and, subsequently, as a grant payable without evidence of relocation from the last duty station. The grant was never payable to nationals of the country in which the last duty station is located, and there were others to whom it was not payable such as those summarily dismissed, etc. That the United Nations quickly moved from an initial requirement formulated in terms of return to the country of nationality to allowing removal to any country in which the retiring employee might wish to take up residence attests to the humanitarian character of the United Nations administration which recognized that, after long years of service for the Organization, a retiring employee should be allowed, as a matter of personal liberty, to seek residence in a third country if that were his wish without losing a grant that would help defray the costs of his relocation.

3. Throughout the various stages of the evolution of this grant, its purpose was, and it remains unchanged by the adoption of General Assembly resolution 34/165, to provide an end of service payment that will assist the retiring staff member, after many years of service for the Organization, in meeting the costs of moving to another country, whether the country of his nationality or a third country. Indeed, the Tribunal so recognizes in paragraph VII of its Judgement. The repatriation grant was never conceived of as an end of service salary supplement—nationals of the country of last duty station never receiving it, notwithstanding the fact that in a large country like the United States their relocation costs away from Headquarters in New York City could be large—and competent bodies of the United Nations variously recognized this fact. For example, in reviewing in 1974 the history of the repatriation grant

(CCAQ/SEC.325, 6 May 1976), the secretariat of the Consultative Committee on Administrative Questions noted that:

> "The whole purpose of the grant is to assist the staff member and his family to re-establish in the *home* country and clearly there is no logical justification for paying the grant to a staff member who remains in the country of his last duty station." (Para. 14, emphasis in the original.)

Now, it must be noted that the CCAQ analysis continued immediately by asserting that "Applying the logic is, however, fraught with practical difficulties" *(ibid.)*, which, according to the authors, arose from the uncertainty of documentation that might be presented to prove relocation, the possibility that the relocated staff member might subsequently return to reside in the country of last duty station or that he might have a residence in more than one country, and so forth. Here we see an exemplification of a curious phenomenon within the secretariat during the long period from the early 1950s until 1980, namely, the raising in an operationally destructive manner of assertedly "practical difficulties" of a documentary and durational character that, so it was asserted, would attend the imposition of any requirement, as a prerequisite to payment of the grant, that the retiring staff member show he had in fact relocated his residence in a place outside the country of last duty station. In this connection, a question may be raised as to the objectivity of those in the Organization who, through the years, advanced these self-styled "practical difficulties" as reason for insisting on the payment of the repatriation grant without evidence of relocation. This matter is the more serious in light of the fact that, following the adoption of General Assembly resolution 34/165, the Secretary-General apparently experienced no difficulty whatever in adopting entirely straightforward rules for the implementation of the documentary requirement. Thus, Administrative Instruction ST/AI/269 of 21 December 1979, currently in force, states that:

> "Evidence of relocation shall be constituted by documentary evidence that the former staff member has established residence in a country other than that of the last duty station, such as a declaration by the immigration, police, tax or other authorities of the country, by the senior United Nations official in the country or by the former staff member's new employer;" (para. 2 *(b)*).

It seems clear that since the repatriation grant may be large in amount if the staff member has had 12 years of service, the maximum period creditable in respect of the grant, the retiring staff member would not experience an inappropriate burden in gathering and presenting the required documentation of relocation outside the country of last duty station.

4. At this juncture it is relevant to consider the reasons why the General Assembly adopted resolution 34/165. In 1976 Austria sharply asked the question in the Fifth Committee of the General Assembly why the United Nations was paying the relocation grant even when a staff member retired in the country of his last duty station and consequently incurred no post-retirement relocation expenses (A/C.5/31/SR.32, para. 46). A lengthier discussion ensued in the Fifth Committee in 1978, during which it must be admitted, the Under-Secretary-General for Administration, Finance and Management asserted that entitlement to the grant even in the absence of evidence of relocation must be considered to be an acquired right and that, accordingly, there should be developed some provision in the nature of a transitional measure assuring payment to staff members who had already completed their period of creditable service in the context of the grant (A/C.5/33/SR.56, para. 32, 9 December 1978). Members of the Fifth Committee do not seem at that time to have addressed this suggestion of a transitional arrangement, agreeing, in what became resolution 33/119 of 19

December 1978 that, in addressing the various work tasks of the International Civil Service Commission for the next year, the General Assembly:

> "4. *Decides* that payment of the repatriation grant to entitled staff members shall be made conditional upon the presentation by the staff member of *evidence of actual relocation*, subject to the terms to be established by the commission;" (emphasis added).

5. The International Civil Service Commission considered the issue of the repatriation grant at length at its 1978 session (A/33/30, paras. 178-186). Some members of the Commission noted, as in the 1974 CCAQ Secretariat observation, *supra*, paragraph 3, that they could not justify payment of the grant if relocation did not take place. Indeed, at this time, the Commission as a whole recorded its conclusion that "Strictly speaking, it was clear that to do so [to allow payment] would be inconsistent with the stated purpose of the grant" (*ibid.*, para. 183). It concluded by recommending to the General Assembly that payment of the repatriation grant "should be made conditional upon signature by the staff member of a declaration that he does not intend to remain permanently in the country of his last duty station" and that this requirement should come into effect 1 January 1979 for new staff members (*ibid.*, para. 186). At its 1979 session, the Commission was informed by the Secretariat that the legal advisers of several specialized agencies (not identified) believed that, by reason of the jurisprudence of the United Nations Administrative Tribunal, a transitional provision protective of existing "entitlements" would be necessary (A/34/30, para. 23). At that session the Commission also had before it an opinion of the Office of Legal Affairs of the United Nations secretariat which, seemingly summarily, set forth as its central observation the fact that there had not been incorporated in the Staff Rules any "express or implied provision that only those who actually made use of the travel entitlement should receive the [repatriation] grant" (*ibid.*, para. 24). (At the request of the Australian representative in the Fifth Committee of the General Assembly, this opinion was subsequently reproduced as A/C.5/34/CRP.8, dated 9 November 1979.) The International Civil Service Commission accordingly decided to recommend the following transitional measure with regard to existing staff members:

> "*(d)* Notwithstanding paragraph *(a)* above, staff members already in service before 1 July shall retain the *entitlement* to repatriation grant proportionate to the years and months of service qualifying for the grant which they had already accrued at that date without the necessity of production of evidence of relocation; the exercise of any *additional entitlement* accrued after that date shall, however, be subject to the conditions [concerning documentary evidence of relocation abroad] set out in paragraphs *(a)* to *(c)* above." (*Ibid.*, para. 25, emphasis added.)

This recommendation was incorporated by the Secretary-General in his Administrative Instruction ST/AI/262 dated 23 April 1979. It is not surprising, given the bias of the secretariat, that the Commission and the Secretary-General decided upon a transitional provision, the drafting of which, a task performed by the secretariat, was drawn in terms of and consistent with the concept of acquired rights.

6. When these developments came before the Fifth Committee of the General Assembly some months later in the fall of 1979, there evidently developed a storm of protest against the notion of a transitional measure. The provisional summary records of the Fifth Committee reveal strongly held views concerning the International Civil Service Commission's recommendation for a continuation, as to existing staff members of the practice of paying the repatriation grant in the absence of any removal from the country of last duty station. On 14 November 1979 the question of a possible acquired right that could have

justified the transitional period provision was addressed on the legal plane in detail by Australia (A/C.5/34/SR.47). Noting that the ICSC had received a secretariat legal opinion appearing to assert the existence of an acquired right, the representative of Australia said:

> "The legal opinion, in fact, appeared to assume that the repatriation grant was equivalent to something like the payment of travel costs on retirement. The term 'repatriation', however, clearly signified a return to one's homeland. It was impossible to interpret the rule as meaning that the repatriation grant would be paid to any staff member who was entitled to be repatriated, irrespective of whether or not he was repatriated. For reasons of language, common sense, and even law, the opinion given by the Office of Legal Affairs was wrong.
>
> His delegation understood that ICSC must act on the basis of the legal advice given to it. However, the General Assembly could make its own law. It was important to follow common sense and restore the repatriation grant to its original function. The fact that in the past it had been incorrectly applied did not confer an unchangeable entitlement." (Paras. 5, 6.)

Earlier, the Australian representative had asked the secretariat to produce a paper setting out in full the reasons underlying its earlier assertion of the existence of an acquired right (A/C.5/34/SR.38, 6 November 1979, para. 80), but no such opinion appears to have been forthcoming.

7. The debates in the Fifth Committee concerning the repatriation grant were extensive (see A/C.5/34/SR.38, 46, 47, 55, 60 and 62). In addition to Australia, representatives of Algeria, Canada, the Federal Republic of Germany, India, Italy, Japan, Morocco, New Zealand, Nigeria, Peru, Sierra Leone, Spain, Syria, Tunisia, Uruguay, the USSR, the United Kingdom, the USA and Yugoslavia took part. While a significant number of these delegations expressly agreed with the Australian view that acquired rights were not involved, only Tunisia, the Under-Secretary-General for Administration, Finance and Management and the Chairman of the International Civil Service Commission supported a transitional measure; these latter stated, variously, the view that were the General Assembly to cancel it, there would arise a violation of an acquired right, difficulties with the specialized agencies in the context of the common system or a possible appeal to the Administrative Tribunal. The Fifth Committee did not agree and, in the end, adopted a proposal by the United States to allow no payment after 1 January 1980 in the absence of documentary evidence of relocation, by a vote of 59 in favour, 5 against, with 24 abstentions, on 28 November 1979 (A/C.5/34/SR.62, para. 33). The same text was adopted without change by the General Assembly a few weeks later on 17 December 1979, in Section II, paragraph 3, of resolution 34/165.

8. Even the Administrative Tribunal of the International Labour Organisation, with its considerably more extensive acquired rights jurisprudence, has stated that not every right or benefit contained in the contract of employment between the new staff member and the hiring international organization, and the record of associated personnel action, is necessarily, by its inclusion in documentation of this fundamental contractual character, to be considered to be an acquired right. Thus, in *de los Cobos and Wenger* (No. 391), the ILO Administrative Tribunal in 1980 stated that in order to constitute an acquired right, an express contractual provision must have been "of decisive importance to a candidate for appointment" and both the candidate and the employing organization must have intended "that it should be inviolate" (para. 6). At the last term, the United Nations Administrative Tribunal held, in connection with an earlier United Nations system of promotion opportunities based upon work performance, that an entitlement arising at the time of initial employment is subsequently to be treated as an acquired right if it relates to a material part of the complex of benefits in compensation for services already performed by the

staff member (*Capio*, No. 266). In the current case, the Tribunal observes that the Personnel Action of 4 August 1958, assimilated to the Letter of Appointment dated 5 August 1958, expressly states "Credit towards repatriation grant commences on 14 February 1949", Applicant having had nine years of service with ICAO. Acknowledging the subjectivity of questions of intent, can it reasonably be asserted that the Applicant considered as "of decisive importance" this notation as to the creditworthy character of his ICAO service in the context of a United Nations repatriation grant that might be paid to him some 20 years in the future? Even if the answer were affirmative, was the Applicant likely to have known of the then five-year-old practice of the United Nations of paying the repatriation grant without evidence of relocation, and, if so, would he have been justified in assuming that the continuation of this payment practice would be guaranteed to him as a matter of legal right over the period of 20 years that was to ensue before he would retire? To the extent that the Applicant and the secretariat considered this aspect of the contract of employment, they might have asked themselves serious questions concerning the survivability of the payment of a "repatriation grant" in the absence of actual expenses. The Applicant might reasonably have had a contingent hope, but nothing more.

9. In my view, the doctrine of acquired rights must serve, in the particular case, to prevent injustice by way of retroactive denial of benefits to an individual who in good faith has performed meritorious service and long entertained just expectations based upon legal undertakings, while, in the general context, it should protect the competence and independence of the civil service of an international organization and thus promote the integrity of the organization itself. It is for these reasons that the General Assembly has guaranteed respect for acquired rights of staff members by adopting the Staff Regulations of the United Nations, Article 12.1. One learned commentator has pointed out that "Acquired rights of international public servants should be protected to the extent there is a *public* interest in the stability of those rights" (Hans W. Baade, "The Acquired Rights of International Public Servants", 15 *American Journal of Comparative Law* (1967), 251, 299 [emphasis in the original]). I believe there is a necessary element of good faith that must exist in order to justify a finding of acquired right. There is not, in this case, any "public" purpose in relation to the Applicant or to the United Nations that may be served by requiring the payment of a substantial sum to a retiring staff member who has not incurred any relocation expenses, who has moved his residence not at all in the last 22 years and who intends to maintain his residence in the country of his last duty station where it has been for those 22 years, namely Switzerland. As observed at the outset of this opinion, the Organization has been generous to the Applicant in the context of the payment of a repatriation grant.

10. For these reasons, I cannot agree that the Applicant had an acquired right to the payment of the repatriation grant which right must in law be recognized without regard to any requirement of relocation to another country and documentary evidence thereof.

(Signed) Herbert REIS,
Geneva, 15 May 1981.

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13. United Nations Administrative Tribunal: Statute and Rules, Provisions in force with effect from 3 October 1972[1] — AT/11/Rev.4

[1] Documents not reproduced. *[Note by the Registry.]*

14. Staff Regulations (as of 1 January 1981)[1,2] — ST/SGB/Staff Regulations/Rev.13

15. Staff Rules: Staff Regulations of the United Nations and Staff Rules 101.1 to 112.8 (1979)[1] — ST/SGB/Staff Rules/1/Rev.5

16. Staff Rules, amendments as of 1 July 1980[1] — ST/SGB/Staff Rules/1/Rev.5/Amend.1

C. Documents submitted to the United Nations Administrative Tribunal[3]: Case No. 257: Mortished against the Secretary-General of the United Nations

17. Applicant's Statement of Appeal to Administrative Tribunal, 10 October 1980[1]

18. Answer of the Respondent to Administrative Tribunal, 4 March 1981[1,4]

19. Comments of Applicant on Answer of Respondent, 10 April 1981[1]

20. Supplementary documentation supplied by Applicant to the Tribunal on 28 April 1981[1]

21. Supplementary documentation supplied by Respondent to the Tribunal on 28 April 1981[1]

22. Supplementary information supplied by Respondent to the Tribunal on 28 April 1981[1]

23. Supplementary information supplied by Applicant to the Tribunal on 29 April 1981[1]

24. Supplementary information supplied by Respondent to the Tribunal on 29 April 1981[1]

25. Supplementary information supplied by Respondent to the Tribunal on 1 May 1981[1]

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[1] Document not reproduced. *[Note by the Registry.]*

[2] This version of the Staff Regulations is the version in force as of 1 January 1981 but the provisions relating to the repatriation grant and all others relevant to the application are unchanged from those in force at the time of Mr. Mortished's separation (30 April 1980).

[3] In these documents, which were submitted to the United Nations Administrative Tribunal, Mr. Mortished is usually referred to as the "Applicant" and the Secretary-General is usually referred to as the "Respondent". The documents are noted in the opening paragraphs of Judgement No. 273 of the Tribunal (doc. No. 12) and constitute the written submissions made to the Administrative Tribunal in the case. Oral submissions made to the Administrative Tribunal are set out in the Verbatim Record of the public meeting of the Tribunal (doc. No. 11).

[4] The Annexes to this document concerning the repatriation grant are now contained in Part II of the dossier. The appendix hereto lists the document numbers of each Annex and their corresponding numbers in Part II of the dossier.

Part II of the Dossier: Documents[1] relating to the Repatriation Grant Scheme

A. Documents of the Fourth Session of the General Assembly

26.	Report of the Committee of Experts on Salary, Allowance and Leave Systems (31 October 1949) (see paras. 106 to 111 of the Report)	A/C.5/331 and Corr.1 (*General Assembly Official Records*, Fourth Session, Annex to *Summary Records* of Fifth Committee, Vol. II)
27.	Report of the Secretary-General on the report of the Committee of Experts (see paras. 1 to 8, 17, 31 and Appendix II, paras. 1 to 9 and 32 to 35)	A/C.5/331/Add.1 and Corr.2 (*General Assembly, Official Records*, Fourth Session, Annex to *Summary Records* of Fifth Committee, Vol. II)

Records of the Fifth Committee

28.	227th meeting, 22 November 1949 (see paras. 16, 44 to 46 and 79)	A/C.5/SR.227
29.	228th meeting, 22 November 1949 (see paras. 8, 14, 40, 71 and 95)	A/C.5/SR.228

B. Documents of the Fifth Session of the General Assembly

30.	Advisory Committee on Administrative and Budgetary Questions, First Report of 1950 to the General Assembly (see paras. 65 to 71)	*Official Records*, Fifth Session, Supplement No. 7A (A/1313)
31.	Report of the Secretary-General, Salary, Allowance and Leave Systems of the United Nations (see para. 12, Annex A, part IX and Annex B, para. 9)	*Official Records*, Fifth Session, Annexes, Agenda item 39 (A/1378)
32.	Report of Sub-Committee 7 of the Fifth Committee (14 November 1950) (see para. 28)	*Official Records*, Fifth Session, Annexes, Agenda item 39 (A/C.5/400)
33.	Note by Chairman of the Fifth Committee (15 November 1950)	*Official Records*, Fifth Session, Annexes, Agenda item 39 (A/C.5/403)
34.	Amendments to the draft resolution and budget recommendations contained in document A/C.5/403 [doc. No. 33] proposed by the Secretary-General (17 November 1950) (see para. 3)	*Official Records*, Fifth Session, Annexes, Agenda item 39 (A/C.5/408)

Records of the Fifth Committee

35.	242nd meeting, 5 October 1950 (see paras. 24 to 42)	A/C.5/SR.242
36.	265th meeting, 17 November 1950 (see paras. 21, 23, 26 to 27, 37, 42, 50, 59 and 76)	A/C.5/SR.265

[1] Documents not reproduced. *[Note by the Registry.]*

37.	266th meeting, 20 November 1950 (see paras. 35, 60 and 67)	A/C.5/SR.266
38.	267th meeting, 20 November 1950 (see paras. 1 to 3, 9, 24, 44, 46, 48 to 50, 53, 55, 66 and 72 to 74)	A/C.5/SR.267
39.	269th meeting, 24 November 1950 (see paras. 23 and 49)	A/C.5/SR.269
40.	Report of the Fifth Committee, Salary, Allowance and Leave System of the United Nations (14 December 1950) (see paras. 6 to 8, 12 to 13, 16 and 31)	*General Assembly, Official Records*, Fifth Session, Annexes, Agenda item 39 (A/1732)

General Assembly resolution

41.	General Assembly resolution 470 (V), Salary, Allowance and Leave System of the United Nations (15 December 1950)	A/RES/470(V) of 15 December 1950

Secretariat document

42.	Information Circular, Implementation of General Assembly resolutions on Salary, Allowances and Leave (20 December 1950) (para. 11 and Annex III)	ST/AFS/SER.A/72

C. Documents of the Sixth Session of the General Assembly

43.	General Assembly resolution 590 (VI), Staff Regulations of the United Nations (2 February 1952)	A/RES/590(VI) of 2 February 1952

D. Documents of the Twelfth Session of the Consultative Committee on Administrative Questions

44.	CCAQ, Twelfth session, Conditions of eligibility for Repatriation Grant (20 March 1952)	CO-ORDINATION/CC/A.12/13
45.	Report of the Twelfth session of CCAQ (14 May 1952) (see para. 4)	CO-ORDINATION/R.124

E. Documents of the Eleventh Session of the General Assembly

46.	Report of the Salary Review Committee, United Nations Salary, Allowance and Benefits System (18 October 1956) (see paras. 223 to 225 and Annex I)	*General Assembly, Official Records*, Eleventh Session, Annexes, Agenda item 51 (A/3209)

Records of the Fifth Committee

47.	Report of the Fifth Committee, United Nations Salary, Allowance and Benefits System (25 February 1957) (paras. 1 to 3 and 107)	*General Assembly, Official Records*, Eleventh Session, Annexes, Agenda item 51 (A/3558)

General Assembly resolution

48.	General Assembly resolution 1095 (XI), United Nations Salary, Allowance and Benefits System (27 February 1957)	A/RES/1095(XI) of 27 February 1957

F. Documents of the Eighteenth Session of the General Assembly

49.	Report of the Secretary-General, Other Personnel Questions (18 September 1963) (see paras. 13 to 29)	*General Assembly, Official Records*, Eighteenth Session, Annexes, Agenda item 66 (A/C.5/979)
50.	Report of the Advisory Committee on Administrative and Budgetary Questions (25 October 1963) (see paras. 11 to 19)	*General Assembly, Official Records*, Eighteenth Session, Annex, Agenda item 66 (A/5579)

Records of the Fifth Committee

51.	1043rd meeting, 18 November 1963 (see paras. 32 to 49)	A/C.5/1043
52.	Report of the Fifth Committee, Other Personnel Questions (9 December 1963) (see paras. 24 to 27)	*General Assembly, Official Records*, Eighteenth Session, Annexes, Agenda item 66 (A/5646)

General Assembly resolution

53.	General Assembly resolution 1929 (XVIII), Amendments to the Staff Regulations of the United Nations (11 December 1963)	A/RES/1929(XVIII) of 11 December 1963

Secretariat document

54.	Amendments to the Staff Regulations (5 February 1964) (see paras. 7 to 9 and Annex)	ST/ADM/SER.A/914

G. Documents of the Twenty-fifth Session of the Consultative Committee on Administrative Questions

55.	Report of the Twenty-fifth session of the Consultative Committee on Administrative Questions (17 April 1964) (see paras. 32 to 34)	CO-ORDINATION/R.451

H. Documents of the Forty-first Session of the Consultative Committee on Administrative Questions (1974)

56.	CCAQ Secretariat, Repatriation Grant (6 May 1974)	CCAQ/SEC/325(PER)
57.	CCAQ Secretariat, Repatriation Grant (1 October 1974)	CCAQ/SEC/325(PER)/Add.1

I. Documents of the Twenty-ninth Session of the General Assembly

58.	Resolution 3353 (XXIX), Amendments to the Staff Regulations and Staff Rules of the United Nations (18 December 1974)	A/RES/3353(XXIX) of 18 December 1974

J. Documents of the Thirty-first Session of the General Assembly

59.	Report of the International Civil Service Commission (1976) (see paras. 265 to 270)	*General Assembly, Official Records*, Thirty-first Session, Supplement No. 30 (A/31/30)

Records of the Fifth Committee

60.	32nd meeting of 31st session, 18 November 1976 (see para. 46)	A/C.5/31/SR.32
61.	34th meeting of 31st session, 22 November 1976 (see paras. 14 and 41)	A/C.5/31/SR.34
62.	Report of the Fifth Committee, Report of the International Civil Service Commission (16 December 1976) (see paras. 28 and 46)	*General Assembly, Official Records*, Thirty-first Session, Annexes, Agenda item 103 (A/31/449)

General Assembly resolution

63.	Resolution 31/141, Report of the International Civil Service Commission (17 December 1976) (see part II, para. 3)	A/RES/31/141 of 17 December 1976

K. Documents of the Forty-eighth Session of the Consultative Committee on Administrative Questions (1978)

64.	Report of the Forty-eighth session of the Consultative Committee on Administrative Questions (Personnel and General Administrative Questions) (3 March 1978) (see paras. 9 to 11)	CO-ORDINATION/R.1263
65.	Report of the Forty-eighth session of the Consultative Committee on Administrative Questions (Personnel and General Administrative Questions), Addendum 3, Entitlements upon cessation of service (6 February 1978) (see paras. 13 to 17)	CO-ORDINATION/R.1263/Add.3

L. Documents of the Thirty-third Session of the General Assembly

66.	Report of the International Civil Service Commission (1978) (see paras. 178 to 186)	*General Assembly, Official Records*, Thirty-third Session, Supplement No. 30 (A/33/30)

Records of the Fifth Committee

67.	32nd meeting of 33rd session, 13 November 1978 (see para. 41)	A/C.5/33/SR.32
68.	37th meeting of 33rd session, 20 November 1978 (see paras. 57 and 76)	A/C.5/33/SR.37
69.	38th meeting of 33rd session, 21 November 1978 (see paras. 4, 21 and 22)	A/C.5/33/SR.38
70.	40th meeting of 33rd session, 22 November 1978 (see para. 11)	A/C.5/33/SR.40
71.	41st meeting of 33rd session, 24 November 1978 (see para. 38)	A/C.5/33/SR.41
72.	42nd meeting of 33rd session, 27 November 1978 (see paras. 69 to 70)	A/C.5/33/SR.42
73.	56th meeting of 33rd session, 9 December 1978 (see paras. 29, 32, 37, 50 to 53, 57 to 66, 72 to 74 and 76)	A/C.5/33/SR.56
74.	Report of the Fifth Committee, Report of the International Civil Service Commission (14 December 1978) (see para. 13, Section IV, para. 4)	A/33/495

General Assembly resolution

75.	General Assembly resolution 33/119, Report of the International Civil Service Commission (19 December 1978)	A/RES/33/119 of 19 December 1978

Secretariat documents

76.	Information Circular, Action taken by the General Assembly on Personnel Questions during the thirty-third session (22 January 1979) (see para. 20)	ST/IC/79/5
77.	Administrative Instruction, Repatriation Grant (23 April 1979)	ST/AI/262

M. Documents of the Thirty-fourth Session of the General Assembly

78.	Report of the International Civil Service Commission (1979) (see paras. 20 to 25)	*General Assembly, Official Records*, Thirty-fourth Session, Supplement No. 30 (A/34/30)

Records of the Fifth Committee

79.	38th meeting of 34th session, 6 November 1979 (see para. 80)	A/C.5/34/SR.38
80.	46th meeting of 34th session, 13 November 1979 (see paras. 65 to 67, 69 and 87)	A/C.5/34/SR.46

81.	47th meeting of 34th session, 14 November 1979 (see paras. 3 to 6, 15, 34 and 38)	A/C.5/34/SR.47
82.	55th meeting of 34th session, 21 November 1979 (see paras. 9 and 38 to 41)	A/C.5/34/SR.55
83.	60th meeting of 34th session, 27 November 1979 (see paras. 45, 59 to 62, 65 to 66, 68 to 69 and 71 to 85)	A/C.5/34/SR.60
84.	62nd meeting of 34th session, 28 November 1979 (see paras. 1 to 35, 39, 43 and 45)	A/C.5/34/SR.62
85.	79th meeting of 34th session, 12 December 1979 (see paras. 109-123)	A/C.5/34/SR.79
86.	Note by Secretariat, Report of the International Civil Service Commission (9 November 1979)	A/C.5/34/CRP.8
87.	Report of the Fifth Committee, Report of the International Civil Service Commission (15 December 1979) (see para. 15, Section II, para. 3)	A/34/774

General Assembly resolution

88.	General Assembly resolution 34/165, Report of the International Civil Service Commission (17 December 1979)	A/RES/34/165 of 17 December 1979

Secretariat documents

89.	Information Circular, Repatriation Grant (14 December 1979)	ST/IC/79/84
90.	Administrative Instruction, Repatriation Grant (21 December 1979)	ST/AI/269
91.	Personnel Directive, Payment of Repatriation Grant (30 October 1980)	PD/1/80

N. Documents of the Thirty-fifth Session of the General Assembly

92.	Report of the International Civil Service Commission (1980) (see para. 14)	*General Assembly, Official Records*, Thirty-fifth Session, Supplement No. 30 (A/35/30)

O. United Nations Staff Rules on Repatriation Grant Since Establishment of Repatriation Grant Scheme on 1 January 1951

93.	United Nations Staff Rules on Repatriation Grant since establishment of Repatriation Grant scheme on 1 January 1951	

93(A)	Staff rule 114 (effective 1 January 1951)	ST/AFS/SGB/81/Rev.2
93(B)	Staff rule 114 (effective 1 July 1951)	ST/AFS/SGB/81/Rev.3
93(C)	Staff rule 109.5 (effective 1 January 1953)	ST/AFS/SGB/94
93(D)	Staff rule 109.5 (effective 1 February 1954)	ST/AFS/SGB/94/Rev.2
93(E)	Staff rule 109.5 (effective 1 September 1955)	ST/SGB/94/Rev.4
93(F)	Staff rule 109.5 (effective 1 January 1962)	ST/SGB/Staff Rules/1/Amend.18
93(G)	Staff rule 109.5 (effective 1 June 1976)	ST/SGB/Staff Rules/1/Rev.3
93(H)	Staff rule 109.5 (effective 1 January 1977)	ST/SGB/Staff Rules/1/Rev.4
93(I)	Staff rule 109.5 (effective 1 July 1979)	ST/SGB/Staff Rules/1/Rev.5
93(J)	Staff rule 109.5 (effective 1 January 1980)	ST/SGB/Staff Rules/1/Rev.5 Amend. 1

Appendix

Table of Annexes 18 to 48 to Secretary-General's Answer to Administrative Tribunal (Document No. 18) showing Location of these Annexes in Part II of Dossier[1]

Annex No.	*Title*	*Dossier Document No.*
18	CCAQ Secretariat, Repatriation Grant (6 May 1974), CCAQ/SEC.325(PER)	56
19	Report of the Forty-eighth session of the Consultative Committee on Administrative Questions (Personnel and General Administrative Questions), Addendum 3, Entitlements upon cessation of service (6 February 1978)	65
20	Advisory Committee on Administrative and Budgetary Questions, First Report of 1950 to the General Assembly (A/1313)	30
21	Report of Sub-Committee 7 of the Fifth Committee (14 November 1950) (A/C.5/400)	32
22	Report of the Fifth Committee, Salary, Allowance and Leave System of the United Nations (14 December 1950) (A/1732)	40
23	General Assembly resolution 470 (V), Salary, Allowance and Leave System of the United Nations (15 December 1950)	41
24	General Assembly resolution 590 (VI), Staff Regulations of the United Nations (2 February 1952)	43
25	General Assembly resolution 3353 (XXIX), Amendments to the Staff Regulations and Staff Rules of the United Nations (18 December 1974)	58
26	General Assembly resolution 31/141, Report of the International Civil Service Commission (17 December 1976)	63
27	Staff rule 114 (ST/AFS/SGB/81/Rev.2) (effective 1 January 1951)	93 (A)
28	Staff rule 114 (ST/AFS/SGB/81/Rev.3) (effective 1 July 1951)	93 (B)
29	Staff rule 109.5 (ST/AFS/SGB/94) (effective 1 January 1953)	93 (C)

[1] Documents not reproduced. *[Note by the Registry.]*

Annex No.	*Title*	*Dossier Document No.*
30	Staff rule 109.5 (ST/AFS/SGB/94/Rev.2) (effective 1 February 1954)	93 (D)
31	Staff rule 109.5 (ST/SGB/94/Rev.4) (effective 1 September 1955)	93 (E)
32	Staff rule 109.5 (ST/SGB/Staff Rules/1/Amend.18) (effective 1 January 1962)	93 (F)
33	Staff rule 109.5 (ST/SGB/Staff Rules/1/Rev.3) (effective 1 June 1976)	93 (G)
33a	Staff rule 109.5 (ST/SGB/Staff Rules/1/Rev.4) (effective 1 January 1977)	93 (H)
34	Summary Records of the Fifth Committee, 32nd meeting of 31st session (18 November 1976) (A/C.5/31/SR.32)	60
35	Summary Records of the Fifth Committee, 34th meeting of 31st session (22 November 1976) (A/C.5/31/SR.34)	61
36	Report of the International Civil Service Commission (1976) (A/31/30, paras. 265 to 270)	59
37	General Assembly resolution 33/119, Report of the International Civil Service Commission (19 December 1978) (A/RES/33/119)	75
38	Report of the International Civil Service Commission (1979) (A/34/30, paras. 20 to 25)	78
39	Staff rule 109.5 (ST/SGB/Staff Rules/1/Rev.5) (effective 1 July 1979)	93 (I)
40	Summary records of the Fifth Committee, 38th meeting of 34th session (6 November 1979) (A/C.5/34/SR.38)	79
41	Summary Records of the Fifth Committee, 46th meeting of the 34th session (13 November 1979) (A/C.5/34/SR.46)	80
42	Summary Records of the Fifth Committee, 47th meeting of the 34th session (14 November 1979) (A/C.5/34/SR.47)	81
43	Summary Records of the Fifth Committee, 55th meeting of the 34th session (21 November 1979) (A/C.5/34/SR.55)	82
44	Summary Records of the Fifth Committee, 60th meeting of the 34th session (27 November 1979) (A/C.5/34/SR.60)	83
45	Summary Records of the Fifth Committee, 62nd meeting of the 34th session (28 November 1979) (A/C.5/34/SR.62)	84
46	Report of the Fifth Committee, Report of the International Civil Service Commission (15 December 1979) (A/34/774)	87

Annex No.	*Title*	*Dossier Document No.*
47	Staff rule 109.5 (ST/SGB/Staff Rules/1/Rev.5/Amend.1) (effective 1 January 1980)	93 (J)
48	Note by Secretariat, Report of the International Civil Service Commission (9 November 1979) (A/C.5/34/CRP.8)	86